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.*

in other activities that would defeat insulation? Does the analysis change if the limited partner is a programming vendor but is not selling programming to the partnership at the time it seeks insulation?

119. We ask commenters to address the court's suggestion that a limited partner selling programming would be unable to influence or control the partnership's programming choices because of the prohibition on communications with respect to the day-to-day operations of the video programming business. Could influence deriving from the dual status as a program supplier and limited partner be exercised without communications? Should we draw a distinction between substantive communications and ministerial communications? Are there circumstances involving the sale of programming where all communications are so ministerial that they should be allowed even though the general prohibition on communications is retained? In that case, how should we enforce a general criterion that prohibits communication while permitting some communications to exist, and where do we draw the line between permitted ministerial communications and prohibited substantive communications?

120. Finally, should we reconsider and eliminate the ban on communications with respect to programming sales even though the court assumed the continued existence of that prohibition? If we were to allow communications with respect to the sale of programming, would that so narrow the bar on communications as to raise questions as to its continued utility? Are there other communications that should still be prohibited? For instance, should discussions regarding the purchase of competitors' programming or placement of competitors' programming on specific tiers be prohibited? If we retain a bar on some communications, how should we draw the line between prohibited communications and permitted ones?

4. Cable Equity Debt Attribution Rule

121. We propose to clarify the ED provision of the cable general attribution rules to correspond with and reflect the guidance provided in the Commission's reconsideration of the broadcast attribution rules.[364] As stated above, under the ED rule, a financial interest in a media entity is attributed if, aggregating debt and voting and non-voting equity interests, the interest exceeds 33 percent of a media entity's total assets (combining equity plus debt value). In order to promote clarity and certainty in applying the ED rule and maintain consistency with the general application of the broadcast EDP attribution rule, from which it is derived, we propose to clarify the ED rule provisions as follows.

122. *Options, Warrants, and Loan Guarantees.* In the *Broadcast Ownership Reconsideration Order*, the Commission clarified how it would apply the EDP rule to options, warrants, and loan guarantees. It specified that it would include the amount of consideration paid for options and warrants in determining whether the 33 percent benchmark is exceeded for purposes of applying the broadcast EDP attribution rule. Similarly, with respect to loan guarantees, it specified that it would include the security deposit or financial contribution made by the guarantor for the guarantee of a loan, including sums held in escrow as security, in determining whether the guarantor's interest exceeds the 33 percent threshold and the interest is therefore attributable under the EDP attribution rule. The Commission also clarified that it would add any consideration or other amounts paid for options or warrants to any other equity or debt investment the holder has in the media entity for purposes of determining whether the 33 percent threshold is exceeded. Similarly, it noted that it would include any financial contributions made by a guarantor to any other equity or debt investments the guarantor has in the media entity.[365] We propose to adopt the same clarifications for the ED attribution rule and seek comment on this proposal.

123. *Total Assets.* In the *Broadcast Ownership Reconsideration Order*, the Commission clarified the definition of "total assets" for purposes of applying the EDP rule. It clarified that it would include all equity and/or debt in whatever manner or amount held (*e.g.*, including all stock, non-stock,

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[364] *Broadcast Ownership Reconsideration Order*, 16 FCC Rcd at 1112-15 ¶¶ 30-39.

[365] *Id.* at 1112-13 ¶¶ 31-32

partnership, and other equity interests, as well as all forms of short-term and long-term debt liabilities) in computing whether an interest exceeds the 33 percent EDP threshold. It also noted that parties could base the valuation of an entity's "total assets" on book value, as determined under standard financial accounting practices, or some other reasonable value, such as fair market value. It noted that clarifying the definition of total assets to include the foregoing reasonable methods of valuing a station's total assets for purposes of the EDP rule would provide applicants flexibility to use the most accurate valuation.[366] It also advised that media entities should retain the documentation upon which they compute the value of the station so it can produce supporting documentation for Commission review if needed.[367] We propose to adopt the same clarifications for purposes of applying the ED rule. As we did in the broadcast context, we also propose to reaffirm that parties must maintain compliance with the attribution criteria as any changes in a firm's assets occur.[368] We seek comment on these proposals.

124. *Multiplier*. As the Commission did in the *Broadcast Ownership Reconsideration Order*, we propose to amend the Commission's cable attribution rules to provide that in applying the ED rule, the "multiplier" formula of the general cable attribution rules will be utilized for identifying indirect, intervening interests, except that the pass-through exception for linkages that exceed a 50 percent interest, under which these interests are not multiplied, will not apply in the cable ED context as it does in the context of corporate voting stock.[369] In the *Broadcast Ownership Reconsideration Order*, the Commission noted that the multiplier was adopted because multiplication of successive interests would more realistically reflect a party's attenuated interest in a media entity where there are intervening corporations. Under the pass-through exception, however, a link in the ownership chain that represents a percentage interest exceeding 50 percent is treated as a 100 percent interest when calculating the successive links in the ownership chain. The Commission established the pass-through exception where an interest exceeds 50 percent to reflect the *de jure* control, rather than the *de facto* control, that an entity might have over a licensee. It noted that it would not apply the pass-through exemption in the EDP rule because the EDP rule applies not only to voting equity but also to non-voting equity and debt. It also clarified that it would use the multiplier in applying the EDP rule not only to corporations but also to financial interests in partnerships, limited liability companies, or any other type of organizational form.[370] We propose to apply these clarifications to the cable ED rule and seek comment on our proposal.[371]

B. Vertical Limit

1. Background

125. Section 613(f) of the Communications Act directs the Commission to "prescribe rules 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."[372] Among other things, in setting such limits, the Commission is directed to "ensure that cable operators affiliated with

[366] *Id.* at 1112 ¶ 28.

[367] *Id.* at 1111 ¶¶ 27-28.

[368] *Id.* at 1111-12 ¶ 29

[369] *Id.* at 1113-14 ¶¶ 33-35.

[370] *Id.* at 1114 ¶ 35

[371] In the *Broadcast Ownership Reconsideration Order*, the Commission clarified how the EDP rule would apply where an investor holds an interest in an entity that owns several stations in one market or multiple stations in several markets. It also clarified how it would apply the EDP rule to officers and directors. *Id.* at 1114-15 ¶ ¶ 36-39. We tentatively conclude that these clarifications are not relevant in the cable ED context because they relate mainly to issues related the EDP triggering prong. We invite comment on this tentative conclusion.

[372] *See* 47 U.S.C. § 533(f)(1)(A)-(B).

video programmers do not favor such programmers in determining carriage"[373] and to refrain from "impos[ing] limitations which would impair the development of diverse and high quality video programming."[374] In 1993, the Commission found that a 40 percent limit on the number of activated channels that can be occupied by affiliated video programming services struck an appropriate balance among the goals of reducing the incentive and ability of vertically integrated cable operators to favor their affiliated programming, increasing diversity, and permitting cable operators to realize the benefits and efficiencies associated with vertical integration.[375] The Commission also set a 75-channel cap on the 40 percent limit.[376] Thus, except for 40 percent of 75 channels of activated channel capacity (i.e., 30 channels), there was no limit on the amount of capacity that a cable operator could devote to affiliated programming. In 1995, the Commission affirmed both the 40 percent vertical limit and the 75-channel cap.[377]

126. The *Time Warner II* decision reversed and remanded the 40 percent channel occupancy limit, finding that the Commission had failed to justify its vertical limit with record evidence, and had failed adequately to consider the benefits and harms of vertical integration or current MVPD market conditions in its analysis.[378] The Commission sought comment on how it could fashion a meaningful and relevant channel occupancy limit given the changes that had occurred in the MVPD industry since the limit was first adopted.[379] The Commission also requested comment on the economic underpinnings of the statutory requirement and asked commenters to address the economic basis underlying the concern with vertical integration and market foreclosure.[380] Additionally, the Commission asked whether the necessary conditions existed in the MVPD industry for cable operators to engage profitably in vertical foreclosure and for this foreclosure to be harmful to the flow of programming.[381] It also sought comment on whether current and likely future developments in the MVPD market would mitigate past concerns regarding the ability of cable operators to discriminate against unaffiliated programming networks.[382]

127. In response, cable operators point to market forces that, they believe, make vertical foreclosure unlikely.[383] First, they state that a programmer can obtain carriage despite a cable operator's preference not to carry the programmer's service under several scenarios:[384] (1) where the programmer is

[373] 47 U.S.C. § 533(f)(2)(B).

[374] 47 U.S.C. § 533(f)(2)(G). The Commission is also directed to consider the other public interest objectives listed in Section 613(f)(2). *See* 47 U.S.C. § 533(f)(2)(A), (C)-(F).

[375] *1993 Second Report and Order*, 8 FCC Rcd at 8593-95 ¶ 68.

[376] *See 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, 8567 ¶¶ 3-4 (1993).

[377] *See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits,* Memorandum Opinion and Order on Reconsideration of the Second Report and Order, 10 FCC Rcd 7364 (1995).

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

[379] *2001 Further Notice*, 16 FCC Rcd at 17350-51 ¶ 81.

[380] *Id.*

[381] *Id.*

[382] *Id.* at 17351-52 ¶ 83.

[383] *See, e.g.*, AT&T Comments to the *2001 Further Notice* at 50-54.

[384] *See id.* at 50-51; Comcast Comments to the *2001 Further Notice* at 25-28.

seeking carriage of a broadcast network entitled to "must carry" status under the Commission's rules;[385] (2) where the programmer is seeking carriage of a "must have" programming network that consumers demand; and (3) where the programmer is seeking carriage of a service pursuant to the Commission's leased access rules.[386] Second, they assert that discrimination on the basis of affiliation is already targeted by the program access rules.[387] Third, they argue that competition from alternative MVPDs such as DBS makes it unprofitable for a cable operator to engage in foreclosure, because failure to carry unaffiliated popular networks will drive customers to other MVPDs.[388] Lastly, they argue that market conditions have changed to make foreclosure unlikely, citing in particular cable systems' increased channel capacity.[389] In this regard, however, we note that cable operators have also complained, in other contexts, 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.[390] Cable operators have also submitted studies that purport to show that they have no theoretical incentive to favor affiliated programming networks and not carry attractive unaffiliated programming networks;[391] that programmers could use alternative distribution channels (such as broadcast TV, foreign MVPDs, and DVD sales) if a cable operator attempted to foreclose rival networks;[392] that larger cable operators have tended to have more channel capacity and carry more channels;[393] that cable operators have not engaged in foreclosure in the past, and there has been plentiful entry by unaffiliated programming networks;[394] and that a cable operator's incentive to foreclose shrinks as its size increases.[395]

128. In the *2005 Second Further Notice*, the Commission discussed the empirical studies and comments submitted in the docket in 2001 and found that they were insufficient to establish whether vertical foreclosure is likely to occur in the current marketplace.[396] CFA had pointed to two academic studies that found that vertically integrated operators favor affiliated programming. AT&T and Time Warner provided evidence to the contrary.[397] Because the industry had undergone tremendous change, including increases in channel capacity, since these studies were performed, the Commission tentatively

[385] *See* 47 C.F.R. § 76.56.

[386] *See* 47 C.F.R. § 76.701.

[387] Time Warner Comments to the *2001 Further Notice* at 35-37 (citing 47 U.S.C. § 536(a)(3); 47 C.F.R. §76.1301(c)).

[388] Cablevision Comments to the *2001 Further Notice* at 7-10; NCTA Comments to the *2001 Further Notice* at 21.

[389] Cablevision Comments to the *2001 Further Notice* at 7-9.

[390] *See Hearing on Completing the Digital Transition Before the S. Comm on Commerce, Science, and Transportation*, 109th Cong. (2005) (statement of Kyle McSlarrow, President, National Cable & Telecommunications Association).

[391] AT&T Comments to the *2001 Further Notice*, Besen Decl. at 6-8; AT&T Comments to the *2001 Further Notice* , Ordover Decl. at 48-52.

[392] AT&T Comments to the *2001 Further Notice*, Ordover Decl. at 52-65. Ordover focuses his analysis on program developers' ability to find outlets to distribute their programming, and not on the ability of a new programming network to enter the market.

[393] Time Warner Comments to the *2001 Further Notice*, Joskow and McLaughlin Decl. at 5-6.

[394] *Id.* at 2-4; AT&T Comments, Besen Decl. at 10-14.

[395] AT&T Comments to the *2001 Further Notice,* Besen Decl. at 14-20; AT&T Comments, Ordover Decl. at 48-52.

[396] *2005 Second Further Notice*, 20 FCC Rcd at 9439-42 ¶¶ 130-36.

[397] AT&T Comments to the *2001 Further Notice*, Besen declaration and Time Warner Comments to the *2001 Further Notice*, Joskow and McLaughlin declaration.

concluded that these studies offer little probative value in the Commission's analysis.[398] Thus, the Commission again sought theoretical and empirical evidence and comment to assist in the development of a reasonable limit and in the articulation of how the limit would address the statutory goals.[399] Moreover, the Commission found that cable operators may have an incentive to engage in vertical foreclosure.[400]

129. The Commission also rejected commenters' proposal that the Commission not set a vertical limit.[401] The Commission found that the statute expressly requires the Commission to establish a limit and concluded that it lacks the authority to forbear from setting a limit.[402] Moreover, the Commission determined that vertical integration can provide both harms and benefits, and there was insufficient evidence in the record to set a "reasonable" limit at that time.[403]

130. Addressing the Commission's request for comment on harms that might flow from vertical integration, TAC asserts that networks affiliated with MVPDs and major broadcasters routinely are favored over independently owned networks in violation of Section 613(f)(2)(B). Specifically, TAC claims that analysis of carriage decisions by Comcast and Time Warner demonstrates that these cable providers have placed their affiliated programming on more widely distributed tiers and have tended not to provide carriage to independent programming with a similar theme to their own affiliated programming.[404] Thus, TAC maintains that vertically integrated media companies have strong incentives

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398 *2005 Second Further Notice* at 20 FCC Rcd at 9439-40 ¶¶ 130-31.

399 *Id.* at 9446-47 ¶ 147.

400 *Id.* at 9442 ¶ 136. In response, Comcast and NCTA reiterate their arguments that cable operators do not have an incentive to engage in vertical foreclosure because of the presence of MVPD competition and of other distribution channels. Comcast Comments to the *2005 Second Further Notice* at 60-66; NCTA Comments to the *2005 Second Further Notice* at 4-7, 14-16.

401 Several commenters respond to the *2001 Further Notice* by asserting that the Commission should not adopt any channel occupancy rules and should not limit the carriage of affiliated programming. *See* Cablevision Comments to the *2001 Further Notice* at 5-11; Comcast Comments the *2001 Further Notice* at 29-33; NCTA Comments the *2001 Further Notice* at 20-23; Time Warner Comments the *2001 Further Notice* at 35-37. They assert that changes in the marketplace have eliminated the need for such limits and that therefore no channel occupancy limit can survive constitutional scrutiny. Cablevision Comments at 6 (arguing that given the technological advancements and today's "vigorously competitive" MVPD marketplace, no channel occupancy limit will survive constitutional scrutiny); NCTA Comments the *2001 Further Notice* at 11, 14 (contending that competition in the sale of video programming has effectively eliminated incentives to discriminate, and that if a cable operator refuses to carry attractive programming services, it will not only fail to attract subscribers and fail to maximize revenue from existing subscribers, it may lose subscribers). Other commenters assert, on the other hand, that horizontal concentration and vertical integration in the MVPD industry require that the Commission enact and enforce a strict channel occupancy limit. *See* CFA Comments the *2001 Further Notice* at 93-105 (arguing that vertical integration of cable firms facilitates the imposition of higher costs on programming rivals or a degradation in their quality of service (by withholding desired programming) to gain an advantage); Writer's Guild Comments at 15 (contending that the Commission should not only retain the existing 40 percent channel occupancy limit but also strengthen it through ownership limits on both cable and broadcast networks, regardless of whether the owner is a cable operator).

402 *2005 Second Further Notice,* 20 FCC Rcd at 9446-47 ¶ 147.

403 *Id.* at 9446 ¶ 146.

404 The America Channel provides analysis of how Comcast and Time Warner's carriage decisions varied according to tier and theme, based on an analysis of carriage decisions for new networks launched in the period of January 1, 2003 to May 15, 2005. It finds that Comcast and Time Warner have placed affiliated programming on analog and standard tiers, while unaffiliated programming has generally been relegated to digital or premium tiers that have less distribution or not provided carriage at all. It also examines the carriage of programming by theme and finds that Comcast and Time Warner provided carriage to affiliated programming networks but not independent networks for (continued....)

to favor affiliated networks because they retain the value of the programming assets, whereas new independent networks compete with the affiliated channels for channel capacity, viewers, and advertising dollars.[405]

131. TAC contends that the expansion of digital capacity has not provided independent networks with additional carriage opportunities because of Comcast's practice of favoring carriage of affiliated networks.[406] Similarly, ACA asserts that the growth of digital capacity has not increased the carriage capacity for independent networks because retransmission-consent tying arrangements consume digital channel capacity and drain the resources that could be used for carriage of independent networks.[407] Moreover, ACA maintains that small and mid-sized cable systems often have no excess capacity and do not have the resources to upgrade to digital service.[408]

132. CFA also alleges a large list of harms likely to occur due to vertical integration of cable operators and video programming. Like TAC, CFA asserts that cable operators are more likely to carry their own programming and are also more likely to carry programming developed by broadcasters.[409] It also contends that vertical integration facilitates price squeezes, enhances price discrimination, forces potential competitors to enter in two stages of production, forecloses markets to competitors, and allows for easier cross-subsidization.[410] CWA asserts that increased vertical integration by cable operators, combined with national and regional concentration in the cable industry, as well as control by cable operators over valuable sports programming, has resulted in increased market power for the large cable operators.[411]

133. In 2001 and 2005, the Commission also sought comments and evidence on the benefits provided by vertical integration. In the *2001 Further Notice* the Commission asked commenters to discuss the benefits of vertical integration and the extent to which these benefits mitigate or outweigh the harms caused by cable operators favoring affiliated programming.[412] The Commission then asked how these benefits should affect the fashioning of a vertical limit. The Commission sought comment on the impact that relaxing or modifying the current limit of 40 percent might have on producing economic efficiencies, fostering innovation in services, and encouraging greater investment in and development of

(Continued from previous page)
programming targeting the African-American, gay and lesbian, and English-speaking Latino communities. TAC Comments to the *2005 Second Further Notice* at 34-39; Exh.5.

[405] *See* TAC Comments to *2005 Second Further Notice* at 32-33. Time Warner criticizes TAC's survey on the grounds that TAC counts a channel as "affiliated" whenever it is owned by Comcast, Viacom, News Corp., NBC Universal, or Disney, which Time Warner claims disregards the lack of corporate affiliation with Time Warner and undercounts independent services that are most likely to succeed. *See* Time Warner Reply Comments to *2005 Second Further Notice* at 7-8.

[406] *See* TAC Comments to *2005 Second Further Notice* at 39-42.

[407] *See* ACA Comments to *2005 Second Further Notice* at 3-5.

[408] *See Id.* at 5-6.

[409] *See* CFA Comments to *2005 Second Further Notice* at 13-14. We otherwise received little comment on whether a cable operator's incentive and ability to engage in vertical foreclosure varies by type of programming network or by placement on different tiers.

[410] *See* CFA Comments to *2005 Second Further Notice* at 37-40. CFA contends that cable operators discriminate and use other anticompetitive practices by leveraging their control of distribution to defend their franchise product and concludes programmers must either own a wire or have transmission rights to be in the top tier of program networks. *See Id.* at 43-44; Exhibit 12.

[411] *See* CWA Comments to *2005 Second Further Notice* at 10-11.

[412] *2001 Further Notice*, 16 FCC Rcd at 17351 ¶ 82.

diverse and responsive programming.[413] The Commission also asked whether the existence of these benefits means that the Commission should employ alternative regulatory restrictions, other than imposing a limit on cable operators' carriage of affiliated programming, to prevent foreclosure.[414] In response, cable commenters maintain that vertical integration provides efficiencies by increasing the likelihood of financing for new networks and reducing the likelihood of "hold-up" (i.e., the cable operator demanding a lower price after the programming network has committed to entering and producing the programming).[415] They also argue that it eliminates the problem of double marginalization (i.e., both parties attempting to exercise market power by charging prices above cost), which occurs when both upstream and downstream firms attempt to exercise market power by charging above-cost prices.[416]

134. In the *2005 Second Further Notice* the Commission identified three kinds of benefits from vertical integration: (1) transaction efficiency, in which vertical integration prevents the post-transaction problems of "hold-up" and double-marginalization; (2) resources, where the cable operator provides the additional resources needed for a new network to survive; (3) signaling commitment, in which vertical integration signals that the programming network is likely to succeed, which may allow new programmers access to capital from sources other than the affiliated MVPD and the ability to acquire talent and content.[417] The Commission concluded that cable commenters had failed to demonstrate that the benefits of vertical integration will always exceed the potential harms from vertical foreclosure. The Commission found that the cable commenters also failed to identify those circumstances in which the benefits from a particular vertical investment or merger are large enough to warrant exemption from the vertical limit.[418]

2. Discussion

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.[419] As detailed below, we again seek comments and evidence on these issues.

136. First we ask for comment on how to define the programming and distribution markets for purposes of determining an appropriate channel occupancy limit.[420] In 2001, the Commission proposed that programming could be classified into two broad categories, general entertainment and niche programming.[421] The Commission also suggested that programming networks vary according to whether they focus on a particular subject or are more general purpose, whether they gain a large nationwide

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[413] *Id.* at 17352 ¶ 84.

[414] *Id.* at 17351 ¶ 82.

[415] Time Warner Comments to the *2001 Further Notice*, Joskow and McLaughlin Decl. at 22.

[416] *Id.* at 23.

[417] *2005 Second Further Notice*, 20 FCC Rcd at ¶¶ 156-59.

[418] *Id.* at 9449 ¶ 155.

[419] Commenters address issues related to vertical integration, such as digital capacity, the issue of whether vertically integrated cable operators discriminate in favor of affiliated programming, and generalized complaints about anticompetitive effects of vertical integration. *See* CFA Comments to *2005 Second Further Notice* at 13-14, 37-40, 43-46; CWA Comments to *2005 Second Further Notice* at 10-11. No commenter, however, links any of these issues to a specific vertical limit.

[420] *2005 Second Further Notice*, 20 FCC Rcd at 9447 ¶ 148.

[421] *2001 Further Notice*, 16 FCC Rcd at 17321 ¶ 9.

audience, how narrowly focused they are in a particular subject, and whether they are national or regional in scope.[422] The Commission asked, in 2005, whether the incentive and ability of cable operators to engage in vertical foreclosure could vary according to the type of programming network and whether a channel occupancy limit would prevent discrimination in a particular submarket.[423] The Commission also sought comment on whether placement of networks on different tiers or in different packages affects how vertical foreclosure might be implemented by a cable operator, especially considering that digital tiers have much greater channel capacity than analog tiers, and whether a vertical limit should be applied on a tier-specific or package-specific basis.[424] We urge commenters to address these issues.

137. We also seek further comment on the extent to which vertically integrated cable operators have an incentive to engage in strategic, anticompetitive behavior, leading to foreclosure of entry by unaffiliated programmers.[425] We ask whether, in today's marketplace, vertically integrated cable operators have an incentive to discriminate unfairly against unaffiliated programming networks that compete against the cable operator's affiliated networks. In this regard we ask whether the Commission's finding that cable operators may have an incentive to engage in vertical foreclosure remains valid in today's marketplace and ask for analyses and studies based on current technological and market conditions.[426] As noted above, the Commission received little comment directly addressing its request for theoretical and empirical evidence regarding how to establish the vertical limit. The Commission did receive, however, two academic studies that particularly address whether cable operators have in recent years engaged in vertical foreclosure and whether they have favored their affiliated programming networks.[427]

138. Chen and Waterman use a 2004 database of 680 cable systems to examine whether Comcast and Time Warner 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. They find that vertical foreclosure is a persistent phenomenon in the cable industry despite channel capacity expansion, digitization, and DBS competition. The paper finds that vertically integrated cable operators (1) 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; and (2) when they do carry an unaffiliated program network with content similar to one of their affiliated networks, they tend to position the unaffiliated network on digital tiers or in other ways that limit consumer access.[428]

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[422] *Id.* at 17322-23 ¶¶ 12-13.

[423] *2005 Second Further Notice*, 20 FCC Rcd at 9447 ¶ 148.

[424] *Id.* at 9447 ¶ 149.

[425] *See Senate Report* at 25-27, 81; *House Report* at 41; *1995 Vertical Reconsideration Order*, 10 FCC Rcd at 7365 ¶ 4; *1993 Second Report and Order*, 8 FCC Rcd at 8583-84 ¶¶ 41-42; *Initial Notice*, 8 FCC Rcd at 218 ¶¶ 42-43; *2005 Second Further Notice* at para. 146. *Cf. generally Program Access Order*, 17 FCC Rcd at 12135-50 ¶¶ 24-55 (discussing ability and incentive of vertically integrated programming networks to favor affiliated cable operators).

[426] *2005 Second Further Notice* at ¶ 136.

[427] In his study of programming network carriage by cable systems, based on a sample of 11 networks, Goolsbee found that vertical integration generally increases the probability of carriage. He also found that increased DBS share in a market reduces this probability, suggesting that the propensity for self-carriage is driven more by market power considerations than by efficiencies from vertical integration. Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming* (April 2007) (MB Docket No. 06-121).

[428] Dong Chen and David Waterman, *Vertical Foreclosure in the U.S. Cable Television Market: An Empirical Study of Program Network Carriage and Positioning* (Aug. 2005).

139. In addition, a paper by Kang analyzes carriage decisions of 943 cable systems to test whether large MSOs might be colluding tacitly by carrying each others' vertically integrated cable networks, which the paper refers to as "reciprocal carriage."[429] The study finds that: (1) vertically integrated MSOs are more likely than non-vertically integrated MSOs to carry the start-up basic cable networks of other MSOs, and (2) vertically integrated MSOs are no more likely than non-vertically integrated MSOs to carry independent start-up basic cable networks. The study concludes that the Commission was correct to assume that the policy concern about excessive market power of cable operators in the programming market extends beyond the unilateral actions of individual MSOs.

140. Comcast disagrees with the findings of Chen and Waterman and Kang. Comcast contends that Chen and Waterman's conclusions are not supported by their findings, and that because programming on each channel tends to be unique, cable operators are motivated to carry programs that consumers will find attractive, regardless of whether an affiliated or unaffiliated network is the provider.[430] It asserts that Kang's conclusions are based on a six-year old data sample that skews results and uses assumptions unsupported by evidence.[431]

141. We seek comment on the validity of these studies and the responses to them. Do these studies establish that vertical foreclosure is occurring despite recent changes in the marketplace? Does Kang's study show that a more extended form of vertical foreclosure exists, based on "reciprocal carriage" of integrated programming, in which a coalition of cable operators unfairly favor each others' affiliated programming? Does carriage of an affiliated programming network reflect unfair discrimination against independent programming networks, which can deny consumers the ability to receive the programming they want, or is it simply a cost-minimizing move by a cable operator seeking to avoid paying affiliation fees, which may be more efficient and may enable cable operators to carry more programming that consumers desire?

142. We also seek comment on evidence regarding the benefits of vertical integration between cable operators and programming networks, and on their size relative to the potential harms of vertical integration. Both Congress and the Commission have recognized that vertical integration can produce efficiencies in the production, distribution, and marketing of video programming, enabling cable operators to make additional investments in distribution plant and programming.[432] Accordingly, we seek comment and evidence, as we did in the *2005 Second Further Notice*, to assist in the establishment of a reasonable channel occupancy limit, taking into consideration these benefits.

143. We invite commenters to propose a specific vertical limit, including whether or not the current 75 channel cap is still appropriate and relevant. We tentatively conclude that the 75-channel cap should be eliminated. 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.

144. We also seek comment on whether the channel occupancy limit should apply to regional

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

[430] Comcast Reply Comments to the *2005 Second Further Notice* at 19-23, citing Exhibit 1.

[431] *Id.* at 17-19, citing Exhibit 1.

[432] *See Senate Report* at 26-27, 81; *House Report* at 41; *1995 Vertical Reconsideration Order*, 10 FCC Rcd at 7365-66 ¶¶ 5-6; *1993 Second Report and Order*, 8 FCC Rcd at 8584-85 ¶¶ 43-44; *Initial Notice*, 8 FCC Rcd at 218-19 ¶¶ 44-45; *2005 Second Further Notice* at ¶ 146.

programming networks. In describing the limit on a cable operator's carriage of affiliated programming networks, the Commission's rule states that the limit applies to "national video programming services" owned by the cable operator or in which the cable operator has an attributable interest.[433] The Commission stated when it adopted this language that a programming service does not have to be distributed in every state to be regarded as a national programming service. [434] A programming service distributed to cable systems in numerous states across the country or in a variety of regions may also be considered a national programming service.[435] Programming services distributed only to a particular community or to a discrete region, on the other hand, are exempt from the limit.[436] The Commission explained that the application of the limit only to "national" networks would preserve cable operators' incentives to invest in the development of local and regional programming services and would thereby serve the Commission's goal of promoting localism.[437] Since 1993, when the Commission implemented this rule, regional networks have proliferated. Whereas in 1998 there were 61 regional networks, 24 of which were affiliated with one or more cable MSOs,[438] in 2005, there were 96, of which 44 were affiliated with at least one cable MSO.[439] Does the proliferation of regional networks since the Commission first adopted its channel occupancy limit support continued application of the limit only to nationally distributed networks, or does this marketplace development suggest that the limit should now apply to networks that are distributed in discrete geographic regions? Commenters supporting a broadened application of the limit should discuss the effects of any such revision on cable operators' incentives to continue investing in the development of regional programming and on the Commission's localism goal. In addition, commenters who advocate continued exclusion of any type of non-national programming should explain how the excluded class of programming should be defined and should explain how their proposed definitions would serve the statutory goals of promoting competition and diversity and should discuss any resulting effects on localism.

145. Finally, we seek comment on whether or not to expand the class of networks that count toward the channel occupancy limit. Currently, the limit applies only to networks that are affiliated with the cable operator whose compliance is at issue. Should we revise the rule so that it also limits the number of channels that can be occupied by video programming networks owned by or affiliated with (1) any cable operator, i.e., not just the operator whose compliance is at issue, (2) other MVPDs, such as DBS providers and/or (3) broadcast networks. We tentatively conclude that we should expand the channel occupancy limit to include video programming networks owned by or affiliated with any cable operator.[440] Congress did not distinguish between different types of cable operators for purposes of

[433] 47 C.F.R. § 76.504(a) (2007).

[434] See *In the Matter of Implementation of Sections 11 and 13 of Cable Television Consumer Protection Act of 1992 Horizontal and Vertical Ownership Limits*, Second Report and Order, 8 FCC Rcd 8566, 8599, ¶ 78 (1993) ("Second Report and Order")

[435] *Id.*

[436] *Id.*

[437] *Id.*

[438] *1998 Video Competition Report*, 13 FCC Rcd at 24380-81, 24439-41 ¶ 171, Appendix D, Table D-3.

[439] *2005 Video Competition Report*, 21 FCC Rcd at 2579, ¶ 166.

[440] We note that, in adopting the exclusive contract prohibition in Section 628(c)(2)(D), Congress applied the prohibition to *all* cable operators. *See* Program Access Order 22 FCC Rcd 17791, 17840-1¶71. *See also* H.R. Rep No. 102-862, at 2 (1992) (Conf. Rep.):

> The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure *1461

(continued....)

Section 628(c)(2)(D)."[441] Commenters are asked to provide a comprehensive analysis of why such revisions would be appropriate and necessary in order to enhance effective competition. Furthermore, because Section 613(f)(2) applies only to the actions of cable operators, commenters should discuss the jurisdictional basis for any revisions to the class of networks that are subject to the cap.

IV. PROCEDURAL MATTERS

A. Fourth Report and Order

146. **Paperwork Reduction Act Analysis.** This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

147. **Congressional Review Act.** The Commission will send a copy of this Fourth Report and Order in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[442]

148. **Final Regulatory Flexibility Analysis.** As required by the Regulatory Flexibility Act,[443] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this Fourth Report and Order. The SFRFA is set forth in Appendix B.

B. Further Notice of Proposed Rulemaking

149. **Ex Parte Rules.** This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

150. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

    - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by

(Continued from previous page)

carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.

[441] *Id.* at ¶ 72.

[442] *See* 5 U.S.C. § 801(a)(1)(A).

[443] *See* 5 U.S.C. § 604.

Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

151. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

152. **Supplemental Initial Regulatory Flexibility Analysis.** As required by the Regulatory Flexibility Act,[444] the Commission has prepared a Supplemental Initial Regulatory Flexibility Analysis (SIRFA) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this *Further Notice of Proposed Rulemaking*. The SIRFA is set forth in the Appendix. Written public comments are requested on the SIRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Further Notice*, and they should have a separate and distinct heading designating them as responses to the SIRFA.

153. **Additional Information.** For additional information on this proceeding, please contact Elvis Stumbergs, Industry Analysis Division, Media Bureau at (202) 418-2330. For Press Inquiries, please contact Mary Diamond, Media Bureau, at (202) 418-7200.

V. ORDERING CLAUSES

154. Accordingly, IT IS ORDERED, that pursuant to the authority contained in sections 2(a),

[444] *See* 5 U.S.C. § 603.

4(i), 303, 307, 309, 310, and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303, 307, 309, 310, 533, the *Fourth Report and Order* and *Further Notice of Proposed Rulemaking* are ADOPTED.

155. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 303 and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303 and 533, that the amendment to 47 C.F.R. § 76.503 discussed in this *Fourth Report and Order* IS ADOPTED. The amendment shall become effective 30 days after publication in the Federal Register.

156. IT IS FURTHER ORDERED, that pursuant to authority contained in sections 2(a), 4(i), 303, 307, 309, 310, and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303, 307, 309, 310, 533, NOTICE IS HEREBY GIVEN of the proposals described in the *Further Notice of Proposed Rulemaking*.

157. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copies of the *Fourth Report and Order*, including the Final Regulatory Flexibility Analysis and the *Further Notice of Proposed Rulemaking*, including the Supplemental Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

158. IT IS FURTHER ORDERED, that MM Docket No. 87-154 and CS Docket No. 96-85 are TERMINATED and MM Docket No. 92-51 is SEVERED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

LIST OF COMMENTERS

Initial Comments

The America Channel (TAC)
American Telephone & Telegraph (AT&T)
American Cable Association (ACA)
Doug Chen
Cablevision Systems Corporation (Cablevision)
Comcast Corporation (Comcast)
Communications Workers of America (CWA)
Consumer Federation of America (CFA)
DIRECTV, Inc.
ION Media Networks (Paxson)
Jun-Seok Kong
Media Access Project (MAP)
Media General, Inc.
National Cable Television Association (NCTA)
National Hispanic Media Coalition (NHMC)
Project and Freedom Foundation (PFF)
Alexander Raskovich
Time Warner Cable (Time Warner)
Viacom, Inc.
Daniel Waterman
Writers Guild of America (Writers Guild)

Supplemental Comments

Comcast Corporation (Comcast)

Further Supplemental Comments

Comcast Corporation (Comcast)

Opposition and Reply Comments

National Cable Television Association (NCTA)

Reply Comments

American Telephone & Telegraph (AT&T)
Comcast Corporation (Comcast)
National Association of Broadcasters (NAB)
ION Media Networks (Paxson)
Time Warner Cable, Inc. (Time Warner)

APPENDIX B

RULE CHANGES

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 76 MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citations for part 76 continue to read as follows:

AUTHORITY: 47 U.S.C. §§ 152(a), 154(i), 303, 307, 309, 310, 533.

2. Section 76.503 is amended by:

a) Revising paragraph (a) to read as follows:

§ 76.503(a) National subscriber limits. No cable operator shall serve more than 30 percent of all multichannel-video programming subscribers nationwide through multichannel video programming distributors owned by such operator or in which such cable operator holds an attributable interest.

b) Replacing the text in subsections (b), (c), and (d) with the word "Reserved."

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *2005 Second Further Notice of Proposed Rulemaking* in MB Docket No. 92-264, FCC 05-96.[2] The Commission sought written public comment on the proposals in the *2005 Second Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

A. Need for, and Objectives of, this Fourth Report and Order

In this Fourth Report and Order, we set the Commission's cable horizontal ownership limit4 to bar cable operators from having an attributable interest in cable systems serving more than 30 percent of multichannel video programming subscribers nationwide. Our action here responds to the court's decision in Time Warner Entertainment Co. v. FCC ("Time Warner II"),[5] which remanded the Commission's 30 percent limit. Our decision implements the statutory directive that we impose a limit designed to ensure that no single cable operator or group of operators, because of their size, unfairly impede the flow of programming to consumers.[6]

In establishing the 30 percent cable horizontal ownership limit, we rely on a modified "open field" approach to ensure that no single cable operator becomes so large that a programming network can survive only if that largest operator carries it. To calculate a horizontal limit that meets this test, we first determine the minimum number of subscribers a network needs in order to survive in the marketplace, and then estimate the percentage of subscribers a network is likely to serve once it secures a carriage contract. The resulting calculation indicates that an open field of 70 percent and an ownership limit of 30 percent are necessary to ensure that no single cable operator is able to impede unfairly the flow of programming to consumers.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

None of the parties in this proceeding filed comments on how issues raised in the 2001 Further Notice or the 2005 Second Further Notice would impact small entities.

C. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[7] The RFA generally defines the term

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *The Commission's Cable Horizontal and Vertical Ownership Limits,* Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374, 9453 ¶ 165 (2005) ("*2005 Second Further Notice*").

[3] *See* 5 U.S.C. § 604.

[4] 47 C.F.R. § 76.503.

[5] *Time Warner Entertainment Co. v. FCC,* 240 F.3d 1126 (D.C. Cir. 2001).

[6] 47 U.S.C. § 533(f)(2)(A).

[7] 5 U.S.C. § 604(a)(3).

"small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[8] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[9] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[10]

Cable and Other Program Distribution. The Census Bureau recently updated the NAICS so that these firms are included in the Wired Telecommunications Carriers category[11] which is described as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[12] The SBA has updated the small business size standards to accord with the revised NAICS. The size standard for Wired Telecommunications Carriers is all firms having an average of 1,500 or fewer employees. The Census Bureau has not collected information on the size distribution of firms in the revised classification of Wired Telecommunications Carriers. Accordingly we will apply the new size standard to Census Bureau data for 2002 regarding the size distribution of Cable and Other Program Distribution.[13] There were a total of 1,191 firms in this category that operated for the entire year.[14] Of this total, 1,178 firms had fewer than 1,000 employees.[15] Thus, under this size standard, the majority of firms can be considered small.

Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[16] The Commission has determined that an operator serving fewer than 653,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates,

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[8] 5 U.S.C. § 601(6).

[9] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[10] 15 U.S.C. § 632.

[11] 13 C.F.R. § 121.201 (2007), NAICS code 517110.

[12] U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[13] 13 C.F.R. § 121.201 (2002), NAICS code 517510.

[14] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 5, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[15] *Id.*

[16] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

do not exceed $250 million in the aggregate.[17] Industry data indicate that, of 994 cable operators nationwide, all but thirteen are small under this size standard.[18] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[19] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems. PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Wired Telecommunications Carriers includes PCOs or SMATV systems and, thus, small entities are defined as all such companies with 1,500 or fewer employees.[20] Currently, there are approximately 76 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[21] Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately 900,000 subscribers.[22] Because these operators are not rate regulated, they are not required to file employment data with the Commission. Furthermore, we are not aware of any privately published employment information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The new rule imposes a 30 percent limit on the number of MVPD subscribers nationwide that one person or entity may serve. No new reporting, recordkeeping or other compliance requirements are adopted.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small

[17] 47 C.F.R. § 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[18] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2007*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of March 30, 2006); Warren Communications News, *Television & Cable Factbook 2007*, "Ownership of Cable Systems in the United States," pages D-1737 to D-1786.

[19] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[20] 13 C.F.R. § 121.201 (2007), NAICS code 517110.

[21] For a list of IMCC members, see http://www.imcc-online.org/membership (visited Jan. 4, 2008).

[22] *See* Kagan Research, LLC, *Basic Cable Network Economics, 2005-2015*, Media Trends 2006, at 64.

entities."[23]

In this *Fourth Report and Order*, based on its calculations using an open field approach, the Commission *sets a 30 percent horizontal ownership limit.*[24] *This rule limits the size of large MSOs* and does not prevent small cable operators from growing larger. We also continue to base the limit on the number of actual MVPD subscribers, a figure used by cable operators when they negotiate with and purchase programming from video programmers. *See id.* Finally, the horizontal cap would not change pursuant to the Order. Accordingly, we do not find that the Order will impose new burdens on small cable operators.

The Commission considered other alternatives,[25] with respect to the horizontal limit, but the Order adopted a 30 percent horizontal ownership limit based on evidence that this is the level necessary to preserve programmer viability. The Commission believes that the decisions it adopts in the Order serve our public interest goals and comport with the evidence.

F. Report to Congress: The Commission will send a copy of the *Fourth Report and Order*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[26] In addition, the Commission will send a copy of the *Fourth Report and Order*, including this Supplemental FRFA, to the Chief Counsel for the advocacy of the SBA. A copy of the *Fourth Report and Order* and the Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.[27]

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[23] 5 U.S.C. § 603(c)(1) – (c)(4).

[24] *See Fourth Report & Order*, ¶¶ 40-73.

[25] *See e.g., Fourth Report & Order,* ¶¶ 77-83 (discussion of regional limits proposal).

[26] *See* 5 U.S.C. § 801(a)(1)(A).

[27] *See* 5 U.S.C. § 604(b).

APPENDIX D

SUPPLEMENTAL INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act, as amended ("RFA")[1] the Commission has prepared this Supplemental Initial Regulatory Flexibility Analysis ("Supplemental IRFA") of the possible significant economic impact on a substantial number of small entities of the policies and rules considered in this *Further Notice of Proposed Rule Making* ("*Further Notice*"). Initial Regulatory Flexibility Analyses were included in the *2001 Further Notice of Proposed Rulemaking* ("*2001 Further Notice*")[2] and the *2005 Second Further Notice of Proposed Rulemaking* ("*2005 Second Further Notice*").[3] Written public comments are requested on this Supplemental IRFA. Comments must be identified as responses to the Supplemental IRFA and must be filed by the deadlines for comments on the *Second Further Notice*. The Commission will send a copy of the *Further Notice*, including this Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[4] In addition, the *Further Notice* and the Supplemental IRFA (or summaries thereof) will be published in the Federal Register.[5]

A. Need for, and Objectives of, the Proposed Rules

The attribution rules identify which interests in a media entity are counted for purposes of applying the broadcast and cable ownership rules. The *Further Notice* invites comment on (1) whether to retain the single majority shareholder attribution exemption in the cable and broadcast contexts; (2) whether, under the cable attribution rules, a limited partner may sell programming to the partnership and retain insulation; and (3) whether the Commission should clarify certain aspects of the cable Equity Debt ("ED") attribution rule. With respect to the first two issues, the Commission invites further comment on how to respond to the remand of the court in *Time Warner II*, which reversed, vacated, and remanded the Commission's decision to eliminate the single majority shareholder exemption and the Commission's prohibition of the sale of programming by an insulated limited partner to the partnership.[6]

Section 613(f) of the Communications Act requires the Commission to establish reasonable limits on the number of channels that can be occupied by the cable system's owned or attributed video programming services (vertical, or channel occupancy, limit). In *Time Warner II*, the D.C. Circuit remanded the Commission's channel occupancy limit.[7]

The Commission subsequently issued its *2001 Further Notice*, seeking comment on whether to reinstate the single majority shareholder exemption in the cable attribution rules, and whether to prohibit insulated limited partners from selling programming to their general partners. The Commission also sought comment aimed at establishing a sound record on which to fashion meaningful and relevant channel

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

[2] *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 Further Notice*").

[3] *The Commission's Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374, 9385 ¶ 17 (2005) ("*2005 Second Further Notice*").

[4] *See* 5 U.S.C. § 603(a).

[5] *See id.*

[6] *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner II*").

[7] *Id.* at 1139.

occupancy limits given the changes that have occurred in the MVPD industry.[8] While many commenters presented theoretical, legal, or economic arguments and anecdotal evidence, no party provided a compelling approach that supported a particular vertical limit. The Commission subsequently sought to augment the record by means of a programming network survey and econometric analysis, with limited results. In its *2005 Second Further Notice*, the Commission again sought to develop a more focused and useful record.

In this *Further Notice*, we seek additional comment on (1) whether to retain the single majority shareholder attribution exemption, which currently applies to the cable and broadcast ownership rules; (2) whether, under the cable attribution rules, a limited partner may sell programming to the partnership and retain insulation; and (3) whether the Commission should clarify the Equity Debt ("ED") provision in the cable attribution rules, to correspond with and reflect the guidance provided in the Commission's reconsideration of its broadcast attribution rules.[9] We also invite comment in the *Further Notice* on how to set a specific channel occupancy limit, responding to the remand of the court in *Time Warner II*. We issue this Supplemental IRFA in order to invite comment on the effects on small entities of the proposals identified in this *Further Notice*. We particularly solicit comment from all small business entities, including minority-owned and women-owned small businesses.

B. Basis

The *Further Notice* is adopted pursuant to sections 2(a), 4(i), 303, 307, 309, 310, and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303, 307, 309, 310, and 533.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[10] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity" under Section 3 of the Small Business Act.[11] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[12] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[13]

Television Broadcasting. In this context, the application of the statutory definition to television stations is of concern. The Small Business Administration defines a television broadcasting station that has no more than $13 million in annual receipts as a small business.[14] Business concerns included in this

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[8] *2001 Further Notice*, 16 FCC Rcd at 17350-51 ¶ 81.

[9] *1999 Broadcast Attribution Reconsideration Order*, 16 FCC Rcd at 1110-15 ¶¶ 25-39.

[10] 5 U.S.C. § 603(b)(3).

[11] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of the term where appropriate to the activities of the agency and publishes the definition(s) in the Federal Register."

[12] *Id.*

[13] 15 U.S.C. § 632.

[14] 13 C.F.R. § 121.201 (2007), NAICS Code 515120.

industry are those "primarily engaged in broadcasting images together with sound."[15] According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of December 7, 2007, about 825 (66 percent) of the 1,250 commercial television stations in the United States have revenues of $13 million or less.[16] However, in assessing whether a business entity qualifies as small under the above definition, business control affiliations[17] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the attribution rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

An element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

Radio Broadcasting. The Small Business Administration defines a radio broadcasting entity that has $6.5 million or less in annual receipts as a small business.[18] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[19] According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of December 7, 2007, about 10,500 (95 percent) of 11,050 commercial radio stations in the United States have revenues of $6.5 million or less. We note, however, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations[20] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small

[15] OMB, North American Industry Classification System: United States, 1997, at 508-09 (1997) (NAICS Code 51320 which was changed to 51520 in October 2002). This category description continues, "These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in produced programming. *See id.* at 502-505, NAICS Code 512110. Motion Picture and Video Production; Code 512120, Motion Picture and Video Distribution, Code 512191, 19 FCC Rcd 15238 (2004). Teleproduction and Other Post-Production Services, and Code 512199, Other Motion Picture and Video Industries.

[16] 13 C.F.R. § 121.201, NAICS code 517510.

[17] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[18] *See* NAICS Code 515112.

[19] *Id.*

[20] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

Cable and Other Program Distribution. The Census Bureau recently updated the NAICS and these firms are included in the Wired Telecommunications Carriers category,[21] described as: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[22] The SBA has updated the small business size standards to accord with the revised NAICS. The size standard for Wired Telecommunications Carriers is all firms having an average of 1,500 or fewer employees.[23] The Census Bureau has not collected information on the size distribution of firms in the revised classification of Wired Telecommunications Carriers. Accordingly we will apply the new size standard to Census Bureau data for 2002 regarding the size distribution of Cable and Other Program Distribution.[24] There were a total of 1,191 firms in this category that operated for the entire year.[25] Of this total, 1,178 firms had fewer than 1,000 employees.[26] Thus, under this size standard, the majority of firms can be considered small.

Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[27] Industry data indicate that, of 994 cable operators nationwide, all but thirteen are small under this size standard.[28] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[29] Industry data indicate that, of 6,391 systems nationwide, 5,399 systems have under 10,000 subscribers, and an

[21] 13 C.F.R. § 121.201 (2007), NAICS code 517110

[22] U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[23] 13 C.F.R. § 121.201 (2007), NAICS code 517110.

[24] 13 C.F.R. § 121.201 (2002), NAICS code 517510.

[25] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 5, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[26] *Id.*

[27] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[28] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2007*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of March 30, 2006); Warren Communications News, *Television & Cable Factbook 2007*, "Ownership of Cable Systems in the United States," pages D-1737 to D-1786.

[29] 47 C.F.R. § 76.901(c).