additional 352 systems have 10,000-19,999 subscribers.[30] Thus, under this second size standard, most cable systems are 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."[31] 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, do not exceed $250 million in the aggregate.[32] Industry data indicate that, of 994 cable operators nationwide, all but thirteen are small under this size standard.[33] 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,[34] 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.[35] Currently, there are approximately 76 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[36] 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 1.1 million subscribers.[37] 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.

Home Satellite Dish ("HSD") Service. Because HSD provides subscription services, HSD falls within

[30] Warren Communications News, *Television & Cable Factbook 2007*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2006). The data do not include 699 systems for which classifying data were not available.

[31] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[32] 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).

[33] 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.

[34] 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).

[35] 13 C.F.R. § 121.201 (2007), NAICS code 517110.

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

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

the SBA-recognized definition of Wired Telecommunications Carriers, which includes all such companies with 1,500 or fewer employees.[38] HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of employment. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. In January 2007, there were 68,781 households authorized to receive HSD service.[39] The Commission has no information regarding the number of employees for the four C-Band distributors.

Wireless Cable Systems. Wireless cable systems use the Broadband Radio Service ("BRS")[40] and Educational Broadband Service ("EBS")[41] frequencies in the 2 GHz band to transmit video programming and provide broadband services to subscribers. The Census Bureau recently updated the NAICS and these firms are now included in the Wireless Telecommunications Carriers (except Satellite) category,[42] described as: "This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services."[43] The SBA has updated the small business size standards to accord with the revised NAICS and, for Wireless Telecommunications Carriers (except Satellite), the standard is all firms having an average of 1,500 or fewer employees.[44]

The Commission has also defined small BRS entities in the context of Commission license auctions. In the 1996 BRS (MMDS) auction,[45] the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[46] This definition of

[38] 13 C.F.R. § 121.201 (2007), NAICS code 517110.

[39] *C-Band*, SKYREPORT, Feb. 12. 19, 2006 at 4 and *C-Band Numbers Keep Dwindling*, Satellite Business News FAXUpdate, July 7, 2006. These numbers are based on a report from Motorola's Access Control Center, which oversees authorizations and de-authorizations of satellite receivers using Motorola's proprietary conditional access systems.

[40] Broadband Radio Service ("BRS"), formerly known as Multipoint Distribution Service ("MDS") or Multichannel Multipoint Distribution Service ("MMDS"), is regulated by Part 27 of the Commission's rules; *see* 47 C.F.R. Part 27.

[41] Educational Broadband Service ("EBS"), formerly known as Instructional Television Fixed Service ("ITFS"), is regulated by Part 27 of the Commission's rules; *see* 47 C.F.R. Part 27. EBS licensees, however, are permitted to lease spectrum for BRS operation.

[42] 13 C.F.R. § 121.201 (2007), NAICS code 517210.

[43] U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wireless Telecommunications Carriers (except Satellite), http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.

[44] 13 C.F.R. § 121.201 (2007), NAICS code 517210.

[45] MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.) Multipoint Distribution Service ("MDS"), also known as Multichannel Multipoint Distribution Service ("MMDS"), is now known as Broadband Radio Service ("BRS").

[46] 47 C.F.R. § 21.961(b)(1).

a small entity in the context of MDS auctions was approved by the SBA.[47] In the 1996 auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business 1996 auction winners, 48 remain small business licensees. Specifically, the Commission estimates that some of the EBS licensees are small businesses since there are currently 2,032 EBS licensees, and all but 100 of these licenses are held by educational institutions.[48] In addition to the 48 small businesses that hold BTA authorizations, there are also approximately 392 incumbent BRS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[49]

Although the SBA changed the small business definition in 2007 so that BRS and EBS now fall under Wireless Telecommunications Carriers (except Satellite), we lack the data to estimate how many entities will be affected by the regulation. Therefore, we continue to employ the definition for small businesses used in the 1996 auction, and estimate that the majority of the affected entities are small.

Open Video Systems ("OVS"). The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[50] OVS falls within the SBA-recognized definition of Wired Telecommunications Carriers, which provides that a small entity is one with 1,500 or fewer employees.[51] The Commission has certified 25 OVS operators, with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services.[52] As of June 2007, BSPs served approximately 1.4 million subscribers, representing 1.46 percent of all MVPD households.[53] Among BSPs, however, those operating under the OVS framework are in the minority, with approximately eight percent operating with an OVS certification.[54] BSPs include companies such as RCN, Champion Broadband, Knology, and SureWest Communications.[55] RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS

[47] *See ITFS Order*, 10 FCC Rcd at 9589.

[48] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

[49] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent BRS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of $12.5 million or less). *See* 13 C.F.R. § 121.201, NAICS code 517910.

[50] *See* 47 U.S.C. § 573.

[51] 13 C.F.R. § 121.201 (2007), NAICS code 517110.

[52] For a complete list of OVS certifications, *see* Current Filings For Certification of Open Video Systems, at http://www.fcc.gov/mb/ovs/csovscer.html (visited Jan. 4, 2008).

[53] BSP subscribers: 2003 subscribers from NCTA Comments for the *2003 Report* at 8; 2004 subscribers from BSPA Comments at 6 for the *2004 Report* and Commission estimates; 2005 from *2005 Report*, 21 FCC Rcd at 2617; 2006 subscribers from BSPA Comments at 6 and Commission estimates.

[54] *See 2005 Cable Competition Report*, 20 FCC Rcd at 2802, ¶ 71.

[55] As of June 2007, RCN serves 355,000 subscribers and Knology serves 221,800 subscribers. *See* http://www.ncta.com/Statistic/Statistic/Top25MSOs.aspx (visited Jan. 4, 2008).

operators may qualify as small entities.

Cable and Other Subscription Programming. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the *broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming* in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[56] The SBA has developed a small business size standard for firms within this category, which is: firms with $13.5 million or less in annual receipts.[57] According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year.[58] Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999.[59] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[60] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[61]

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

Depending on the rules adopted as a result of this *Further Notice*, the Report and Order ultimately adopted in this proceeding may contain new or modified information collections. We anticipate that none of the changes would result in an increase to the reporting and recordkeeping requirements of broadcast stations, newspapers, or applicants for licenses. As noted above, we invite small business entities to comment in response to this *Further Notice.*

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

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed 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 or reporting requirements under the rule for small entities; (3) the use of performance, rather than design,

[56] U.S. Census Bureau, 2002 NAICS Definitions, "515210 Cable and Other subscription Programming"; http://www.census.gov/epcd/naics02/def/ND515210.HTM#N515210.

[57] 13 C.F.R. § 121.201 (2007), NAICS code 515210.

[58] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 515210 (issued Nov. 2005). As noted above, the U.S. Census Bureau has not yet collected data for 2007, so we continue to rely on 2002 data.

[59] *Id.* An additional 40 firms had annual receipts of $25 million or more.

[60] 15 U.S.C. § 632.

[61] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[62]

We are directed under law to describe any alternatives we consider, including alternatives not explicitly listed above.[63] The *Further Notice* seeks comment on whether or not it should retain the single majority shareholder exemption, and whether eliminating the exemption would negatively impact capital investment, particularly in small businesses. Additionally, it seeks comment on whether or not to bar a limited partner from selling video programming to the general partner cable entity in order to maintain insulated limited partner status for purposes of the attribution rules. It also seeks comment on whether to conform various aspects of the ED cable attribution rule to the amended EDP broadcast attribution rule upon which the cable rule was based.[64] Finally, it seeks comment on how it should craft a rule to limit the number of cable channels that can be occupied by affiliated video programming services. Cable ownership limits are intended to prevent large cable entities from unfairly impeding the flow of video programming to consumers through their horizontal reach or their level of vertical integration. We anticipate that any channel occupancy limits adopted by the Commission will have little adverse impact on small cable entities because small entities as a general matter do not approach the channel occupancy limits and are not the focus of the rule. We also expect that, whichever alternatives are chosen with respect to revising the cable attribution rules, the Commission will seek to minimize any adverse effects on small businesses.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

None.

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[62] 5 U.S.C. § 603(c).

[63] 5 U.S.C. § 603(b).

[64] The Equity Plus Debt (ED) rule attributes the interest of those who hold 33 percent or more of a cable entity's total assets, including interests which otherwise would not be attributable (including non-voting stock and insulated partnership interests).

APPENDIX E

TECHNICAL APPENDIX

A. Estimating the Penetration Rate

1. We estimate the penetration rate as the fraction of a cable operator's subscribers that will have access to a network if the operator reaches a carriage agreement with the network. Two elements play a role in this penetration rate. An operator, once having reached an agreement with a network, may not carry the network on all of the systems the operator controls. Furthermore, even when the network is available on a cable system, the network may be placed on a tier which is not purchased by all of the system's subscribers. We use confidential data from the Commission's Cable Price Survey to determine the subscriber penetration rate of 135 cable networks. The launch date of each network is used to calculate the age of each network.[1] With this information it is possible to predict the fraction of a cable operator's subscribers a programming network is likely to have access to at any point in its lifecycle. We limit our analysis to cable networks that are standard definition, predominately English language, nationally distributed, and are not generally sold on an a la carte basis. These requirements yield the 135 cable networks in the analysis.

2. Due to the small number of programming networks in any single age category, we use linear regression to develop a more robust estimate of the relationship between the subscriber penetration rate and the age of a network. We explore several specifications of the relationship between the age of a network and the network's subscriber penetration rate. We consider, in succession, the addition of higher level polynomials of the age variable in the regression, up through inclusion of age to the fourth power. The regression result when only age is included in the analysis are:

Regression Specification 1			
Independent Variable	**Coefficient**	**Robust Standard Error**	**t-Statistic**
Constant	0.1775261	0.0325708	5.45
Age	0.0243273	0.0025334	9.60
$R^2 = 0.398$			

Both the constant and the coefficient on age are statistically different from zero in this result. The result generates an estimate of the penetration rate of a network five years after launch of 29.92%. However, this expression also predicts that the penetration rate of a network that has been in existence for 35 years would have a predicted penetration rate of 105%. While the oldest network in our data is 33 years old, this is still a drawback to using this simple specification. Therefore it is best to incorporate additional polynomial terms to better fit the data.

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

3. The next specification includes age and age raised to the second power, with the following results:

Regression Specification 2			
Independent Variable	**Coefficient**	**Robust Standard Error**	**t-Statistic**
Constant	0.0489173	0.0500314	0.98
Age	0.0492842	0.0099937	4.93
Age^2	-.0008458	-0.0003409	-2.48
$R^2 = 0.430$			

The coefficients on the age variables are statistically different from zero; however, the estimated constant is not. This is not a cause for concern since we would expect a network less than one year old to have a relatively low penetration rate. This result generates an estimate of the penetration rate of 27.42% for a network five years after launch. The result also yields coefficients that ensure that no network, regardless of its age, has a penetration rate above 100%. Furthermore, the regression yields a reasonable increase in the value of R^2, which represents the fraction of the variation in the data that is explained by the regression.

4. The next specification adds age raised to the third power to the previous specification and yields the following results:

Regression Specification 3			
Independent Variable .	**Coefficient**	**Robust Standard Error**	**t-Statistic**
Constant	0.1080096	0.0563045	1.92
Age	0.0283781	0.0183821	1.54
Age^2	0.0009049	0.0015611	0.58
Age^3	-0.0000393	0.0000367	-1.07
$R^2 = 0.435$			

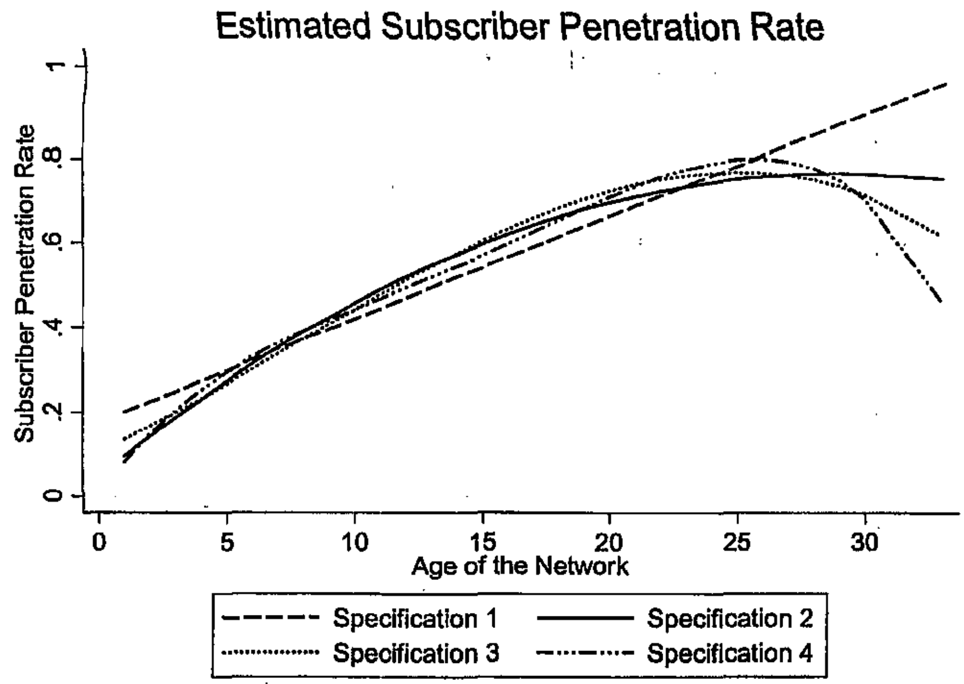
This result generates an estimate of the penetration rate of 26.76% for a network five years after launch. The result also yields coefficients that ensure that no network, regardless of its age, has a penetration rate above 100%. The increase in the value of R^2 is much less pronounced when adding the cubic term of age. Furthermore, all of the estimated coefficients are individually not statistically different from zero, though this is likely due to the high degree of correlation between the polynomial terms rather than the likelihood that there is no relationship between the age of the network and its penetration rate. This is reinforced by an F-test, which tests whether all of the estimated coefficients, except the constant, are zero. This hypothesis is soundly rejected with a test statistic of 51 distributed with (3, 131) degrees of freedom.

5. The final specification adds age raised to the fourth power to the previous specification and yields the following re results:

Regression Specification 4			
Independent Variable	Coefficient	Robust Standard Error	t-Statistic
Constant	0.0048196	0.0709284	0.07
Age	0.0847567	0.0359461	2.36
Age^2	-0.0068894	0.0049475	-1.39
Age^3	0.0003392	0.0002325	1.46
Age^4	-0.0000059	0.0000035	-1.69
$R^2 = 0.443$			

This result generates an estimate of the penetration rate of 29.51% for a network five years after launch. The result also yields coefficients that ensure that no network, regardless of its age, has a penetration rate above 100%. The increase in the value of R^2 is a bit more pronounced when adding the additional term, though it provides less of a lift than adding the squared value of age in specification 2. All of the estimated coefficients, with the exception of the coefficient on age, are not statistically different from zero. As with the previous specification, this is likely due to the high degree of correlation between the polynomial terms rather than the lack of higher order polynomial effects in the relationship between the age of the network and its penetration rate. An F-test rejects the hypothesis that all of the estimated coefficients except the constant are zero.

6. We will use regression specification 2 to determine the appropriate penetration rate for use in the open field analysis. This specification strikes a balance between statistical significance and explanatory power as measured by the R^2 value. The following diagram shows the estimated profile of penetration over the lifetime of the network. Most of the differences in the specifications occur in older networks. There is little variation in estimated penetration rates at five years among the four specifications.



B. The Subscriber Penetration Rates from the Cable Price Survey

7. We use confidential data from the Commission's Cable Price Survey to estimate the likely penetration of a programming network given its age. The Cable Price Survey sampled 783 cable community units as of January 1, 2006. For each franchise, the respondent provides a list of the programming networks that are carried, the tier on which each network is carried, and the number of subscribers to the tier.[2] By aggregating all of this information to the level of a cable operator, we calculate the fraction of each cable operator's subscribers who have access to a specific programming network. The penetration rate of a network on the surveyed cable operator's systems is then averaged with the penetration rate of the network among the other surveyed cable operators that carry the network on at least one system to obtain an estimate of the network's penetration rate nationwide among those operators that carry the network. The resulting penetration rates for the 135 networks in the analysis are presented in the following table.[3]

Network	Year of Launch	Penetration
ABC Family	1977	85.2%
American Movie Classics	1984	84.1%
AmericanLife TV	1985	17.8%
America's Store	1986	13.3%
Animal Planet	1996	85.9%

[2] The survey contains information on the basic, expanded basic, and most popular digital tier.

[3] The data in this table were derived from the responses to the Cable Price Survey. Although individual responses are subject to confidentiality requests, the table presents aggregated data.

Anime Network	2002	0.8%
Arts & Entertainment	1984	87.0%
AZN	1990	19.8%
BBC America	1998	41.6%
BET	1980	79.8%
BET Gospel	2002	1.8%
BET Jazz	1996	33.2%
Biography Channel	1998	40.5%
Black Family Channel	1999	22.4%
Bloomberg Television	1995	31.2%
Boomerang	2000	14.2%
Bravo	1980	79.9%
Bridges TV	2004	1.4%
Cartoon Network	1992	85.9%
Celtic Vision	1995	1.8%
Church Channel	2002	0.5%
CNBC	1989	86.2%
CNBC World	1989	13.9%
CNN	1980	86.8%
CNN Headline News	1982	87.0%
CNN International	1995	9.2%
College Sports Television	2003	20.2%
Comedy Central	1991	86.0%
Country Music TV	1983	75.8%
Court TV	1991	83.2%
C-SPAN	1979	86.9%
C-SPAN2	1986	79.8%
C-SPAN3	1997	23.6%
Current	2005	18.1%
DayStar Television	1998	6.1%
Discovery Channel	1985	87.8%
Discovery Health	1998	45.3%
Discovery Home & Leisure	1996	41.9%
Discovery Kids	1996	44.5%
Discovery Science	1996	44.6%
Discovery Times	1996	44.6%
Disney Network	1983	85.1%
Do-It-Yourself	1994	36.9%
E! Entertainment Television	1990	85.5%
ESPN	1979	87.3%
ESPN Classics	1995	55.3%
ESPN2	1993	87.3%
ESPNews	1996	44.6%
ESPNU	2005	3.3%
EWTN	1981	57.7%
FamilyNet	2000	7.9%
Fine Living	2002	32.9%
FIT TV	2004	39.4%
Food Network	1993	85.9%
Fox Movie Channel	1994	34.6%
Fox News Channel	1996	86.5%
Fox Reality Channel	2005	4.2%

Fox Soccer Channel	1997	45.0%
FUEL	2003	19.6%
FUSE	1994	37.7%
FX	1994	85.9%
G4/TechTV	2002	55.3%
Game Show Network	1994	54.4%
Golf Channel	1995	73.8%
Great American Country	1995	39.3%
Hallmark Channel	1998	64.1%
Hallmark Movie Channel	2004	6.8%
History Channel	1995	87.7%
History Channel International	2004	38.5%
Home and Garden TV	1994	86.4%
Home Shopping Network	1985	83.4%
Horse Racing TV	2002	3.7%
Independent Film Channel	1994	33.9%
Inspirational Life	1998	18.8%
Inspirational Network	1990	29.0%
JCTV	2002	0.2%
Jewelry Channel	1993	22.4%
Learning Channel	1980	87.8%
Lifetime	1984	87.1%
Lifetime Movie Network	1998	47.2%
Lifetime Real Women	2001	13.3%
LOGO	2005	20.3%
Military Channel	1998	42.5%
MSNBC	1996	81.4%
MTV	1981	87.6%
MTV Hits	2002	34.5%
MTV Jams	2002	23.7%
MTV2	1998	56.8%
NASA	1991	7.0%
National Geographic Channel	2001	56.0%
NBA TV	1999	36.7%
NFL Network	2003	23.1%
Nick Too	1998	25.7%
Nickelodeon	1979	87.4%
Nickelodeon Gas	1999	43.5%
Nicktoons	1999	40.0%
NOGGIN	1999	44.7%
Outdoor Channel	1993	34.2%
Outdoor Life Network	1995	65.5%
Ovation	1996	15.4%
Oxygen	2000	60.6%
PBS Kids Sprout	2005	15.2%
Product Information Network	1994	8.5%
QVC	1986	85.3%
Sci-Fi Channel	1992	83.5%
Shop at Home	1986	14.5%
Shop NBC	1991	50.3%
SoapNet	2000	39.6%
Speed Channel	1996	67.0%

Spike	1983	87.1%
Sportsman Channel	2003	3.3%
Style	1998	58.5%
Sundance	1996	42.2%
TBS	1976	82.9%
Tennis Channel	2003	24.6%
TNT	1988	85.1%
Toon Disney	1998	48.1%
Travel Channel	1987	80.6%
Trinity Broadcast Network	1973	34.5%
Turner Classic Movies	1994	69.1%
TV Games Network	1994	11.4%
TV Guide Channel	1988	65.4%
TV Land	1996	83.2%
TV One	2004	20.1%
USA Network	1980	86.8%
VH1	1985	87.3%
VH1 Classic	2000	44.0%
VH1 Country	1998	27.6%
VH1 Soul	1998	25.6%
WE: Women's Entertainment	1997	52.1%
Weather Channel	1982	86.5%
Weatherscan	1999	17.2%
WGN Superstation	1978	48.2%
Wisdom	1997	4.5%
Word Network	2000	17.5%

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: *The Commission's Cable Horizontal and Vertical Ownership Limits*; *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*; *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*; *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*; *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*; *Reexamination of the Commission's Cross-Interest Policy*.

I pleased that today the Commission takes action on an issue that is long overdue. In September 2001, at only my second Open Meeting as a Commissioner, we adopted a notice seeking comment on this issue. More than six years later, we finally adopt an order.

In 1992, Congress instructed the FCC to establish "reasonable limits" on horizontal and vertical cable ownership. Specifically, Congress in the 1992 Cable Act, directed the FCC to establish limits on the number of subscribers a cable operator is authorized to reach.

Today's Order provides appropriate justification for a 30% limit on horizontal ownership. We therefore respond to the D.C. Circuit and Congress's mandate. In so doing, we ensure that a single operator cannot unduly limit the viability of a new independent network in its formative years. As Congress observed, it is important that we "ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual cable operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer." 47 U.S.C. § 533 (f)(2)(A).

As with all our ownership rules, it is important that the Commission promote competition and the diversity of voices.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *The Commission's Cable Horizontal and Vertical Ownership Limits*; *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*; *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*; *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*; *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*; *Reexamination of the Commission's Cross-Interest Policy.*

I'm pleased that we have finally complied with our statutory obligation and the 2001 court remand and re-established our horizontal cable ownership limit. The 30% limit should help ensure that no cable operator, because of its size, is able to unfairly impede the flow of video programming to consumers. Although the percentage cap remains the same, the underlying economic justification is quite different and is, I believe, completely responsive to the issues raised by the D.C. Circuit Court. I recognize that setting a prophylactic limit like this is never easy, and inevitably involves some line-drawing that can always be second-guessed. But just because the task Congress gave us is difficult is no reason to shirk it.

It is with some disappointment, however, that I note we are initiating yet another *Further Notice of Proposed Rulemaking* on our vertical ownership rules. These are the rules that provide a structural limit on the amount of capacity a cable operator can devote to affiliated programming. In other words, vertical ownership rules would ensure that cable operators open at least part of their systems to independent programming. Unfortunately, this NPRM marks the ***third*** time since the 2001 Court remand that we have put this issue out for comment without moving forward to a decision. It's reminds me of the movie *Groundhog Day*. I keep re-living the same scene over and over again. But maybe this time we will get it right and finally adopt a rule that provides the breathing room for independent programming that Congress intended. That would be a significant win-win, giving consumers access to some honest-to-goodness diversity in their programming and providing the creative community with the access to distribution it needs to survive and to thrive.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: *The Commission's Cable Horizontal and Vertical Ownership Limits*; *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*; *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*; *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*; *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*; *Reexamination of the Commission's Cross-Interest Policy*.

Our media frames our society both as an outlet for individual expression and as a reflection of our collective values, diversity, and creative voices. With so much riding on the vitality, openness, and diversity of our media, this Commission has an obligation to engage in a careful, comprehensive and thoughtful review of our ownership rules for cable systems, which serve as the primary video delivery platform for so many American consumers.

I have long expressed concerns about the negative effects of media consolidation for this country, and I have encouraged the Commission to adopt well-justified rules addressing both horizontal ownership limits for cable operators and the problems raised by growing vertical integration of programming and distribution. Although we push off decisions on many important questions of vertical ownership into the attached Further Notice, I am pleased that we finally establish in this Order sustainable horizontal cable ownership rules, as directed by Congress almost 15 years ago in Section 613(f) of the Act.

Section 613 directs the Commission to enhance "effective competition" and makes clear that Congress was concerned that unchecked growth of cable providers could increase their incentives to foreclose or engage in other anticompetitive practices against independent, unaffiliated programmers. As the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) observed, the Commission has identified important governmental objectives in setting horizontal ownership limits, including ensuring that cable operators do not preclude new programming services from reaching a critical mass of viewers necessary to survive, and preserving a diversity of information available to the public.[1] So, I support the Commission's decision to adopt a horizontal ownership cap that responds to the concerns of the D.C. Circuit.[2]

As the court noted, the market for the delivery of video programming has experienced significant changes since Congress first directed the Commission to establish a cap. It is important for the Commission to assess the impact of these developments, including the continued growth of direct broadcast satellite (DBS) and the entry of incumbent local phone providers into the video marketplace. For example, in 2001, DBS providers DirectTV and EchoStar served 16 million subscribers, while today they serve approximately 28 million subscribers, representing a growing percentage of the total multichannel video programming distribution (MVPD) market. I take seriously Section 613's admonition that we take into account the dynamic nature of the marketplace. This growth gives increasing merit to the argument that the horizontal ownership rules should be applied to DBS providers, as well. While Section 613 does not explicitly authorize such a cap on DBS providers, the Commission should further explore these issues in the context of its annual video competition reports and consider any appropriate recommendations to Congress.

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[1] *Time Warner Entertainment Co. v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000) (*Time Warner I*).

[2] *Time Warner Entertainment Co. v. U.S.*, 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner II*).

As I have often stated, the prospect of new distribution networks holds the promise of reducing the ability of vertically integrated conglomerates from imposing an economic, cultural or political agenda on a public with few alternative choices. While the presence of DBS has reduced cable's dominance, concentration remains a concern. In 2006, the top four MVPDs served 63 percent of all MVPD subscribers. The effects of this continued concentration are reflected not only in the upstream market, but also, in the downstream MVPD market. As the Commission recently acknowledged in its most recent video competition report, DBS competition has not checked cable prices to the same extent as competition from wireline providers.

In this Order, the Commission's focus is trained particularly on the potential influence of cable operators on the upstream programming market. The Order finds that a large cable operator would have the power to significantly undermine the viability of a reasonably popular programming network by refusing to carry it, despite the competitive pressures of DBS and other providers. It is apparent that video programming delivery involves an intricate web of relationships, and this Order attempts to boil these down into an appropriate horizontal limit. Given the contentious nature of this proceeding and its history in the courts, we put our best foot forward in defense of this difficult task. Significantly, this Order embraces the consistent message I have heard from many small and independent creators of local and diverse programming, namely that they find it difficult or impossible to gain access to and carriage on cable systems. This Order is a necessary measure to prevent that problem Congress sought to address from growing more acute.

STATEMENT OF COMMISSIONER DEBORAH TAYLOR TATE

Re: *The Commission's Cable Horizontal and Vertical Ownership Limits; Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy.*

Section 613(f) of the 1992 Cable Act requires the Commission to establish "reasonable limits" regarding the number of cable subscribers a cable operator is authorized to reach. In 1993, the Commission set the limit at 30%. The Commission's decision was appealed, and was reversed by the D.C. Circuit Court in 2001. In its holding, the Circuit Court found that "While a 60% limit might be appropriate as necessary to ensure that programmers had an adequate 'open field' even in the face of rejection by the largest company, the present record supports no more." Today we are again considering an Order that would set the limit at 30%.

In accordance with the D.C. Circuit Court's directive, we must examine the marketplace, and set a limit that protects competition while promoting successful business models. As the Court said, "Congress also sought to 'ensure that cable operators continue to expand, where economically justified, their capacity,' and it specifically directed the FCC, in setting the ownership limit, to take into account the 'efficiencies and other benefits that might be gained through increased ownership or control.'" In addition to increased efficiencies, we must also remember that cable operators play a crucial role in the deployment of broadband, which continues to be one of the FCC's top priorities.

In 2001, when the Court reversed the 30% cap, the landscape was much different than it is today. DirecTV and EchoStar served 16 million subscribers, or 18% of the MVPD marketplace. Today they serve almost twice that many subscribers, with 30% of the MVPD marketplace. In addition, they have exclusive rights to highly sought after programming that cannot be provided by cable operators.

In 2001, telecommunications giants like Verizon and AT&T had not yet entered the video marketplace. Today these companies are aggressively promoting their video services, and they have an enormous pre-existing customer base on which to draw. The FCC is doing all it can to facilitate entry of competitors into the video market so that consumers will have greater choice. In fact, the Commission's recent franchising decision allows entry into new markets more efficiently than in the past.

Another change in the marketplace is the explosion of online video, which offers programmers yet another means of distribution. Approximately 70% of American households subscribe to an Internet service, and in 2006, three out of five watched video online. We have recently seen ABC, CBS, NBC, and Fox offering episodes of their popular primetime shows on the Internet free of charge. Consumers are also getting video on their mobile phones. Nearly eight million were using their phones to watch video as of October 2006, and the numbers continue to grow. As viewers begin watching programming on these devices-- at any time they choose, from anywhere in the world -- more programmers will likely turn to online distribution.

Programmers today have a greater variety of options than ever before, and are constantly trying new business models, new platforms, new ways of producing and presenting their content. Cable operators are no longer the gatekeepers they may once have been. And where programmers feel they are being unfairly denied carriage, the FCC has a complaint process in place to deal with such disputes. Therefore, it is difficult to see why, in this increasingly diverse video marketplace, the FCC would once again seek to institute a 30% limit on the size of their customer base.

While I recognize our statutory directive to set a limit on the number of subscribers a cable operator can have, I am also mindful of the importance of getting that number right. If the record in 2001 supported no less than a 60% cap, I cannot be persuaded that the record before us today does either. For these reasons, I respectfully dissent.

DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

Re: *The Commission's Cable Horizontal and Vertical Ownership Limits; Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy.*

What we have before today us may be the "Ghost of Christmas Past." Almost seven years ago, the court rejected the FCC's attempt to impose a 30 percent cable ownership cap. So what is the majority doing today? It's sending back up to the very same court the very same 30 percent cap. Maybe this is really the "Ghost of Christmas Present" then. In Charles Dickens' tale, "A Christmas Carol," that ghost carried the specters of "Ignorance" and "Want." Today's order does the same. This order goes out of its way to remain ignorant of current market conditions which obviate a need for a cap. And the order is wanting for any sustainable legal or evidentiary justification to trample on the First Amendment, in defiance of the court's 2001 warning. Certainly, the ghost of the future will foretell an inescapable fate for this order. Its dark, cold epitaph is all but carved on its tomb. This order *will be overturned* by the D.C. Circuit. Even Ebeneezer Scrooge would pry a few coins from his miserly hands to place that bet.

My dissent is focused on three primary concerns:

1) The cap is out-of-date, is bad public policy and is not needed in today's market;
2) The court is sure to strike down the cap again; and
3) The cap is contrary to the existing policy goals of *this* Commission by creating regulatory *dis*parity and asymmetry.

I. <u>The Cap Is Out-of-Date</u>.

In 1992, Congress authorized the Commission, through Section 613, to "prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach" in order to prevent any "cable operator or group of cable operators" from "unfairly imped[ing]... the flow of video programming from the video programmer to the consumer."[1] In instructing the Commission to craft these rules, however, Congress was clear that the Commission must "make sure such rules and regulations reflect the dynamic nature of the communications marketplace" and must not "impose limitations which would impair the development of diverse and high quality video programming."[2] Congress also required the Commission to "take particular account of the market structure" of the cable industry and "account for any efficiencies and other benefits that might be gained through increased ownership."[3]

When Congress enacted this section, vertical integration between cable operators and programmers was at about 57 percent, which sparked legitimate concerns regarding potential exclusion of independent programmers by cable companies. In contrast, vertical integration today stands at less than 15 percent. The unwritten story here is that, back then, fewer than 100 national programming

[1] 47 U.S.C. § 533(f)(1)(A), (f)(2)(A).

[2] *Id.* at § 533(f)(2)(E), (f)(2)(G).

[3] *Id. at* § 533(f)(2)(C)-(D).

networks existed; now there are about 550. That's more diversity, not less.

In 1992, the average consumer had a "choice" of only one subscription video provider. Today, the average consumer has a choice of at least three such providers, and sometimes five. In 2001, when the court last looked at the cap, DirecTV and Echostar had a combined 16 million subscribers with an 18 percent market share. Today, they serve over 30 million consumers and have grown to a 30 percent market share. These two companies are now the second and third largest subscription video service providers. DirecTV is now 54 percent bigger, and Echostar is 92 percent bigger. In the meantime, cable's video subscribership is 4 percent *smaller*.

And there are other differences. In 1992 and 2001, phone companies were not in the video business. Now they are - big time. For instance, Verizon alone has almost 1 million video subscribers. Cable overbuilders are much more viable as well. In 1992, there was no public Internet, let alone Internet video. Today there is so much Internet video, that YouTube alone requires more bandwidth than the *entire Internet* did in 2000. And that's not counting new ventures such as Joost, Cinema Now, Movielink and others that allow consumers to avoid traditional subscription video paradigms altogether. In fact, as the FCC's own research shows, by July 2006, 107 million Americans viewed video online and about 60 percent of U.S. Internet users download videos.[4] Furthermore, today's video market will only become more competitive as broadcasters beam new HDTV and multi-cast video programming, over-the-air, for *free*, and as wireless providers build out powerful new platforms using our recently-auctioned Advanced Wireless Services spectrum and the 700 MHz spectrum being auctioned next month.

This order is unnecessary because the bottleneck threat to programming distribution that existed in 1992 no longer exists. Deregulatory policies have spurred new investment and competition in the marketplace. As a result, new delivery platforms and new content providers have sprouted up, supplanting the need for regulation. However, should a programmer find that a cable operator is unfairly excluding its content from carriage, and all other private sector avenues for resolution have failed, then the statute and our regulations allow that programmer to pursue a complaint here at the Commission. But, to date, only two such complaints have been filed—which underscores the point that the majority is concocting an unconstitutional cure for an illness that does not exist. If a viewer wants specific programming not carried by a cable operator, the viewer and the programmer both have a panoply of ways to find each other -- certainly more than they had in 1992 or 2001. In short, other less heavy-handed alternatives exist to address the majority's concerns without having to resort to such archaic industrial policy.

II. The Cap Is Sure to Be Struck Down Again by the Court.

Today's 30 percent cap has a smaller chance of surviving appeal than did the ill-fated and ill-advised 2001 30 percent cap. In 2001 in *Time Warner Entertainment Co. v. FCC*, the D.C. Circuit rejected the 30 percent cable ownership cap and imposed a heavy burden on the Commission to adopt any new cap on remand.[5] The court found that the Commission lacked an evidentiary basis for a 30 percent cap and, as a result, did not meet its obligation under the First Amendment to show a "real risk" of "non-conjectural harm" to programmers. The court also rejected the Commission's argument that a 30 percent cap was justified in order to "enhance diversity."

Indeed, the court stated that based on the marketplace evidence in 2001, the Commission could

[4] News Release, FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* 4 (Nov. 27, 2007).

[5] *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1134 (D.C.Cir. 2001).

justify *at most*, a 60 percent cap—*twice* the number the majority adopts today.[6] Specifically, the court maintained that a 60 percent limit "might be appropriate as necessary to ensure that programmers had an adequate 'open field' even in the face of rejection by the largest company" and that the "present record supports no more." In particular, the court found that the Commission had not given sufficient weight to marketplace developments, especially the increasing success of Direct Broadcast Satellite ("DBS"). The court pointed out that because "DBS could be considered to 'pass every home in the country'" its competitive effect is especially significant. The Court admonished the Commission to account for this fact when considering any new ownership cap. The majority's order does not clear this hurdle, not by a mile. How can the same 30 percent limit that *insufficiently* accounted for DBS in 2001 possibly satisfy the requirements of *Time Warner II* today when DBS is roughly *twice as large* a competitive presence as it was in 2001, and when other competitors are competing vigorously with cable operators? The answer is that it cannot.

III. The Cap Creates Regulatory *Disparity* and Asymmetry.

Placing a horizontal ownership cap on cable creates regulatory disparity and asymmetry, all at a time when this Commission has been trying to level the regulatory playing field by creating parity. Order after order over the past few years has sought to change the stove-pipe paradigm of old in an attempt to treat similar technologies and services alike, not differently. Today's cap applies only to cable, not to satellite. Furthermore, we don't cap the number of:

- wireline telephone subscribers one company can have;
- wireless subscribers one company can have; or
- websites a company can own.

Even in the era of rapid technological convergence, such asymmetry will only create market distortions that will inhibit investment and innovation. How does that serve the public interest? In a world where cable companies compete directly against telephone companies and others to provide video, voice and data services, restricting the ability of one group of competitors to achieve the economies of scale enjoyed by others undermines years of efforts to spur intermodal competition and violates the well-established principle of competitive neutrality. If the majority sees so many flaws in the cable industry, it should remedy those shortcomings by encouraging competition, as we did with our video franchising order, not through unnecessary and unconstitutional regulation. Likewise, it is ironic that those who are voting today to *limit* cable company growth have consistently voted to *expand* telephone company growth. Such a reversal of policy just for this one sector defies logic.

IV. Conclusion.

Today's item also contains a further notice of proposed rulemaking, seeking comments regarding the cable attribution rules and the vertical ownership limit. While I am not opposed to asking questions about the attribution issues, the answers will make little sense with the 30 percent horizontal ownership cap in place. I hope that our consideration of the vertical limit will be far better-reasoned than today's action.

For these reasons, I respectfully dissent from today's order.

[6] *Id.* at 1136.