Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules	)	MM Docket No. 92-264
	)	
Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154
	)	

REPLY COMMENTS
OF
CONSUMER FEDERATION OF AMERICA,
CONSUMERS UNION, MEDIA ACCESS PROJECT
CENTER FOR DIGITAL DEMOCRACY, THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC., ASSOCIATION FOR INDEPENDENT VIDEO AND FILMMAKERS, NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE, THE ALLIANCE FOR COMMUNITY MEDIA, AND NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

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CFA, *et al.* do hereby submit the following joint *Reply Comments* in the above captioned proceeding.[1]

[1] CFA, *et al.* are joined in these *Reply Comments* by the National Association of Telecommunications Officers and Advisors (NATOA). NATOA is a national association that represents the telecommunications needs and interests of local governments, and those who advise local governments. Its membership is predominately composed of local government agencies, local government staff and public officials, as well as consultants, attorneys, and engineers who consult local governments on their telecommunications needs. NATOA is online at www.natoa.org.

INTRODUCTION

As demonstrated by the comments submitted, the perception of the dangers of excessive concentration in the cable industry depends almost entirely on whether one owns an incumbent cable system or whether one wishes to offer programming over one.

To those who own incumbent cable systems, the world appears as a happy theoretical model in which the exercise of monopoly power at the local level can never happen. Discrimination against programmers, poor consumer service, or price gouging would result in instant customer loss so devastating that no cable company would dare attempt it. Any programmer can fund itself through overseas sales or distribute its products through video outlets. DBS, broadcast television, even local video rental places and the Internet perfectly substitute for cable. Thus, in the happy theoretical world postulated by the cable industry, cable's actual market share bears no relation to its market power, and no need for any limit exists.

For those in the real world, increased concentration has meant diminished local programming and poor customer service from "absentee landlords" with little connection to the local franchise and high prices based on monopoly control at the local level. In the real world, as demonstrated by CFA, *et al.* in their initial comments, DBS provides, at best, a poor substitute for cable and does not serve to discipline programming choices, quality of service, or price. Independent programmers such as Sherjan Broadcasting Company ("Sherjan"), the Screen Writers Guild ("SWG"), and the United State Catholic Conference of Bishops ("USCCB") provide real world evidence of how consolidation has made it increasingly harder for local programmers and other independents to reach willing viewers in violation of the intent of Section 613.

SUMMARY

A. THE COMMENTS OPPOSING A 30% LIMIT MAKE SEVERAL FUNDAMENTAL ERRORS OF LAW

CFA, *et al.* have submitted separate comments demonstrating the flaws in the economic arguments of the cable multi-system operators ("MSOs"). The comments here focus on the errors of law in the arguments of those who oppose reinstating the 30% limit.

First, the Commission has no discretion as to whether to impose a specific, numeric limit. Time Warner Cable ("TWC") and others argue that the Commission could chose not to impose a numeric limit, or could set the limit at the same level as the antitrust laws require. This flies in the face of the plain language of the statute and its legislative history. As CFA, *et al.* explained in their initial comments, the Commission must set a numeric limit that comports with the longstanding policy of "imposing limits on ownership of media outlets ***substantially below*** those that a traditional antitrust analysis would support." H.R. Rep. No. 102-628 (1992) ("*House Report*") at 43 (emphasis added). *See also Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 194 (1997) ("*Turner II*").

Those who suggest that the First Amendment compels the Commission to choose the highest limit permissible under the record similarly misconceive Congress' intent and the role of the First Amendment in setting the limit. Congress intended Section 613 to protect the First Amendment principle of promoting diversity in the marketplace of ideas (a principle recognized in antitrust as well as telecommunications law). *Time Warner Entertainment Co., L.P. v. United States*, 211 F.3d 1313,1319 (2000). *See also* S. Rep. No. 102-92 (1991) ("*Senate Report*") at 32-33, 51-52. This argues for the strictest limit supported by the record.

Similarly, those who argue that antitrust law provides adequate protection or that the PEG, leased access and program access requirements eliminate the need for an ownership limit misunderstand that Congress intended Section 613 as a prophylactic measure to enhance competition, and to protect the other access rights (such as PEG and leased access) available under the statute. The experiences of USCCB and Sherjan demonstrate that increased concentration attenuates the other protections of the statute, necessitating a 30% limit to preserve these rights.

Second, AT&T misunderstands the purpose of Section 613 and misstates Commission precedent when it attempts to broaden the market beyond the delivery of subscription video programming to the American public and seeks to include over-the-air broadcasting, video streaming, video rental, and foreign markets in the relevant market definitions.

Congress intended Section 613(f) "to promote effective competition." Although the drafters clearly expressed concern that, among other anticompetitive effects, large cable MSOs could exercise undue control over what programming services would "make it," they did not intend Section 613 to enhance competition in the general entertainment market. Rather, the drafters sought to create effective competition in the subscription MVPD market generally and the cable market specifically.

In their comments, competing MVPDs and broadband providers demonstrate that overseas markets and video rental establishments have nothing to do with enhancing competition in the cable market either nationally or at the local franchise level. Furthermore, the comments of Sherjan, SWG, and USCCB demonstrate the real difficulties in distributing programming as consolidation increases. Local programmers and rival MVPDs, whose contribution to diversity and effective competition are explicitly recognized in the 1992 Act and its legislative history,[2] have submitted convincing evidence that increased concentration defeats the protections mandated by Congress in Section 613 and other sections of the Act.

Finally, the Commission explicitly rejected this broad market definition proposed by AT&T in the 1998 *Broadcast Biennial Review*. *See 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCCRcd 11058 (2000). Although the Commission suggested that such broad definitions might be appropriate in the *Dual Network NPRM*,[3] the Commission retreated from this approach in the final *Dual Network Order*, and relied instead on predictions of an increase in local diversity it expected to result. *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, 16 FCCRcd 11114, 11127-32 (2001). Accordingly, the language quoted by AT&T has no bearing here.

Third, the cable MSOs err when they maintain that Section 613 or *Time Warner II* limits the Commission to consideration of effects on the programming market to the exclusion of all else, and that the Commission therefore cannot consider the effects of the limit on the LFA's ability to regulate or any other public interest factors. While *Time Warner II* limited the Commission's ability to rely ***exclusively*** on promoting diversity as the sole rationale supporting a 30% limit, it did not purport to foreclose other considerations. To the contrary, *Time Warner II* specifically observed that other theories or different record evidence could support a 30% limit. *Time Warner Entertainment Co., LP v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) ("*Time Warner II*").

Nor could *Time Warner II* have held otherwise. Section 613 explicitly directs the Commission to consider "other public interest factors," and lists four factors that do not bear on programming or programmers at all. §613(f)(2), (2)(C)-2(F). Furthermore, aside from the explicit

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[2] 1992 Cable Act §2(a)(10) (finding value of local origination of programming and local broadcasters), §7 (no exclusive franchise awards), §9 (recognizing importance of leased access programmers to competition and diversity); *Senate Report* at 13-20 (alternate MVPDs), 29-32 (leased access); *House Report* at 43-44 (alternate MVPDs).

[3] *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule, Notice of Proposed Rule Making*, 15 FCCRcd 11253 (2000).

mandate that the rule must enhance effective competition, the Commission must read Section 613 in the context of the goals of the 1992 Cable Act and the Communications Acts as a whole. *See AT&T v. Iowa Utilities Bd*., 525 U.S. 366, 377-78 (1999).

Fourth, the cable MSOs argue that a numeric limit runs the risk of denying consumers the potential benefits of a merger. This argument has no merit. Any cable MSO that demonstrates conclusively that the benefits to the public interest outweigh the risk of harm from increased concentration can request a waiver of the limit from the Commission. By contrast, in the absence of a rule, the current Commission appears disinclined to engage in any further public interest analysis. *See Applications of UTV San Francisco, et al. and Fox Television Stations, Inc.* 16 FCCRcd 14975, 14995 (separate statement of Chairman Powell) ("*Fox/Chris-Craft Merger Order*"). Accordingly, the rules should err on the side of caution.

B. IF THE COMMISSION DOES NOT REINSTATE THE PRE-1999 *ORDER* ATTRIBUTION RULES, IT SHOULD REINSTATE THE "NO SALE" CRITERION.

As an initial matter, the Commission must bear in mind that the attribution rules do not implicate any First Amendment rights on the part of cable operators or broadcasters. *Time Warner II*, 240 F.3d at 1140. On the other hand, they do protect the public's "paramount" First Amendment right to views from genuinely "antagonistic sources," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969), by ensuring that purportedly independent sources remain truly independent.[4]

Accordingly, crafting a prophylactic rule as required by Congress does not require the same level of record evidence as setting the cable ownership limit. It suffices that these comments provide sufficient evidence and theory for the Commission to properly exercise its predic-

[4] *See also Turner II*, 520 U.S. at 190 (identifying access to diverse programming and government's interest in promoting competition as purposes "of the highest order").

tive judgment in how best to carry out its twin missions of enhancing competition and enhancing the availability of views from genuinely antagonistic sources. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775,795-96 (1978) ("*NCCB*").

As they explained in their initial comments, CFA, *et al.* continue to maintain that the Commission erred when it altered the attribution criteria for limited partnerships in 1999, and that the Commission should therefore reinstate the previous attribution criteria prohibiting any "material involvement" in the partnership by an insulated partner. If the Commission refuses to reverse its previous decision, however, it should reinstate the "no sale" provision.

The Commission cannot expect a limited partner to bargain sincerely and genuinely at "arms length" for programming. Even if the limited partner selling the programming does not actively participate in the decision to carry the programming, limited partners have an incentive to favor each other at the expense of other programming or service rivals. In addition, because the partners will have intimate knowledge of each other's strengths and weaknesses denied to other market participants, the partners will either actively collaborate or passively coordinate in the sale of programming in an anticompetitive fashion yet remain able to certify truthfully that they did not participate in the programming decision of the limited partner.

Finally, as AT&T itself observes in a different context, some programmers can exert leverage over purchasers, influencing their programming decisions directly. *AT&T Comments* at 26-27. The no sale provision prevents such an "end run" around the insulation criteria.

The Commission created the attribution rules precisely to prevent this sort of behavior and to deter hidden influences on programming from compromising the interests of competition and diversity. Accordingly, if the Commission does not restore the attribution rules to their pre-1999 state, the commission should reinstate the no sale criteria of the insulation rule.

C. THE COMMISSION SHOULD ELIMINATE THE SINGLE MAJORITY SHAREHOLDER EXCEPTION

Several broadcasters join the cable MSOs in supporting repeal of the Single Majority Shareholder Exception (SMSE) to the attribution criteria. They generally argue that because a single majority shareholder can theoretically exercise absolute control over an entity and can thus ignore the opinion of the minority shareholder, the minority shareholder has no influence on the decision making process.

Because these commentors focus exclusively on ***control***, they ignore the many ways in which a minority shareholder can ***influence*** decisions. The attribution criteria ensure that relationships that fall short of control do not circumvent the goals of the ownership restrictions of enhancing competition and enhancing the likelihood of genuinely diverse and antagonistic points of view in the marketplace of ideas. *NCCB*, 436 U.S. at 795-96; *Time Warner II*, 240 F.3d at 1140.

As a final safety valve, a minority partner that can make the necessary showing can request a waiver of the rule from the Commission. The genuine threat posed by such relationships, however, and the tremendous difficulty in discovering anticompetitive effects from such relationships absent a rule, requires the Commission to eliminate the SMSE in all services.[5]

In conclusion, the record established in this proceeding clearly demonstrates the need to reinstate the 30% cable national ownership limit, eliminate the SMSE in all services, and reinstate the pre-1999 attribution rules or, barring that, reinstate the no sale criterion.

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[5] The National Cable Telecommunications Association ("NCTA") includes in its comments a *Petition for Rulemaking* requesting that the Commission re-examine the attribution criteria explicitly affirmed in *Time Warner II*. NCTA does not suggest anything to prompt re-evaluation of rules affirmed by the D.C. Circuit only a year ago. Its arguments remain essentially unchanged from those the Commission rejected in 1999 and the *Time Warner II* court rejected in 2001. To the extent NCTA's argument appears predicated on the definition of "effective competition" announced by the court in *Time Warner II*, NCTA Comments at 23, that same court affirmed the rules NCTA now challenges.

ARGUMENT

I. THOSE OPPOSING REINSTATING THE THIRTY PERCENT CABLE OWNERSHIP LIMIT MISCOMPREHEND THE PURPOSE OF SECTION 613.

The Comments CFA, *et al.* have submitted clearly demonstrate the need to reinstate the 30% limit. CFA, *et al.* have provided an economic justification for the rule, grounded in empirical data and employing well recognized techniques of economic analysis. As discussed at length in the initial comments, the legislative history, consideration of antitrust law and policy, and the core First Amendment concern for civic discourse and access to multiple genuinely antagonistic sources of information that has informed telecommunications policy in the United States for the last 60 years, mandate a limit no higher than thirty percent. The comments of other independent programmers such as Sherjan and USCCB, and comments of rival MVPDs such as RCN and the Broadband Service Providers Association ("BSPA"), provide further record evidence that compels a 30% limit.

By contrast, the cable MSOs have submitted comments rife with theory but short on empirical fact. The theories submitted rely on faulty assumptions, and CFA, *et al.* have submitted separate comments devoted to a rigorous analysis and critique of the statements submitted by the industry's experts.

In addition, the cable comments rely on faulty legal assumptions regarding the nature of Section 613. These reply comments address these misperceptions.

A. THE LANGUAGE OF SECTION 613 REQUIRES THE COMMISSION TO SET A NUMERIC LIMIT ON NATIONAL OWNERSHIP BELOW THAT REQUIRED BY THE ANTITRUST LAWS.

Several commentors argue that the Commission should not set a numeric limit on national ownership, as no non-conjectural danger exists that would warrant such a limit. *See, e.g.*, Comcast at 9; TWC at 9; AT&T at 7-11. Time Warner Cable ("TWC") specifically cites *Tele-*

communications Resellers Ass'n v. FCC, 141 F.3d 1193 (1998) as authority that the Commission may ignore the directive of Congress to set a numeric limit. TWC at 9 & n.6.

As an initial matter, the record clearly demonstrates that a "non-conjectural" danger warranting reinstatement of the 30% limit exists. More importantly, however, the Commission has no discretion regarding whether or not to set a limit. The statute mandates that the Commission set a specific numeric limit.

Section 613(f)(1) states:

> the Commission ***shall***…conduct a proceeding – (A) to prescribe rules and regulations establishing reasonable limits on the ***number*** of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest. (Emphasis added)

Congress' use of the word "shall" denotes "the language of command." *See Alabama v. Bozeman*, 533 U.S. 146, ___; 121 S. Ct. 2079, 2085 (2001) (citing cases). As the D.C. Circuit has explained:

> "Shall," the Supreme Court has stated, "is the language of command," *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 820, 79 L.Ed. 1566 (1935); "[a]bsent a clearly expressed legislative intention to the contrary," courts ordinarily regard such statutory language as conclusive. *GTE Sylvania*, 447 U.S. at 108, 100 S.Ct. at 2056; *see, e.g., Amalgamated Transit Union v. Donovan,* 767 F.2d 939, 944 (D.C. Cir. 1985)

MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1191 (D.C. Cir. 1985). *See also Association of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977).

If this plain language were not enough, the legislative history resolves any doubt. The drafters reviewed the FCC's failure to impose a national ownership limit, "although the FCC has the authority to impose horizontal limitations on the cable industry (both national and regional)."

Senate Report at 34. Frustrated by this failure, "the legislation directs the FCC to place reasonable limits on the size of MSOs." *Id.* While providing the FCC with "flexibility to determine what limits are reasonable and in the public interest," the drafters left no discretion as to whether or not to impose a limit. *Id.* Rather, as the drafters explained: "the legislation is clear that the FCC must adopt ***some*** limitations." *Id.* at 80 (emphasis added).

In conference, the Conference Committee rejected the alternate language put forth in the House bill, which would have required the Commission merely to do a study on concentration rather than mandating that the Commission set a limit. H.R. Rep. No. 102-862 (1992) at 81-82 ("*Conference Report*"). In other words, when faced with a choice between commanding the FCC to set a limit and granting the FCC discretion whether to address the problem of cable concentration, Congress clearly and affirmatively elected to ***require*** a heretofore reluctant Commission to set a specific limit.

Against this clear Congressional directive, TWC cites *Telecommunications Resellers Ass'n v. FCC*, 141 F.3d 1193 (1998) ("*TRA*"). *TRA*, however, has no bearing whatsoever on the requirement to issue a specific numeric cable ownership limit. There, the Commission complied with Congress' mandatory command to issue rules "necessary" to implement the statutory interconnection rights of certain wireless carriers by the date mandated. *Id.* at 1195. The Commission did not resolve all the questions presented, however, and announced it would conduct further proceedings to resolve a limited number of complex cases. *Id.* The Court found reasonable the FCC's interpretation of the word "necessary" as requiring it to issue regulations governing general rights under the statute, but not resolving the most difficult cases before it. *Id.* at 1196-97. Even as regard to those cases, however, the court warned the Commission that it found the (at that point) five year delay inexcusable and that the "denial of the petition for review should not be interpreted to suggest how the court would address a future petition for mandamus." *Id.* at 1198.

TRA thus stands for precisely the opposite of TWC's contention that the Commission has discretion to ignore the mandatory commands of Congress. While the Commission certainly has discretion to determine what constitutes a "reasonable" limit, it cannot set no limit at all. If the court found the five year delay in *TRA* "dismaying" and possible grounds for mandamus, *id.* at 1197-98, the current situation certainly brooks no further delay. Twice the time identified in *TRA* as intolerable has passed, and the Commission has yet to implement a specific numeric limit. The suggestion that the Commission can set no limit, or has further discretion to delay, flies in the face of the plain language of the statute.

B. THE RELEVANT FIRST AMENDMENT CONCERNS REQUIRE THE COMMISSION TO SET A LIMIT THAT WILL PROTECT THE PUBLIC'S RIGHT TO EFFECTIVE COMPETITION FROM DIVERSE AND ANTAGONISTIC SOURCES.

The cable MSOs and others make much of the Commission's responsibility, as defined by *Time Warner II*, to set a limit which burdens the cable MSO's speech "no more than necessary." *Time Warner II*, 240 F.3d at 1130. This does not eliminate the Commission's responsibility to ensure that the public enjoys the fruits of "effective competition," as required by Section 613. Nor does it eliminate the need for the Commission to consider the effect of consolidation on civic discourse. *Turner II*, 520 U.S. at 190; *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 663-64 (1994).

As both CFA, *et al.* and RCN explain, *Time Warner II* does not prohibit the Commission from considering the effects on its rules on the availability of diverse and antagonistic sources of news. *CFA, et al.* at 13-16, 30-38; *RCN* at 7-10. Such a result would have violated the holding of *Time Warner I,* which recognized that Congress enacted Section 613 in part to prevent the formation of “media gatekeepers” capable of controlling the public’s access to information. *Time Warner I*, 211 F.3d at 1318-19. Rather, *Time Warner II* merely limited the Commission’s ability to rely ***exclusively*** on diversity when setting the specific limit, requiring the Commission to do more than show that the limit chosen made it more likely than not that more independent programmers would survive. *Time Warner II*, 240 F.3d at 1136.

The drafters of Section 613 identified increased diversity and concomitant protection of civic discourse as a benefit directly flowing from effective competition; they likewise expressed concern that the absence of effective competition would have profound negative effects on democracy. *Senate Report* at 32-33, 50-55. Thus, while the Commission cannot justify a numeric limit solely on the basis increasing the number of independent programmers, it can (and must) bear in mind the effects of its actions on the very mechanics of democracy. *Turner I*, 512 U.S. at 663-64.

Indeed, the FCC itself has recognized the limits of the *Time Warner II* in this regard, observing that the limitations imposed here stand as the last bulwark against consolidation that would drive all diversity from the market. *Opposition of Federal Respondents to Petition for Certiorari in Consumer Federation of America v. FCC*, No. 01-223 (filed November 4, 2001).

Nor does the requirement that the Commission burden no more speech than necessary to effectuate the compelling government purpose *Time Warner II*, 240 F.3d at 1130, require the Commission to select the least restrictive limit that might conceivably protect the public from the dangers of concentration. *See, e.g. Comments of Progress and Freedom Foundation* at 10. Having identified a real, non-conjectural danger, the government has leeway to construct an effective remedy even if some other remedy might arguably prove less restrictive. *See Turner II*, 520 U.S. at 217.

In balancing the competing First Amendment rights, the government may err on the side of caution in protecting the public. *Id.* at 225-228 (concurrence of Justice Breyer). The Commission should employ such caution here. History has demonstrated that the industry will consolidate to the greatest extent permitted under the rules. Once a merger takes place, it becomes impossible to "unscramble the egg" and undo the damages of an overly optimistic Commission prediction. By contrast, the availability of a waiver if merger applicants can conclusively demonstrate the benefits to the public overcome the harms caused by increased concentration provides a sufficient safety valve if the limit set by the Commission proves too cautious.

The existence of other statutory provisions designed to promote diversity and competition, notably the leased access and program access provisions, do not alter this analysis. *AT&T* at 54-55,[6] *Comcast* at 9. Thus, while Comcast correctly recognizes that Congress "offered more than one solution" to the numerous problems identified in the 1992 Act and "tried to provide the Commission with a complete 'regulatory toolkit,'" *Comcast* at 8-9, it errs in concluding that "implicit in this approach is a corresponding responsibility on the part of the Commission to be selective in the tools it uses." *Id.* at 9.[7]

As the D.C. Circuit has recognized, Congress intended the structural limitation of Section 613 to augment the behavioral limitations designed to promote the same ends of effective competition and diversity. *Time Warner I*, 211 F.3d at 1320. The legislative history makes clear that the drafters intended the ownership limits, leased access, non-discriminatory access to program-

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[6] AT&T's suggests that the lack of complaints under 47 C.F.R. §76.1301(c) (prohibition on restraints of unaffiliated programmers) indicates a lack of dissatisfaction by programmers with the current *status quo*, *AT&T* at 55, demonstrates the difficulty in proving a negative. One might more plausibly assume that the lack of complaints indicates that programmers fear reprisals and, in light of the Commission's previous failure to take action against cable MSOs, futile. *CFA* at 24-25; *RCN* at 10-15.

[7] Jonathan Golfman & Brendan Murray, filing as "Concerned Consumers," make a similar error. (Since Golfman and Murray have included no information regarding "Concerned Consumers," CFA, *et al.* assume they file in their individual capacities).

ming, and must-carry to work together jointly to protect the public. *Senate Report* at 23. As the Senate Committee Report observed:

> In view of the necessarily severely limited number of franchised cable systems able to operate in any one community, it is necessary to ensure that the diversification principle (*Associated Press*) is not undermined in this increasingly important governmentally franchised medium. Accordingly, the Committee believes certain structural regulations are necessary.
>
> That is what this Committee has done ***by requiring the FCC to establish vertical and horizontal limitations on ownership of cable systems***, and to ensure effective commercial leased access, by establishing cross-ownership restrictions, and by specifying that franchising authorities may require public, educational and government access channels.

Senate Report at 51-52 (emphasis added).

Congress' judgment on the need for multiple remedies to address the overarching problem of cable market power has proved correct. Numerous commentors have submitted evidence demonstrating that even the current levels of concentration have eroded the protections afforded by program access, leased access, and other provisions designed to enhance competition and increase diversity. *See Comments of RCN* at 10-15; *BSPA* at 4-6; *USCCB* at 2-5; *Sherjan* at 1-4; *CFA, et al.* at 37-38.

Finally, that Congress provided multiple mechanisms to protect these interests bespeaks the high value Congress placed upon the goals of effective competition and diversity. Accordingly, the Commission must effectuate the will of Congress and set a structural limit sufficient to protect the behavioral remedies Congress provided.

C. SECTION 613 REQUIRES THE COMMISSION TO PROMOTE EFFECTIVE COMPETITION IN THE CABLE INDUSTRY TO THE BENEFIT OF THE AMERICAN PEOPLE, NOT PROTECT THE PROGRAMMING MARKET FOR THE BENEFIT OF PROGRAMMERS OR PROTECT THE "ENTERTAINMENT MARKET."

Several cable MSOs state that the sole purpose of Section 613 lies in protecting video programmers. *Comcast* at 9; *AT&T* at 4-15; *NCTA* at 6-8; *TWC* at 29. Indeed, some go so far as to say that the statute, as interpreted in *Time Warner II*, actually prohibits the Commission from considering any factors beyond the effect on the video programming market. *TWC* at 29. Most significantly, these commentors dispute the ability of the Commission to consider the effects of the horizontal ownership limit on the local franchising authority (LFA). *TWC* at 33-34; *AT&T* at 40.

As discussed below, these commentors misconceive the purpose of Section 613: to promote effective competition in the ***cable*** industry. *Time Warner II*, 240 F.3d at 1136. The Commission must therefore set a limit that protects the American people from the dangers of excessive concentration regardless of whether other conduits by which some class of programmers may reach an audience exist. This duty includes protecting the ability of the LFA to protect local subscribers. Indeed, the statute explicitly directs the Commission to "take particular account" of "the nature and market power of the local franchise." §613(f)(2)(C).

1. Congress Intended To Stimulate Competition In the Cable Television Market and Minimize the Harm From A Lack of Competition.

Several cable MSOs argue that Section 613(f) exists exclusively to preserve an independent programming market. Comcast at 9; TWC at 29-35, AT&T at 4-15. This bold assertion violates both the plain language of the statute and the legislative history.

Congress intended to benefit the American people as a whole, not simply programmers, with a limit on national ownership and the promise of effective competition. Certainly, the legislation reflects the concern of the drafters that the bottleneck power of the cable operator at the local level combined with national concentration allowed a programmer to "unfairly impede…the flow of video programming from the video programmer to the consumer." §613(f)(2)(A). But the legislation also addresses concern for the other anticompetitive effects that flow from multiplying a cable operator's market power at the local level across too great a subscriber base. For example, Congress explicitly directed that the FCC set the ownership cap at a level that would protect rival MVPDs from discrimination by vertically integrated programmers. §613(f)(2)(B). Congress also directed the Commission to "take particular account" of the "nature and market power of the local franchise," §613(f)(2)(C), and consider "other public interest objectives" when setting the limit. §613(f)(2).

While *Time Warner II* spent considerable time discussing the effects on the programming market, this was because the court was addressing the justification previously used by the Commission: the open field/market foreclosure argument. Because the Commission justified the 30% limit exclusively in terms of the programming market and the flow of programming from programmers to subscribers, the *Time Warner II* court focused its analysis on the Commission's discussion on the market for video programming. The court made clear, however, that any analysis begins with the overarching concern of the statute to "enhance effective competition" and that "other theories of anti-competitive behavior" could justify the 30% limit. *Time Warner II* 240 F.3d at 1133.

Congress used the term "effective competition" in two places in the *Cable Television Consumer Protection and Competition Act of 1992*.[8] In the one place where it defined "effective competition," it did so exclusively in terms of competition between MVPDs as measured by market share. *See* 1992 Act §3(a), amending 47 USC §543(l)(1). Nothing indicates that Congress intended some other definition for Section 11 of the 1992 Act. To the contrary, the express directive of Section 613(f)(2)(C) that the Commission "among other public interest objectives….take particular account…of the nature and market power of the local franchise,"

[8] *See* Pub. L. 102-385 §3(a) (amending §623(l)(1)); §11 (amending §613(f)(1)). To the extent any uncertainty regarding in what market Congress intended to encourage competition remains, the title of the Act makes it plain that Congress intended to "enhance effective competition" in the ***cable television*** market, not the programming market generally. *See, e.g. United States Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 458

§613(f)(2)(C), indicates legislative intent that the national ownership limit address local franchise monopoly power and minimize the potential for abuse by enhancing effective competition. *See also Senate Report* at 8-11 (describing cable market power and its root in monopoly power at the local franchise level).

Turning to the legislative history, the drafters engaged in a lengthy discussion of the benefits of "effective competition" and what constitutes "effective competition." The Committee determined that "effective competition" required not merely the presence of a number of over-the-air broadcasters, but also "a viable multichannel video competitor." *Senate Report* at 12. The drafters concluded that without regulatory intervention – including imposing a national ownership limit – effective competition could not emerge. *Id* at 13-34.

Thus, AT&T's discussion of foreign sales of programming and the ability of some large, vertically integrated programmers to sell programming through video rental outlets, *AT&T* at 22-24, has no bearing whatsoever on the appropriate limit under Section 613(f). Neither of these things bears in the slightest on the ability of a "viable multichannel video competitor" to challenge local market power. Similarly, while the availability of broadcast stations bears slightly greater significance, the legislation makes clear that free over-the-air broadcasting does not create effective competition for cable. *Senate Report* at 11-12 (explicitly rejecting testimony submitted by FCC and NCTA that free over-the-air broadcasting provided effective competition to cable).

In support of its contention that video sales, foreign markets, the Internet, and the possibility of multistreaming digital broadcasters matters in setting the limit, AT&T relies on statements extracted from an unrelated proceeding, *Amendment of Section 73.658(g) of the Commis-*

(1993) (title of act may aid in statutory construction); *INS v. National Center for Immigrants Rights, Inc.*, 502 U.S. 183, 190 (1991) (same).

sion's Rules – The Dual Network Rule, 16 FCCRcd 11114 (2001), and on certain statements in the Commission's video competition report. *AT&T* at 23-25, 34 AT&T's reliance, however, is misplaced.

The concerns raised in the *Dual Network* docket were wholly unrelated to the issues here. There, the Commission sought comment on whether a rule adopted in 1941 for the express purpose of enhancing diversity in the radio programming market remained necessary. This presents a far different set of issues than the competitive issues that animate the national ownership limit.

More importantly, in its *Report and Order*, the Commission retreated from this broader definition, choosing to rely instead on its prediction that modifying the rule would increase diversity at the local level. *Dual Network Order*, 16 FCCRcd at 11127-30. While the Commission noted in passing that the proliferation of cable networks "diminished the importance of maintaining UPN and WB as independently owned network voices," *Id.* at 11131, this hardly justifies AT&T's leap to the conclusion that the Commission considers free broadcast television a substitute for MVPDs.

Similarly, in the Commission's video competition report, the Commission addressed far different concerns than those it confronts here. The Commission has included video stores in its competition report because these compete with certain limited cable programming services, *i.e.*, "premium and pay-per-view" services. *2000 Video Competition Report* ¶114. As the *Video Competition Report* itself observes, video stores regard cable as a competitor, not the other way around. *Id.* If anything, therefore, the Commission may consider the threat that cable concentration poses to the home video market. This says nothing, however, as to whether the home video rental market acts as a genuine competitor for cable. Indeed, in a far more closely related proceeding, the Commission found the exact opposite: that the availability of home video rental does not substitute for cable television subscription and has no disciplining effect on cable programming.

In the far more relevant context of the Commission's *1998 Biennial Review of Broadcast Ownership Rules*, the Commission rejected the broad market definitions proposed by AT&T. *See 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCCRcd 11058, 11103-18 (2000) (discussing and rejecting proposition that print, internet, cable and broadcast are substitutable as sources of news and entertainment). *See also Toys R Us v. FTC*, 221 F.3d 928, 931 (D.C. Cir. 2000) (in highly differentiated product market, even closely related goods do not serve as effective substitutes).

Accordingly, the Commission should reject the attempt of AT&T to muddy the waters and expand the market definitions at issue here.

2. Congress Did Not Intend To Limit The FCC To Consideration of the Effect of National Concentration on the Programming Market.

As regard to the national ownership limit specifically, the drafters expressed concern that, in addition to acting as media gatekeepers, national concentration permitted cable MSOs to act anticompetitively against rival MVPDs, depriving the American people of the benefits of competition. *See, e.g.*, *Senate Report* at 33; *House Report* at 44 ("competition is essential ***both*** for ensuring diversity in programming ***and*** for protecting consumers from potential abuses by cable operators possessing market power"). Consistent with the drafters' approach, *Senate Report* at 18, the Cable Act sought to encourage effective competition through structural and behavioral remedies. *See Senate Report* at 18, 23-24.

In particular, the drafters worried about cable operators leveraging local market power to "charge unduly high rates…provide poor quality of service for customers and…exact[ing] added advantages over programmers and competitors." *Id.* at 20. When multiplied across a sufficient number of cable systems, the drafters feared this would allow large MSOs to act as both monopsonists vis-a-vis national markets and monopolists at the local level. *Id* at 33. Accordingly, when providing "sufficient guidance" to the Commission on how to set the national ownership limit, *Id.* at 34, the drafters directed the Commission to pay particular attention to the markets of greatest concern and where the exercise of market power could do the greatest harm on the national level, *i.e.*, against programmers and against rival MVPDs. But the drafters certainly did not limit the Commission to addressing these concerns alone.

Rather, as CFA, *et al.* and RCN explain in their initial comments, Congress intended the Commission to consider the full panoply of "public interest objectives." *CFA* at 13-16; *RCN* at 7-10. As the legislative history quoted above demonstrates, this includes consideration of rates, quality of service, and effect on diversity of programming available through local programmers receiving access through leased access or PEG channels.

Finally, as noted in the initial comments, the Commission must consider the detrimental effects of national concentration on the deployment of broadband and other advanced telecommunications services. §613(f)(2)(E); Telecommunications Act of 1996, Pub. L. 104-104, §706 (national policy to encourage deployment of advanced telecommunications services to all Americans). While some cable MSOs argue that this factor betokens a need for a less restrictive limit to create efficiencies and encourage deployment. CFA, *et al.*, RCN, and other rival broadband service providers, however, have already demonstrated the fallacy of that argument.

When the Commission considered this very argument in 1999, it concluded that "the cable operators have presented no credible evidence that a larger size is necessary for deployment of advanced technologies or telephony." *Implementation of Section 11(c) of the Cable Television Act of 1992, Horizontal Ownership Limits Third Report & Order*, 14 FCCRcd 19098, 19123

(1999) ("*1999 Cable Ownership Order*"). The Commission observed that cable operators could achieve the same effects through joint agreements to provide specific services. *Id.* at 19123-24. Nothing the cable MSOs have introduced in this proceeding refutes this previous conclusion, whereas the submissions of CFA, *et al.* and others have provided more than sufficient evidence to validate these conclusions a second time.

3. Congress Expressed Particular Concern Regarding Monopoly Power At The Local Level, and On The Ability of LFA's to Regulate Effectively to Protect Their Citizens.

Several Commentors question whether the Commission may take into account monopoly power at the local level, or the ability of LFAs to regulate effectively. *TWC* at 33-34; *AT&T* at 40-41. This flies in the face of the plain language of the statute and the legislative history.

Under the plain language of the statute, the exact opposite is true. The statute ***commands*** the FCC to "take particular account of the…nature and market power of the local franchise." This flows logically from the concerns discussed above regarding cable market power at the local level, *Senate Report* at 8-11, and the ability of large MSOs to leverage that power in national markets to the detriment of subscribers, would be subscribers, rival MVPDs, programmers, and others. *Senate Report* at 32-34.

In addition, the legislative history demonstrates a considerable concern for the ability of LFAs to regulate effectively. 1992 Cable Act at §2(a)(20) (finding Cable Act of 1984 hobbled ability of LFA to protect interest of residents in franchise area), §8 (restoring ability of LFA's to enforce customer service standards and other performance requirements); *Senate Report* at 21, 47-48 (concern that role of LFA in protecting citizens expanded unduly curtailed by 1984 Act and should be restored).[9]

[9] Part of the confusion lies with the cable MSOs' misunderstanding that Section 613(f) limits the Commission to consider exclusively the programming market. Since LFA's may not consider mix of programming in franchise

Accordingly, there is no justification for excluding from consideration the interest of the LFAs in effectively regulating local systems. To the contrary, the statute and the legislative history support such a conclusion.

4. While the Commission Must Consider the Efficiencies Of Size When Setting The Ownership Limit, The Cable MSOs Have Submitted No Non-Conjectural Evidence Regarding These Efficiencies That Counterbalances the Dangers of Excessive Concentration and the Commission Should Therefore Proceed Cautiously.

The cable MSOs observe that, in formulating the limit, the Commission must "account for any efficiencies and other benefits that might be gained through increased ownership or control." §613(f)(2)(D). They urge this as justification for failure to set a limit, since setting a limit would arguably deny consumers these "efficiencies and other benefits." *See, e.g., AT&T* at 68-70.

As with any matter of record evidence, the Commission cannot simply assume the existence of these benefits. The MSOs must present substantial evidence of real, non-conjectural evidence upon which the Commission can make its decision. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In addition to the evidence of real, non-conjectural harms provided in the initial comments, CFA, *et al.* have conclusively demonstrated in the economic reply comments that the benefits promised by the cable MSOs theories do not hold up under the harsh light of reality. Rather, as the Commission itself found in 1999, the MSOs can achieve the same results through agreements short of ownership. *1999 Cable Ownership Order*, 14 FCCRcd at 19123-24.

Finally, to the extent that two cable MSOs seeking to merge can demonstrate real benefits to the public that overcome the presumption of harm from increased concentration, the Commis-

renewal decisions, the cable MSOs argue that benchmarking would serve no use. *TWC* at 34; *AT&T* at 40. This, of course, misconceives the scope of the Commission's inquiry.

sion has the authority to waive the ownership limit on a temporary or permanent basis – depending upon the specific set of facts before it.

The history of the cable industry, and the mass media generally, demonstrates that the industry will reach the maximum level of concentration allowed by law, then seek to go beyond it. *See, e.g. Fox-Chris Craft Merger Order*, 16 FCCRcd 14975 (2001) (exceeding national ownership cap and local ownership limit); *Application for Consent to Transfer of Control of MediaOne Group, Inc. and AT&T Corp.*, 15 FCCRcd 9816 (2000) (exceeding cable ownership cap) ("*AT&T/MediaOne Order*"). Given the demonstrated risks of excessive concentration, it would behoove the Commission to set an appropriate limit based on these harms rather than an optimistic limit based on the unproven hope of potential benefits.[10]

II. IF THE COMMISSION DOES NOT REINSTATE THE PRE-1999 ATTRIBUTION CRITERIA, IT SHOULD REINSTATE THE "NO SALE OF PROGRAMMING" CRITERIA.

As explained in the initial comments of CFA, *et al.*, the Commission dismissed the *Petition for Reconsideration* of the Commission's *1999 Attribution Order*[11] as moot. In this, the Commission erred, in that it should have granted the *Petition for Reconsideration* on its merits.[12]

Without waiving the objections to the attribution rules raised again as part of this proceeding,[13] CFA, *et al.* maintain that if the Commission does not reinstate the no substantial in-

[10] In this regard, it bears noting that despite acquisition of first TCI and then MediaOne, the later acquired with the benefit of a waiver from the Commission *AT&T/MediaOne Order* 15 FCCRcd at 9895-96, AT&T has yet to deploy cable-based telephony services on a broad scale. *Cf. Id. at* 9883-92 (describing plans of merged entity to offer local telephone service via cable and finding that promise of facilities-based local telephone competition warranted grant of waiver). Cable telephony remains a will-o'-the-wisp, despite the aggressive relaxation of ownership rules designed to facilitate it. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Cable Attribution Rules, Report and Order*, 14 FCCRcd 19014, 19040-42 (1999). The Commission should not compound this error with further relaxation of the rule on the basis of no more than the same speculation and theory previously offered by cable MSOs.

[11] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Cable Attribution Rules, Report and Order*, 14 FCCRcd 19014 (1999).

[12] Because the *Time Warner II* Court did not have the arguments in the *Petition for Reconsideration* before it, that decision provides no defense to the statutory and APA arguments raised in the *Petition for Reconsideration*.

volvement criteria in effect before the *1999 Attribution Order*, the Commission should reinstate the "no sale" criterion.

As an initial matter, the attribution rules generally (including the insulation criteria) address any relationship that subverts the independence of licensed entities. Accordingly, the Commission must look at all ways in which the partnership can influence licensed entities.

The ability to sell programming, and the negotiation for programming, provides yet another avenue for influence. The negotiations of the partners provide ample opportunities for tacit collusion, or for the exchange of information that subverts the competitive market behind closed doors, even without explicit collaboration. *See, e.g., High Plains Wireless v. FCC*, 276 F.3d 599 (D.C. Cir. 2002) (describing how tools such as "reflexive bidding" allow potential purchasers to signal intent with bids).

More importantly, the limited partners have access to the business information and strategies of the partnership and, to some degree, of each other. This makes genuine, sincere, arms-length negotiations, for all practical purposes, impossible. Federal Trade Commission and Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000) ("*Collaboration Guidelines*") at §2.2 (explaining that joint ventures "facilitate practices such as the exchange or disclosure of competitively sensitive information" which may compromise competition in "the relevant market in which the collaboration operates, or another market in which participants in the collaboration are actual or potential competitors"). If nothing else, it puts the partners at an advantage relative to genuinely independent programmers seeking to sell their programming, distorting the market and compromising the independent programming the rules purportedly protect.

[13] Because the Commission dismissed the *Petition* as part of the *FNPRM*, it is properly considered a subject of the *FNPRM* and does not require refilling.

Finally, as the cable MSOs themselves acknowledge, the holder of popular programming can use its power over programming to influence the programming decision of cable MSOs. *See AT&T Comments* at 26-27 (citing sources). On the other side of the coin, the Commission found in its previous *Orders* on ownership and attribution that the use of discounts or other sale terms and the fear of angering a large potential customer had in fact induced programmers to deny sale of their programming to rivals in violation of the intent of Section 613(f)(2)(A). *1999 Ownership Third Report and Order,* 14 FCCRcd at 59 ("credible evidence" that programmers refused to sell programming to rival MVPDs for fear of angering large cable MSO customers); *1999 Attribution Order*, 14 FCCRcd at 19031 (sales agreements allow large MSOs to exert influence on customers).

Thus, the negotiation over sale provides an opportunity for either the buyer or the seller of programming to "unfairly" influence each other in violation of the purpose of the attribution rules and in ways not prevented by the remaining insulation criteria. *Cf. Time Warner II*, 240 F.3d at 1143 (requiring further explanation for how sale of programming added additional protections not covered by other insulation criteria). Accordingly, if the Commission once again errs in rejecting the arguments for restoring the pre-*1999 Attribution Order* criteria, it should reinstate the no sale criterion.

III. THE COMMISSION SHOULD ABOLISH THE SMSE IN ALL SERVICES.

The cable MSOs and a number of broadcasters advocate reinstating the SMSE in all services. *See, e.g., AT&T* at 77-81; *TWC* at 38-40; *National Association of Broadcaster* at 5-10; *Viacom* at 3-20. These comments generally rest on a theory that a single majority shareholder can ignore a minority shareholder with impunity, and the minority shareholder thus exercises no influence over the entity. As discussed in Part II, *supra*, this takes far too narrow a view of the purpose of the attribution rules. Because a minority shareholder retains an ability to influence an entity, and because the majority shareholder and the minority shareholder may use their joint interest in the entity to coordinate their other media activities and thus subvert the interest of the ownership rules, the Commission should eliminate the SMSE.

Even a minority shareholder with a sufficiently large holding can exercise influence over the majority shareholder. As in the case of partnerships, such shareholders will have far greater access to and knowledge of the inner workings of the entity than a true competitor. The minority shareholder will have far greater access to information, and will command considerably greater respect and influence from the majority shareholder than would a member of the public. Threats to sell the minority stake or otherwise destabilize the corporate *status quo* provide a significant minority shareholder with further tools to sway the majority shareholder.

Of perhaps greater importance, the minority shareholder can use its privileged position vis-à-vis the majority shareholder to coordinate better its own offerings and subvert genuine competition in either the economic marketplace or the marketplace of ideas. Indeed, as discussed in Part II above, the *Antitrust Guidelines for Collaborations Among Competitors* developed and used by the Antitrust Division of the Department of Justice and the Federal Trade Commission require consideration of this enhanced ability to communicate and coordinate – either actively or through passive communication – when evaluating the potential for anticompetitive effects in any joint venture. Because the Commission established the attribution criteria to provide a bright line rule and avoid the administrative cost and uncertainty of adjudicating every ownership arrangement, *Time Warner II*, 240 F.3d at 1141, its rules should reflect this threat to competition and diversity.

As always, in the event entities can show that a merger or other venture that would give rise to an attributable interest and cause a violation of the ownership rules would benefit the public, the Commission may grant a waiver. Here, however, the Commission must consider what general rule best captures the potential danger to the public.

Chairman Powell has stated that because the mass media remain subject to "highly developed structural rules," the Commission should assume that mergers that comply with the rules serve the public interest. *Fox/Chris-Craft Merger Order*, 16 FCCRcd at 14995. While CFA, *et al.* believe this would violate the requirement that the Commission make individual findings regarding the public interest as to every transfer under 47 USC §310(d), they also observe the logical corollary of this principle: that these "highly developed structural rules" must take a highly conservative approach and genuinely safeguard the public from the potential dangers of media concentration. Since, under this principle, the Commission would not examine the particulars of a merger that meets the rule because the process that produces the rule has already made the requisite public interest analysis, the rules must capture any ***potential*** danger. On application of the rule to a specific merger, the Commission will consider whether the applicants have shown whether waiver would serve the public interest. *Id.* (granting waivers). Only in this fashion, under Chairman Powell's formulation, will the rules filter harms but pass benefits to the public.

Accordingly, because a genuine danger of influence and anti-competitive coordination exists even where a single majority shareholder controls an entity, the Commission should eliminate the exception in all services.

CONCLUSION

CFA, *et al.* and others have demonstrated the very real, non-conjectural harms of concentration within the cable industry, and set forth the theoretical, empirical, and legal framework requiring a 30% limit on national cable ownership. The cable MSOs and their supporters have provided only theory in support of their arguments that bigger means better and at no risk to anyone. As demonstrated in CFA, *et al.'s* separate economic replies, even these theoretical justifications cannot justify the conclusions of the cable MSOs, or negate the contrary real-world evidence in the record.

Compounding the error, the cable MSOs have embedded their theory in a flawed legal matrix. Section 613 does not provide the Commission with discretion to forbear from setting a limit, nor does it artificially constrain the scope of the Commission's inquiry.

As to attribution, nothing submitted negates the arguments presented by CFA, *et al.* to (a) reinstate the pre-1999 "no material involvement" insulation criteria for partnerships and (b) eliminate the single majority shareholder exception. If the Commission does not reinstate the "no material involvement" criteria, however, it should reinstate the "no sale" criterion. This will, at least, minimize the ability of cable partners to end run the attribution rules to the detriment of true competition.

WHERFORE, the Commission should:

1) Set the national ownership limit at 30%;
2) Reinstate the "no material involvement" criterion or, failing that, at least reinstate the "no sale" criterion;
3) Eliminate the single majority shareholder exception in all services; and,
4) Deny the *Petition for Rulemaking* submitted by NCTA.

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