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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MM Docket No. 92-264 (Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits)

Dear Ms. Dortch:

It appears that the Commission may soon be considering a Report and Order in the above-referenced proceeding. It has been six years since the United States Court of Appeals for the District of Columbia Circuit set aside the Commission's last attempt to adopt a cap on cable ownership,¹ and the Commission has twice sought comments on how to respond to the court's remand order. The National Cable & Telecommunications Association has submitted comments each time. By this letter we refresh the record once again, further demonstrating that it is unlikely that *any* cap can be shown to be necessary to fulfill the purposes of the cable ownership provisions of the Communications Act.

Background

It is understandable why the Commission has so far been unable to come up with a set of rules that meet the standards set forth by the Court and by Congress. The video marketplace has been evolving and expanding so rapidly that every time the Commission tries to refresh the record with additional comments, the data it collects become stale before rules can be adopted.

The statute directs the Commission, "in order to enhance effective competition," to adopt rules "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."² The purpose of any such limits is to ensure that cable operators do not become so

¹ *Time Warner Entertainment Co. v FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner II*").

² 47 U.S.C. § 533(f)(1)(A).

large that they can “unfairly impede” the “flow of video programming from the video programmer to the consumer.”³

The Court of Appeals agreed with the Commission that its task was to be sure that “no single company could be in a position single-handedly to deal a programmer a death blow.”⁴ But, as the court made clear, the extent to which a single cable operator could exercise such “make or break” power necessarily depends not only on the operator’s current share of all MVPD households, but also on the extent to which there are competitive alternatives to the cable operator, to which the operator’s current subscribers might turn if the operator refused to carry a service:

[N]ormally a company’s ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability* of competition.... If an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch. The FCC shows no reason why this logic does not apply to the cable industry.⁵

The Marketplace In Which Cable Competes Is Even More Competitive Today, Reducing Further Any Single Distributor’s Power In The Programming Marketplace.

The Court recognized, even in 2001, that the entry and success of Direct Broadcast Satellite (“DBS”) providers was profoundly relevant to the rationale of the horizontal ownership provisions of the 1992 Cable Act. Competition from DBS undermined any ability that a cable operator might have to refuse to carry a potentially attractive program network without losing customers and market share. The fact that DBS already “could be considered to ‘pass every home in the country’”⁶ made it less likely, even then, that a cable operator, regardless of its market share, would turn down a network for unfair or anticompetitive reasons because the DBS provider could add the programming to its lineup and win away customers who found it attractive. Therefore, according to the Court, “it seems clear that in revisiting the horizontal rules, the Commission will have to take account of the impact of DBS” on a cable operator’s market power, notwithstanding its market share.⁷

DBS has since shown itself to be a very effective competitor – and numerous additional competitors to incumbent cable operators have emerged. When we filed our initial comments in this proceeding in January 2002, we noted that the percentage of MVPD households that

³ *Id.* § 533(f)(2)(A).

⁴ *Time Warner II*, 240 F.3d at 1131.

⁵ *Id.* at 1134

⁶ *Id.*

⁷ *Id.*

subscribed to a competitor of the incumbent cable operator was already above 20%, and that “the growth of competition appears to be steady and irreversible.”⁸

Three years later, the Commission concluded in its *10th Annual Report* on the status of competition in the video marketplace that “the vast majority of Americans enjoy more choice, more programming and more services than any time in history.”⁹ A year later, it further confirmed that “almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two direct broadcast satellite (DBS) providers” and found that “in some areas, consumers may also choose” to receive service via one or more emerging technologies.¹⁰

In 2007, four years after the Commission first recognized that video competition had irreversibly taken hold, competition among providers is even more deeply rooted. In 2005, the Commission conceded that the evidence before it then could not justify any specific horizontal cap.¹¹ The comments submitted in response to the *2005 Second Further Notice* made plain that the evidence would not support any cap. NCTA’s Video Competition Comments filed in November, 2006 (and incorporated by reference) demonstrate anew that significant – and decisionally significant – changes have occurred in the video marketplace since this remanded proceeding was commenced, let alone since the original cap was adopted.

These new marketplace conditions demonstrate that traditional cable operators face a level of competition that will prevent any operator from “unfairly imped[ing] ... the flow of video programming from the video programmer to the consumer.”¹² As we said in our Video Competition Comments, “there is no starker proof of a competitive video marketplace than the fact that *nearly 32 million* consumers now subscribe to cable’s competitors – DBS, alternative broadband providers, and local telephone companies that are just beginning to enter the marketplace. That’s almost one of every three video subscribers.”¹³ Fifteen years ago, cable’s competitors had only five percent of the multichannel video marketplace. But today, because of fierce competition from DBS and other broadband service providers, their share has increased to more than 33 percent.

⁸ Comments and Petition for Rulemaking of the National Cable & Telecommunications Association, MM Docket No. 92-264, filed January 4, 2002, at 13.

⁹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, 1608 (2004) (“*10th Annual Report*”).

¹⁰ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2757 (2005) (“*11th Annual Report*”).

¹¹ *The Commission’s Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374, 9410 (2005).

¹² 47 U.S.C. §533(f)(2)(A)

¹³ Comments of the National Cable & Telecommunications Association, MB Docket No. 06-189, filed November 29, 2006, at 9 (“*NCTA Video Competition Comments*”). In addition to MVPD competition, the broadcast and home video industries remain vibrant video competitors, vying for the consumer’s eyeballs and dollars.

MVPD SUBSCRIBERS		
As of September 2006		
<u>MVPD</u>	<u>Customers (in Millions)</u>	<u>Percent of Total</u>
Cable	64.5	66.90%
DBS	28.9	30.00%
C-Band	0.1	0.10%
SMATV	1.0	1.00%
Wireless Cable	0.1	0.10%
Overbuilds	1.1	0.70%
<u>Others</u>	<u>0.7</u>	<u>1.20%</u>
Non-Cable MVPDs	31.9	33.10%
Total MVPD	96.4	100.00%

The growth of ubiquitously available competition in the retail MVPD marketplace and the fact that market share remains so fluid and contestable by new video alternatives have eviscerated the ability of any single cable operator to harm competition in the programming marketplace, regardless of its market share at any point in time. Moreover, MVPDs are no longer the only purchasers and providers of video programming to consumers. As broadband access further penetrates American households, consumers increasingly look to the Web, through their PCs, TVs, and handheld mobile devices, as another medium for the delivery of video content. New outlets for original and repurposed video content emerge every day, and media companies are racing to enter this burgeoning marketplace with web-based services.

In addition, one of the principal reasons why Congress was concerned about *horizontal* consolidation of cable systems was that many of the larger cable MSOs were vertically integrated. It perceived that “a few large, *vertically integrated* firms increasingly control large segments of the domestic cable marketplace.”¹⁴ But this is no longer the case as the level of vertical integration has continued to decline since the ownership statute was enacted. In 1992, 48% of all national cable programming services were owned by cable operators. By January 2002, that number had fallen to only 26%. According to the Commission’s *12th Annual Report* in 2006, only 21.8% of cable programming networks were vertically integrated as of 2005.¹⁵ And the cable operator with the largest vertical ownership controls less than six percent of all national cable networks.¹⁶ These marketplace changes demonstrate that imposing any horizontal ownership cap is neither necessary nor warranted.

¹⁴ Report of the Committee on Energy and Commerce of the House of Representatives, H.R. Rep. No. 92-628, 102d Cong., 2d Sess. 41 (1992) (“House Report”).

¹⁵ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2575 (2006) (“*12th Annual Report*”) (“In 2005, we identified 531 satellite-delivered national programming networks, an increase of 143 networks over the 2004 total of 388 networks. Of the 531, 116 networks (21.8 percent) were vertically integrated with at least one cable operator in 2005.”)

¹⁶ *Id.* at 2576.

Any Cap on Cable Subscribers Would Adversely Affect Competition Between Telephone Companies and Cable Operators for “Triple Play” Customers

While the two nationwide DBS providers, DirecTV and EchoStar, are well-established proven competitors, having captured over 28 million customers, perhaps most significant for purposes of this proceeding is the looming presence of the telephone companies, who are moving into the video marketplace on a massive, unprecedented scale. If, as the Court of Appeals noted, the availability of DBS undermines any power that a cable operator might have to refuse to carry an attractive program network, the rapidly increasing availability of telco-provided cable service will only compound this effect.

Moreover, telephone companies and cable operators are competing head-to-head for customers by offering a bundle of services – the “triple play” of voice, video and data (sometimes expanded to include wireless). In selling their voice services, cable operators first approach their existing customer base. The phone companies do the same thing when they try to sell their new video services to their existing voice customers. Any analysis of current market conditions must take into account the negative effect on competition that a cap on cable subscriber growth would have in the voice, data *and* video markets.

A comparison of the existing residential customer bases of the three Regional Bell Operating Companies (“RBOCs”) with the three largest cable multiple system operators (“MSOs”) is instructive:

Primary Residential Customer Relationships			
as of December 31, 2006			
(in millions)			
Telephone Company Switched Access Lines		Cable Company Basic Video Subscribers	
AT&T ¹	37.1	Comcast	24.2
Verizon	27.8	Time Warner Cable	13.4
Qwest	<u>8.1</u>	Charter	<u>5.4</u>
Total	73.0	Total	43.0
		Remainder of cable companies	<u>22.6</u>
Total	<u>73.0</u>	Total cable industry	<u>65.6</u>

¹ Includes access lines of BellSouth
Sources: Year end company reports, except for total cable industry subscribers, which come from Kagan Research LLC.

AT&T has over 37 million primary residential customer relationships (as measured by residential switched access lines) while Verizon has almost 28 million. By contrast, Comcast, currently the largest cable operator, has 24 million primary customer relationships (as measured by basic video subscribers), and Time Warner Cable, the second largest, has just over 13 million. With the Commission having just approved the AT&T acquisition of BellSouth, AT&T alone has more than 55% of the total number of primary residential customers served by all existing

cable operators (37 million vs. 65.6 million). As a result, it would be unreasonable to impose a subscriber cap on cable operators that does not account for AT&T's footprint.

With no cap on the number of voice subscribers telephone companies may have, the FCC will give AT&T and Verizon an ongoing advantage to market their triple play because they start with a larger existing base of customers than cable operators, whose video customer base will be capped. As we said in our Video Competition Comments, taking into account RBOC residential, business and other services, "[w]ith 130 million access lines and \$150 billion in annual revenues, the Bell Operating Companies' (BOCs) immense size is a force to be reckoned with by all video providers even at this early stage in their deployment of video services. The Bell companies control roughly 90% of the revenue in residential and small business telephone markets."¹⁷ This huge voice market share gives them a massive perch from which to market their video services. A cap on cable's growth will result in an ongoing disadvantage on cable's ability to market voice, data and video as compared to the ability of the Bell companies to do the same.

We recognize the Commission's obligation to address horizontal ownership limits as a result of the remand from the Court in *Time Warner II*. But that same Court made clear that the Commission must examine the horizontal ownership issue in light of current market conditions. As the Comcast Supplemental Comments state, the statute authorizes the Commission to impose only "reasonable" limits, and the reasonableness of such limits must be determined in light of current market conditions.¹⁸ As NCTA, Comcast and others have demonstrated, under current market conditions, no specific limit could be deemed reasonable.

Sincerely,

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¹⁷ *NCTA Video Competition Comments* at 14. The figures cited were for 2005. According to company reports, the 2006 pro forma revenues for the three RBOCs were \$219 billion.

¹⁸ See Supplemental Comments of Comcast Corporation, MM Docket No. 92-264, filed February 14, 2007, at 21-22.