ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 08-1114

COMCAST CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici

All parties and amici in this case are listed in the Brief for Petitioner.

(B) Ruling Under Review

The Commission's Cable Horizontal and Vertical Ownership Limits, 23 FCC Rcd 2134 (2008) (JAXXXX) ("*Fourth Report*").

(C) Related Cases

The order on review has not been before this Court or any other court. The order was issued in response to a remand by this Court in *Time Warner Entertainment Co. v. FCC,* 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner II*").

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Administrative Decisions

Statutes and Regulations

Others

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

DBS	Direct Broadcast Satellite
MVPD	Multichannel Video Programming Distributor
MVS	Minimum Viable Scale
PFF	Progress & Freedom Foundation

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

(1) Whether Comcast's vague and unsupported statements regarding possible future injury are sufficient to carry its burden of demonstrating the concrete and imminent harm necessary to establish standing.

(2) Whether the Federal Communications Commission fulfilled its statutory mandate to "ensure that no cable operator ... can unfairly impede ... the flow of video programming from the video programmer to the consumer," 47 U.S.C. § 533(f)(2)(A), by imposing a reasonable limit on the number of cable subscribers a single cable operator can serve.

(3) Whether the cable subscriber limit prescribed by the FCC is consistent with the First Amendment.

JURISDICTION

Generally, this Court has jurisdiction to review final orders of the FCC pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). But as we explain in Part I of the Argument, the Court lacks jurisdiction in this case because Comcast has failed to establish Article III standing.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in Appendix A to this brief.

COUNTERSTATEMENT

A. Statutory Background: The 1992 Cable Act

During the 1980s, the cable television industry grew "dramatically" more concentrated. S. Rep. No. 102-92, at 32 (1991). "By 1990, the five largest cable operators served nearly half the country's cable subscribers." *Time Warner Entertainment Co. v. United States,* 211 F.3d 1313, 1319 (D.C. Cir. 2000) ("*Time Warner I*"). As a result, Congress became concerned that the increasing concentration of cable system ownership in a few hands could create "barriers to entry for new programmers," thereby reducing "the number of media voices available to consumers." Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, § 2(a)(4), 106 Stat. 1460. The 1992 Cable Act responded to this concern by requiring the FCC "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." 47 U.S.C. § 533(f)(1)(A).

The Act's subscriber limit provision directs the Commission to adopt limits that accommodate various competing "public interest objectives." 47 U.S.C. § 533(f)(2). On the one hand, the Commission must design rules that "ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual 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." *Id.* § 533(f)(2)(A). The statute defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." *Id.* § 522(20). In prescribing subscriber limits, the agency must also "take particular account of the market structure ... of the cable television industry, including the nature and market power of the local franchise." *Id.* § 533(f)(2)(C).

On the other hand, the FCC's subscriber limit rule must "account for any efficiencies and other benefits that might be gained through increased ownership or control," 47 U.S.C. § 533(f)(2)(D), and must "reflect the dynamic nature of the communications marketplace." *Id.* § 533(f)(2)(E).

Shortly after the 1992 Cable Act became law, several cable operators mounted a facial constitutional challenge to the subscriber limit provision. This Court rejected that challenge, holding that the subscriber limit statute did not violate the First Amendment. *Time Warner I,* 211 F.3d at 1316-20. In upholding the statute, the Court applied "intermediate, rather than strict scrutiny" because it

determined that "the subscriber limits provision is not content-based." *Id.* at 1318. The Court then concluded that the statute was narrowly tailored to advance two important government objectives: "the promotion of diversity in ideas and speech" and "the preservation of competition" in the video programming market. *Id.* at 1319.

B. The Commission's Previous Subscriber Limit Rules

To implement the subscriber limit statute, the FCC in October 1993 adopted a rule setting the limit at "30% of cable homes passed nationwide." *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992,* 8 FCC Rcd 8565, 8577 (¶ 25) (1993) ("*Second Report*").[1] Six years later, the Commission substantially revised its subscriber limit rule to account for the fact that cable operators were not the only multichannel video programming distributors ("MVPDs") in the market. *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992,* 14 FCC Rcd 19098 (1999) ("*Third Report*"). In contrast to the *Second Report*, which defined the subscriber limit as a percentage of cable homes passed, the *Third Report* shifted the focus from homes passed to subscribers – and not just cable subscribers, but all MVPD subscribers. *Id.* ¶¶ 27-35. Specifically, the Commission amended its rules to set the limit at 30% of MVPD subscribers. *Id.* ¶ 37. It made this revision "to reflect changes in the marketplace

[1] "Cable homes passed" are households that can be served by existing cable systems.

since 1993." *Id.* ¶ 27. Although the Commission found that cable was "still dominant in the MVPD marketplace" in the late 1990s, it decided that calculating the cable subscriber limit as a percentage of all MVPD subscribers would best "reflect the dynamic nature of the marketplace" and the "growing impact" of "non-cable MVPDs" – including providers of direct broadcast satellite ("DBS") service – "on that marketplace." *Id.* ¶ 30.

Having made this adjustment to its rules, the Commission saw no need to change the percentage limit from 30% to some other figure. It determined that a 30% limit would ensure that large cable operators could not unfairly impede the development of new video programming. According to industry data from the late 1990s, a new cable channel needed to reach about 15 million MVPD subscribers (roughly 20% of the market) to have a reasonable prospect of long-term viability; and, on average, a new channel on a cable system reached only about 50% of the system's subscribers. On the basis of that evidence, the Commission estimated that new channels would have a reasonable chance of survival if they received a fair opportunity to obtain carriage on systems reaching 40% of MVPD subscribers. *Third Report* ¶¶ 40-50. The Commission found that a 30% subscriber limit would "prevent two large operators from obtaining control" over more than 60% of the market, thereby ensuring that even if those operators "individually or collusively deny carriage to a programming network, the network will still have access to 40% of the market" and "a reasonable chance of financial viability." *Id.* ¶ 53. At the same time, the Commission found that a 30% subscriber limit would permit cable

operators to grow sufficiently large to take advantage of economies of scale. *Id.* ¶ 62.

C. The Court's Remand

Time Warner and AT&T petitioned for review of the subscriber limit established by the *Third Report.* This Court reversed (but did not vacate) the subscriber limit and remanded for further proceedings. *Time Warner Entertainment Co. v. FCC,* 240 F.3d 1126, 1128-36 (D.C. Cir. 2001) ("*Time Warner II*"). It concluded that the record compiled by the Commission did not support a 30% horizontal ownership limit.

The Court recognized that the 1992 Cable Act authorized the FCC to set a subscriber limit to ensure "that no single company could be in a position single-handedly to deal a programmer a death blow." *Time Warner II,* 240 F.3d at 1131. Assuming (without deciding) that a new network needed an "open field" of 40% of the market to have a reasonable chance of survival, the Court found that the prospect that a single cable operator could block access to a 40% open field "would justify a horizontal limit of 60%." *Id.* at 1132. In the Court's view, however, the presumed need for a 40% open field could not support a 30% subscriber limit unless the record established "a non-conjectural risk" of collusion or anticompetitive joint action by the two largest cable companies. *Ibid.* The Court found "nothing in the record supporting a non-conjectural risk of anticompetitive behavior, either by collusion or other means." *Id.* at 1136. Accordingly, the Court concluded, "the present record" supported "no more" stringent restriction than a 60% subscriber limit. *Ibid.*

The Court acknowledged the government's substantial interest "in ensuring public access to a multiplicity of information sources." *Time Warner II,* 240 F.3d at 1131 (quoting *Turner Broadcasting System v. FCC,* 520 U.S. 180, 190 (1997) ("*Turner II*")). "If this interest in diversity is to mean anything" in the context of the MVPD marketplace, the Court said, "the government must be able to ensure that a programmer have at least two conduits through which it can reach the number of viewers needed for viability – independent of concerns over anticompetitive conduct." *Id.* at 1131-32. In the Court's view, however, Congress did not authorize the Commission "to impose, solely on the basis of the 'diversity' precept, a limit that does more than guarantee a programmer two possible outlets (each of them a market adequate for viability)." *Id.* at 1135. Thus, the Court held that in the absence of collusion or joint anticompetitive conduct, the Commission could not adopt a 30% subscriber limit merely to avert the possibility that "programming choices made unilaterally by multiple cable companies might reduce a programmer's open field below the 40% benchmark." *Id.* at 1134 (citations and internal quotations omitted).

The Court also faulted the Commission for failing to consider factors other than market share when assessing a cable operator's market power. The Court explained: "[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." *Time Warner II,* 240 F.3d at 1134. The Court surmised that even if a cable operator possessed a large market share, its ability to block the development of new programming could

be constrained by competition in the MVPD market: "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." *Ibid.* In particular, the Court declared that the Commission, "in revisiting the horizontal rules" on remand, would "have to take account of the impact of DBS on [cable operators'] market power." *Ibid.*

D. The Order On Review

In response to the Court's remand, the Commission in September 2001 sought comment on current conditions in the MVPD market and various proposals for a new horizontal limit. *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312 (2001) (JAXXXX) ("*2001 Further Notice*"). The comments filed in response to the *2001 Further Notice* "did not contain sufficient evidence to allow the Commission to set" a "reasonable and sustainable" cable subscriber limit. *The Commission's Cable Horizontal and Vertical Ownership Limits,* 23 FCC Rcd 2134, 2140 (¶ 12) (2008) (JAXXXX) ("*Fourth Report*").

Although the FCC and its staff attempted to supplement the record in 2002 by conducting various studies, none of those analyses provided solid empirical support for any particular subscriber limit. *Fourth Report* ¶ 13 (JAXXXX). Consequently, in 2005, the Commission again solicited evidence that would enable the agency to establish a reasonable cable subscriber limit. *The Commission's Cable Horizontal and Vertical Ownership Limits,* 20 FCC Rcd 9374 (2005) (JAXXXX) ("*2005 Further Notice*"). Among other things, the *2005 Further*

Notice requested comment on a "survival analysis" conducted by the FCC's Media Bureau – a research paper that examined "the effect of subscribership on a network's ability to survive in the marketplace." *Id.* ¶ 16 & n.64 (JAXXXX).

In response to the *2005 Further Notice,* "commenters submitted new evidence and in some cases specific proposals." *Fourth Report* ¶ 15 (JAXXXX). On the basis of that new evidence, the Commission in December 2007 concluded that the record supported a subscriber limit of 30% of MVPD subscribers. *Id.* ¶¶ 1-2 (JAXXXX-XXXX).

For purposes of calculating the limit, the agency adopted a modified version of the "open field" approach that it had previously employed. In contrast to the "open field" analysis in the *Third Report*, the Commission in the *Fourth Report* declined to make any adjustment to account for collusion because it lacked "evidence to draw definitive conclusions regarding the likelihood that cable operators will behave in a coordinated fashion." *Fourth Report* ¶ 66 (JAXXXX). Instead, the Commission sought to impose a limit that would prevent any single cable operator from becoming so large that the operator's failure to carry a network would "significantly undermine" the network's viability. *Id.* ¶ 73 (JAXXXX).

The "basic building block" for the Commission's revised subscriber limit was the minimum viable scale ("MVS") – an estimate of "the minimum number of subscribers a programming network requires in order to be viable." *Fourth Report* ¶ 40 (JAXXXX). To derive the MVS, the Commission employed the methodology

and empirical data set forth in a 2007 network survival study.[2] By the agency's estimate, if a network was not vertically integrated or a "spin-off" of an existing network, it would need to reach 19.03 million subscribers to have a 70% chance of viability five years from its inception. Accordingly, the Commission adopted an MVS of 19.03 million subscribers. *Fourth Report* ¶¶ 55-57 (JAXXXX-XXXX).

The Commission further observed that "not all of an MVPD's subscribers receive access to all of the networks carried by the MVPD." *Fourth Report* ¶ 40 (JAXXXX). Because different subscribers purchase different packages of programming, the Commission concluded that "the minimum viable scale must be modified to determine how many of an MVPD's subscribers will also be subscribers to [a particular] program network." *Ibid.* For that purpose, the Commission developed a "subscriber penetration rate." *Id.* ¶¶ 58-62 (JAXXXX-XXXX). Using linear regression to analyze data from the FCC's latest *Cable Price Survey*, the agency projected that, on average, "a network will be available to 27.42 percent of the subscribers of the [cable operators] that carry the network" five years after its launch. *Id.* ¶ 61 (JAXXXX). This 27.42% penetration rate was considerably lower than the 50% rate that the agency applied in the *Third Report.* The reduced rate reflected the fact that many new cable networks were being placed on recently created, higher-priced digital tiers instead of the basic service tiers purchased by most cable subscribers. "A consequence of being placed on a

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[2] *See* Keith Brown, *How many viewers does a cable network need? A survival analysis of cable networks,* 39 Applied Econ. 2581 (2007) ("*Network Survival Study*"). This study relied on the same data and approach that the FCC's Media Bureau used in its 2004 survival analysis. *Fourth Report* at n.182 (JAXXXX).

digital tier," the Commission explained, "is a much lower penetration rate." *Id.* ¶ 60 (JAXXXX).

Finally, the Commission estimated that there were 95,784,478 MVPD subscribers in the United States as of June 2006. *Fourth Report* ¶ 43 (JAXXXX). To calculate the subscriber limit, the Commission used the following formula:

Limit = 1 – MVS/(Penetration Rate x Total MVPD Subscribers).

Id. ¶ 40 (JAXXXX). On the basis of the FCC's estimates for MVS, penetration rate, and MVPD subscribers, this formula yielded an answer of 28 percent:

1 – (19,030,000/(0.2742 x 95,784,478)) = 0.28.

Id. at n.228 (JAXXXX). The Commission then decided to "adjust the limit slightly upward, from 28 percent to 30 percent," to maintain "consistency" with the limit it had applied in merger reviews over the past decade. *Id.* ¶ 68 (JAXXXX).

"In setting the 30 percent limit," the Commission recognized that it "must, as instructed by the *Time Warner II* court, assess 'the determinants of market power in the cable industry' and draw 'a connection between market power and the limit set.'" *Fourth Report* ¶ 69 (JAXXXX) (quoting *Time Warner II,* 240 F.3d at 1133-34). The agency acknowledged that its "open field analysis," which focused on "the upstream programming market," did "not directly measure" the effect of "competition in the downstream [MVPD] market" on a large cable operator's ability "to prevent successful entry by a programming network." *Ibid.* It explained that the record contained no "reliable … empirical data" for determining "whether competition in the retail MVPD market negates the importance of having a sufficiently open field." *Ibid.* (JAXXXX). However, on the basis of the record in

this proceeding, the Commission concluded that retail MVPD competition would not diminish the need for a substantial open field for video programmers.

In particular, the Commission found that if a new programming network "failed to gain carriage on the largest cable operator's system," the network was unlikely to obtain a sufficient subscriber base to ensure its survival because it could not "induce enough of the large cable operator's subscribers to switch" to MVPDs that carried the network. *Fourth Report* ¶ 70 (JAXXXX). The Commission based this conclusion on several factors. "First, due to switching costs, consumers are reluctant to switch MVPDs except when there is a large benefit." *Ibid.* "Second, cable operators reduce the likelihood of switching by offering non-video services (e.g., broadband Internet access and phone service), giving the cable operator some market power in video service." *Ibid.* "Third, consumers are unlikely to switch providers to gain access to new programming because" they cannot be sure "whether they would enjoy viewing a network which they have never seen before." *Ibid.* (JAXXXX-XXXX). Finally, the Commission reasoned that in the absence of a sufficiently large open field, "many new programming networks might not even attempt to enter the market without a contract from the largest cable operator" because "they may be unable to secure financing." *Id.* ¶ 71 (JAXXXX). "For all of these reasons," the Commission concluded, "it is quite likely that a large cable operator controlling more than 30 percent of the MVPD market would have the power to significantly undermine the viability" of a programming network "by

refusing to carry it, despite the presence of competitive pressures from DBS and other competing MVPDs." *Fourth Report* ¶ 72 (JAXXXX-XXXX).[3]

SUMMARY OF ARGUMENT

Congress has directed the FCC to place "reasonable limits on the number of cable subscribers" a single cable operator can serve. 47 U.S.C. § 533(f)(1)(A). In Congress's considered judgment, a subscriber limit is necessary to "ensure that no cable operator or group of cable operators can unfairly impede ... the flow of video programming from the video programmer to the consumer." *Id.* § 533(f)(2)(A).

In this case, the FCC prescribed a cable subscriber limit that reasonably prevents any one cable operator from impeding the flow of video programming to consumers. The Commission's subscriber cap is based on sound economic theory, substantial record evidence, and common sense.

I. As a threshold matter, the Court should dismiss this case because Comcast has failed to establish that it has standing. Comcast's vague and conclusory claims of potential future harm do not suffice to show that it will suffer any concrete or imminent injury stemming from the challenged rule. Comcast has offered no evidence that it is likely to exceed the subscriber cap anytime soon. In fact, Comcast's own filings show that its share of the MVPD market is *declining*, not increasing.

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[3] The Commission rejected the cable industry's assertion that a 30% horizontal limit "will prevent cable operators from realizing economies of scale." *Fourth Report* ¶ 37 (JAXXXX).

II. The subscriber limit statute "plainly" gives the FCC "authority to be sure that no single company could be in a position single-handedly to deal a programmer a death blow." *Time Warner II,* 240 F.3d at 1131. The Commission properly exercised that authority here. Using the well-accepted economic technique of survival analysis, the agency carefully examined the data in the record. On the basis of its analysis, the Commission developed a formula for estimating the number of subscribers that a programming network would need to survive if it could not obtain carriage on the largest cable operator. After applying the formula to the data, the Commission reasonably determined that a cable operator serving more than 30% of all MVPD subscribers would have the power to impede the flow of video programming. Accordingly, the Commission set the cable subscriber limit at 30%.

Many of Comcast's challenges to the Commission's formula for calculating the subscriber cap have been waived, and none withstand scrutiny. Comcast also contends that the Commission did not adequately consider whether competition from other MVPDs constrains the ability of a large cable operator to impede the flow of programming. To the contrary, the Commission directly addressed that issue; and it reasonably determined that MVPD competition would not have a significant effect on a large cable operator's power to impede the development of new programming networks. Specifically, the Commission found that for a variety of reasons, cable subscribers were not likely to switch to an alternative MVPD merely to gain access to a new network. *Fourth Report* ¶¶ 70-71 (JAXXXX-XXXX).

III. Comcast's First Amendment challenge to the horizontal ownership rule is subject to intermediate – not strict – scrutiny. The Supreme Court and this Court have repeatedly held that strict scrutiny does not apply to content-neutral regulations of this sort.

Under the intermediate scrutiny test, the Commission's rule easily passes muster. It advances important government interests: ensuring public access to diverse information sources and promoting competition in the video programming market. Moreover, the problems addressed by the rule are real. The record showed that if a cable operator grew to serve more than 30% of the nation's MVPD subscribers, it would have the ability to threaten substantially the survival of a new network merely by declining to carry the network. Finally, the rule is reasonably tailored to achieve the policies underlying the statute. The subscriber cap does not burden more speech than necessary to ensure that no single cable operator can unfairly impede the flow of video programming to consumers.

STANDARD OF REVIEW

Review of the FCC's interpretation of the subscriber limit statute is governed by *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984). If "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The challenged rule must be upheld under the APA unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is "highly deferential." *Cellco Partnership v. FCC,* 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotations omitted).

ARGUMENT

I. COMCAST HAS FAILED TO ESTABLISH ARTICLE III STANDING.

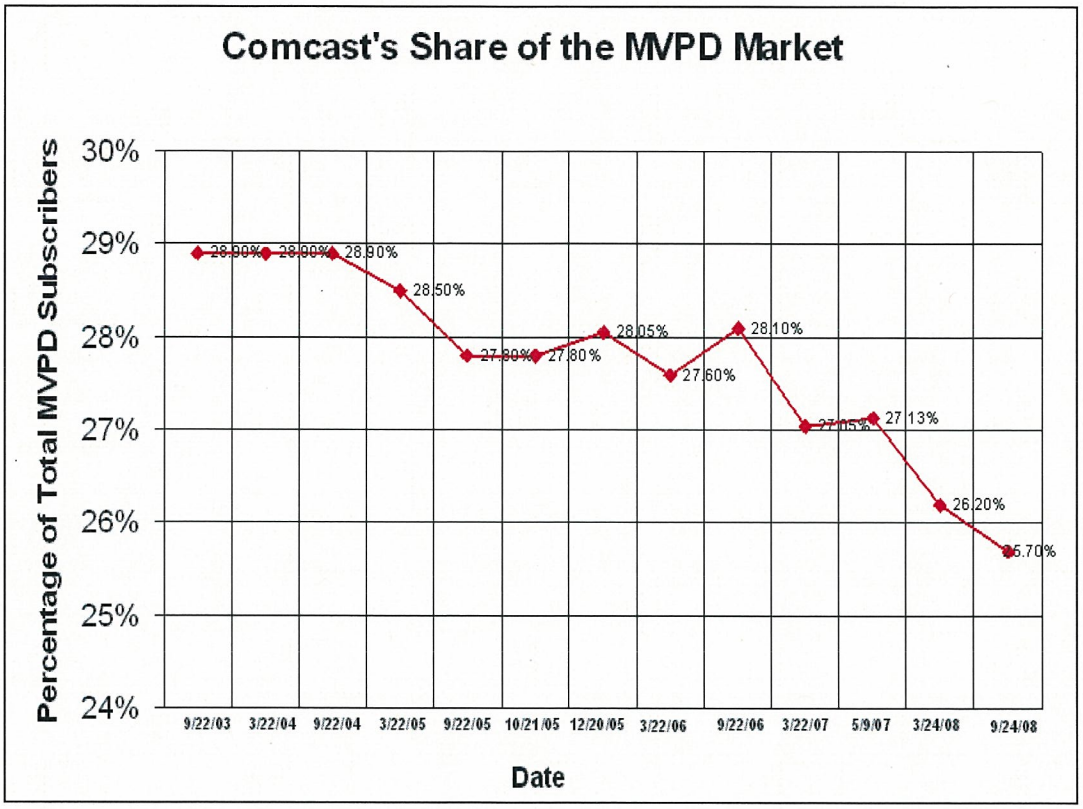
A party lacks standing under Article III unless it can show that it has suffered (or will suffer) a "concrete" injury that is "actual or imminent, not conjectural or hypothetical." *C-SPAN v. FCC,* 545 F.3d 1051, 1054 (D.C. Cir. 2008) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)). This Court has established specific pleading rules to require petitioners in every agency review case to explain and document how they meet this standard. Unless the standing of a petitioner challenging agency action is "self-evident," the Court "insist[s]" that the petitioner provide all its "'arguments'" *and* "'evidence'" in support of standing in its opening brief because "'experience teaches that full development of the arguments for and against standing requires the same tried and true adversarial procedure [used] for the presentation of arguments on the merits.'" *Core Communications, Inc. v. FCC,* 545 F.3d 1, 2 (D.C. Cir. 2008) (quoting *Sierra Club v. EPA,* 292 F.3d 895, 900 (D.C. Cir. 2002)); *see* D.C. Cir. Rule 28(a)(7). Comcast has failed to make the requisite showing of injury here. Accordingly, the Court should dismiss this case for lack of standing.

Comcast's brief includes a four-sentence standing discussion, in which it broadly asserts that the FCC's cable subscriber limit "will substantially injure Comcast" by "limiting the number of persons to whom it would otherwise speak and unduly restricting its opportunity to grow internally and make economically efficient acquisitions." Comcast Br. 19-20. Beyond this general assertion, however, Comcast does not specify how the subscriber limit will imminently injure the company in any concrete way. Nor does Comcast attach any "evidence" to its brief or include citations to the administrative record in support of its vague claims. *Cf.* D.C. Cir. Rule 28(a)(7).

Comcast claims that the cap could limit its ability to "grow internally," but Comcast's own quarterly earnings reports and data it has filed with the FCC show that the company is actually *losing* cable subscribers, both in absolute terms and as a percentage of the MVPD marketplace. Consequently, there is no "imminent" possibility that Comcast will bump up against the ownership cap through internal growth, *cf. C-SPAN,* 545 F.3d at 1054; to the contrary, the prospect becomes more remote with each passing quarter.

In a recent letter to the FCC, Comcast acknowledged that it is not close to breaching (or even reaching) the 30% limit: "Comcast currently serves approximately 25,153,060 MVPD subscribers or approximately 25.7% of all MVPD subscribers." Letter from Thomas R. Nathan, Comcast, to Marlene Dortch,

FCC, September 24, 2008.[4] And, as depicted in the following graph, Comcast's prior filings with the Commission (set forth in Appendix B to this brief) show that Comcast's share of the MVPD marketplace has steadily declined from a starting point of 28.9% over the past five years.



[4] According to the letter, there are now 97.682 million MVPD subscribers nationwide. *Id.* at n.2 (citing SNL Kagan, *Multichannel Trends: Telcos Gain the Majority of New Video Subscribers,* August 12, 2008). Thus, to reach more than 30% of the current universe of MVPD subscribers, Comcast would need to add more than 4 million subscribers.

Comcast acknowledges in its brief that this trend is likely to persist: "Market dynamics strongly indicate that cable's share of subscribers will continue to decline." Comcast Br. 30.

Comcast's quarterly earnings reports likewise show that it is shedding cable customers. Comcast's cable subscriber base fell by 342,000 during the first three quarters of 2008; and in the third quarter alone, the company lost 147,000 cable subscribers. Press Release, Comcast Reports Third Quarter 2008 Results, October 29, 2008, at 3 (available at www.cmcsk.com).

Comcast's vague allusion to "economically efficient acquisitions" (Br. 20) also does not suffice to meet its pleading burden. Comcast's brief does not discuss any concrete plans to pursue acquisitions, much less any of sufficient size to push the company above the subscriber limit.[5] Nor does it attach any affidavits or point to any discussion of possible acquisitions in the administrative record.

Comcast's claim to standing based on possible "acquisitions" thus fails for the same reason that petitioner's similar claim failed in *Core*. In that case, Core's opening brief claimed that the rule it challenged "chills Core's entry into rural market areas." *Core,* 545 F.3d at 2. This Court held that this general statement about possible future action was inadequate because Core did not "say anything to indicate the seriousness of its plans, which might range from a gleam in management's eye to a well-developed business plan." *Ibid.* Comcast's vague and

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[5] On the basis of statistics set forth on the website of the cable industry's trade association, it appears that there are only three cable operators (Time Warner, Cox, and Charter) whose acquisition by Comcast would push Comcast past the subscriber limit. *See* www.ncta.com/Statistic/Statistic/Top25MSOs.aspx.

unsupported reference to "economically efficient acquisitions" suffers from the same deficiency: Comcast has given the Court no basis to believe that potential acquisitions represent anything more than "a gleam in management's eye." *Ibid.*[6]

Because Comcast has not properly established "an imminent and concrete injury in fact that is 'direct, real, and palpable'" (Comcast Br. 59 (quoting *Public Citizen v. NHTSA,* 489 F.3d 1279, 1292 (D.C. Cir. 2007)), its petition for review should be dismissed.[7]

II. THE SUBSCRIBER LIMIT THAT THE COMMISSION ADOPTED IN THIS CASE IS LAWFUL AND REASONABLE.

Section 613 of the Communications Act directs the FCC "to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers" a single cable operator can serve. 47 U.S.C. § 533(f)(1)(A). In particular, Congress instructed the Commission to adopt a subscriber limit that would "*ensure* that no cable operator or group of cable operators can unfairly impede, either *because of the size of any individual 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." *Id.* § 533(f)(2)(A) (emphasis added). As this

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[6] Intervenors' claim to standing, Intervenors Br. 8-9, is just as vague and unsupported as Comcast's. Moreover, they are (or represent) cable operators significantly smaller than Comcast, so any future injury to them is even more remote and speculative.

[7] If the Commission ever applied its subscriber limit rule to block an acquisition by Comcast or any other cable operator, "constitutional and statutory challenges" to the rule's application could be raised at that time. *See Graceba Total Communications, Inc. v. FCC,* 115 F.3d 1038, 1040 (D.C. Cir. 1997).

Court recognized in *Time Warner II*, the statutory text "plainly" gives the agency the "authority to be sure that no single company could be in a position" (due to its sheer size) "single-handedly to deal a programmer a death blow." *Time Warner II,* 240 F.3d at 1131. The FCC properly exercised that authority in this case.

In response to the Court's remand in *Time Warner II*, the Commission solicited additional comments and new evidence so that it could reassess its cable subscriber limit. After compiling and reviewing an updated record, the Commission found that a single "large cable operator controlling more than 30 percent of the MVPD market would have the power" to undermine substantially the viability of a new programming network "by refusing to carry it, despite the presence of competitive pressures from DBS and other competing MVPDs." *Fourth Report* ¶ 72 (JAXXXX-XXXX). Accordingly, in the *Fourth Report,* the Commission reasonably set the cable subscriber limit at 30% of all MVPD subscribers.

There is no basis for Comcast's claim that the *Fourth Report* is inconsistent with *Time Warner II.* To be sure, the Court in *Time Warner II* held that the Commission had failed to justify a 30% subscriber cap in the *Third Report.* But that subscriber cap was based on a different conceptual framework and a different record. In the *Third Report*, the Commission premised its subscriber limit on the theory that two cable operators would act jointly to deny carriage of programming networks. The Court, however, found no record evidence of collusion or anticompetitive conduct to support the agency's assumption of joint action. *Time Warner II,* 240 F.3d at 1132-33.

In the *Fourth Report*, the Commission took care to avoid the errors that had resulted in the Court's reversal of the *Third Report*. The agency expressly declined to base the subscriber limit on coordinated action among cable operators, finding insufficient record evidence of collusion or other anticompetitive conduct. *Fourth Report* ¶¶ 63-66 (JAXXXX-XXXX). Instead, the Commission set a subscriber limit to ensure that no single cable operator would grow sufficiently large to "be in a position single-handedly to deal a programmer a death blow." *See Time Warner II,* 240 F.3d at 1131. On the basis of a new record that was assembled after the Court's remand, the Commission reasonably concluded that a cable operator serving more than 30% of all MVPD subscribers could – simply by virtue of its size – seriously threaten the viability of a new programming network by refusing to carry it. The updated record showed that if a single cable operator exceeded the 30% limit, the remaining "open field" would not give a new network a reasonable opportunity to survive even if the network was carried by every other MVPD. *See Fourth Report* ¶¶ 40-73 (JAXXXX-XXXX).

The Commission arrived at this subscriber limit by employing a formula with three key variables: (1) the number of MVPD subscribers; (2) the minimum viable scale (or MVS); and (3) the subscriber penetration rate. *Fourth Report* ¶ 40 (JAXXXX). Comcast challenges the Commission's derivation of each of these variables. Comcast Br. 35-53. It also argues that the agency erred by failing to

evaluate competition among MVPDs when setting the subscriber cap. *Id.* at 53-57. None of these claims has merit.[8]

Ultimately, Comcast's challenges to the Commission's calculations boil down to a quarrel with the lines that the agency drew when it chose an MVS, a penetration rate, and a subscriber limit. This Court has "repeatedly given the Commission wide discretion to determine where to draw administrative lines." *Nuvio Corp. v. FCC,* 473 F.3d 302, 309 (D.C. Cir. 2006) (internal quotations omitted)). And the statute itself gives the agency broad discretion to prescribe "reasonable limits." 47 U.S.C. § 533(f)(1)(A). The lines that the Commission drew in this case were based on the agency's expert assessment of market conditions. In evaluating the reasonableness of those lines, the question for the Court is "not whether the FCC's economic conclusions are correct or are the ones [the Court] would reach on [its] own, but only whether they are reasonable." *EarthLink, Inc. v. FCC,* 462 F.3d 1, 12 (D.C. Cir. 2006) (internal quotations omitted). In other words, the Court must determine "whether the agency's numbers are within a zone of reasonableness, not whether its numbers are precisely

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[8] In an amicus brief, Verizon argues that the FCC exceeded its statutory authority and violated the First Amendment by applying the subscriber cap to "non-incumbent" cable systems. The Court should not consider these arguments because no party raised them. *Michel v. Anderson,* 14 F.3d 623, 625 (D.C. Cir. 1994). In any event, Verizon's arguments are baseless. The statute says nothing about imposing a subscriber limit only on incumbent cable operators. And the rationale for imposing such a limit applies equally to all providers of cable service. Any company that serves enough cable subscribers to have the power "single-handedly to deal a programmer a death blow" could unfairly impede the flow of video programming. *See Time Warner II,* 240 F.3d at 1131.

right." *Vonage Holdings Corp. v. FCC,* 489 F.3d 1232, 1242 (D.C. Cir. 2007) (internal quotations omitted). The Court is "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem." *Covad Communications Co. v. FCC,* 450 F.3d 528, 541 (D.C. Cir. 2006) (internal quotations omitted). As we explain below, Comcast has not shown that the lines drawn in the *Fourth Report* were unreasonable.

A. The Commission Reasonably Calculated The Cable Subscriber Limit As A Percentage Of All MVPD Subscribers.

When it first adopted rules implementing the subscriber limit statute in 1993, the Commission defined the limit "in terms of the fraction of cable homes passed." *Fourth Report* ¶ 41 (JAXXXX) (citing *Second Report* ¶ 24). In the *Third Report*, however, the agency revised its methodology, calculating the cable subscriber limit as a percentage of "total MVPD subscribers ... in order to account for the large and growing presence of competitors, particularly DBS." *Ibid.* (citing *Third Report* ¶ 27).

In the *Fourth Report*, the Commission reasonably decided to "continue to use all MVPD subscribers when calculating the cable ownership limit." *Fourth Report* ¶ 43 (JAXXXX). It explained that "including all MVPD subscribers" in the calculation produces a limit that reflects "the impact of the dynamic nature of the MVPD market on the viability of programming networks." *Ibid.*

Comcast contends that the Commission should have considered all "homes passed" by MVPDs, not just MVPD subscribers. Comcast Br. 36. The statute,

however, does not mandate a "homes passed" standard. *Fourth Report* ¶ 47 (JAXXXX). Absent any such requirement, it was entirely reasonable for the FCC to adopt a subscriber-based standard for setting the cable subscriber limit. Cable operators' "share of actual subscribers nationwide more accurately reflects their market power in the video programming market than [a] homes passed standard" because "cable operators negotiate with and purchase programming from video programmers based on the actual number of subscribers they serve." *Id.* ¶ 48 (JAXXXX). Moreover, because many "homes are passed by more than one MVPD," the "homes passed" standard advocated by Comcast would inevitably result in "double counting." *Ibid.* Rather than adopt such an "unworkable" standard, the Commission reasonably concluded that a "subscriber-based standard is a more accurate indicator of cable operators' size and market power in a dynamic and evolving communications marketplace." *Ibid.*

Comcast asserts that the Commission, by "focusing on cable's market share of current subscribers," failed to respond to the Court's directive in *Time Warner II* "to 'take account of the impact of DBS on [cable's] market power.'" Comcast Br. 36 (quoting *Time Warner II*, 240 F.3d at 1134). But Comcast is wrong to suggest that the Court required the Commission to adopt a "homes passed" approach. The Court simply directed the agency on remand to account for the effect of DBS competition on a cable operator's ability to exercise market power. As we explain in Part II.E below, the Commission directly addressed that issue in paragraphs 70 and 71 of the *Fourth Report* (JAXXXX-XXXX).

Comcast also argues that the Commission improperly disregarded broadcast programming in assessing whether cable operators can impede "the flow of video programming from the video programmer to the consumer." Comcast Br. 36-37 (quoting 47 U.S.C. § 533(f)(2)(A)). Comcast appears to assume that Congress contemplated that the widespread availability of broadcast programming would obviate the need for a cable subscriber limit. If that were true, however, Congress would not have needed to adopt a subscriber limit statute at all. The Act's must-carry provision (47 U.S.C. § 534) was designed to ensure that broadcast stations are viewable by all consumers who own a television (whether or not they are MVPD subscribers). *See Turner II,* 520 U.S. 180. Because the must-carry statute independently prohibits cable operators from impeding the flow of *broadcast* video programming, the Commission reasonably construed the subscriber limit statute to address a different concern: removing unfair impediments to the flow of *non-broadcast* video programming. Proceeding from that reasonable premise, the agency saw no reason to include broadcast programming in its analysis of the appropriate cable subscriber limit.

Comcast further complains that "the FCC failed to consider the ability of video programmers to reach consumers through non-MVPD outlets, explicitly excluding outlets such as 'mobile phones, the Internet, [or] home video rentals.'" Comcast Br. 38 (quoting *Fourth Report* ¶ 44 (JAXXXX)). To be sure, the Commission did not include those outlets "in the total subscriber count." *Fourth Report* ¶ 44 (JAXXXX). Contrary to Comcast's assertion, however, the agency did not ignore non-MVPD outlets when calculating the subscriber limit. The

Commission's calculation of the minimum viable scale took into account the effect of alternative revenue sources (including non-MVPD outlets) on network program viability. *Fourth Report* at n.148, ¶ 52 (JAXXXX, XXXX).

There is no basis for Comcast's contention that the Commission should have factored non-MVPD outlets into the total subscriber count. Although Comcast cites various "evidence" concerning "alternative outlets" (Br. 38 n.11), none of that evidence refuted the Commission's conclusion that non-MVPD outlets "should not be considered part of the ... market [for] programming network distribution" because "in many cases these conduits merely represent separate exhibition windows and not alternative means of entry." *2005 Further Notice* ¶ 68 (JAXXXX). The Commission found that "many of these alternative outlets operate based upon the existing popularity of the content, which is gained only through widespread distribution via MVPDs." *Fourth Report* ¶ 44 (JAXXXX). Moreover, the Commission observed that "including [non-MVPD] outlets" in the total subscriber count "could result in double-counting or triple-counting the same consumers," since many MVPD subscribers also view programming on DVDs, the Internet, and other non-MVPD outlets. *Ibid.* Comcast does not really dispute either of these findings. These considerations amply justified the Commission's refusal to revise its MVPD subscriber count to account for non-MVPD conduits.

B. The Subscriber Limit Is Based On A Reasonable Estimate Of The Minimum Viable Scale.

To determine the minimum viable scale (or MVS) for a programming network, the Commission relied upon the *Network Survival Study,* "an analysis that

estimates the probability" that the network "will continue to operate based on the number of subscribers it has at a point in time." *Fourth Report* ¶ 52 (JAXXXX). This sort of survival analysis "is a standard method used in the fields of economics, biology, and engineering." *Ibid.* The survival study that formed the basis for the Commission's MVS accounted for a variety of relevant factors, including "all of the revenue sources that maintain the viability of the programming network" and "the impact of DBS competition on the carriage decisions of cable operators." *Ibid.*

"In order to use the *Network Survival Study* to estimate the minimum viable scale of a programming network," the Commission needed "to choose the point in the network's life at which to measure viability, as well as the probability that the network survives past that point." *Fourth Report* ¶ 55 (JAXXXX). The Commission reasonably selected "five years from the launch of a network" as the "appropriate point for measuring viability." *Ibid.* It explained that this 5-year "viability date" was sufficiently "beyond the 'start-up' phase" to permit "a programmer to establish itself, but not so long that it attempts to ensure success for an extended period." *Ibid.*[9]

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[9] Comcast maintains that the Commission's MVS must be too high because the agency's own survival study indicated that "a network requires only 10.18 million subscribers from day one to have a survival probability of 70 percent over the first five years." Comcast Br. 45 (quoting *Fourth Report* ¶ 51 (JAXXXX)). Comcast asserts that a new network can reach 10.18 million subscribers "from day one" by gaining carriage on a national DBS provider. But the real issue here is whether to measure the MVS from day one or after five years. The Commission reasonably decided to select a "viability date … beyond the 'start-up' phase" – one that "permits a programmer to establish itself." *Fourth Report* ¶ 55 (JAXXXX).

The Commission also reasonably decided that 70 percent was the "appropriate probability of survival" for purposes of calculating the MVS. *Fourth Report* ¶ 56 (JAXXXX). It derived this figure from the *Network Survival Study*, which contained data over a 17-year period "indicating that 68.5 percent" of the 305 networks in the study "survived." *Ibid.*

The Commission properly excluded "the effect of vertical integration and 'spin-offs'" from its MVS calculation "in order to account for the additional difficulties faced by independent and unaffiliated programming networks." *Fourth Report* ¶ 57 (JAXXXX). Consequently, the Commission focused on "empirical data indicating the number of subscribers needed for" an independent network "to have a 70 percent probability of survival after five years." *Ibid.* Those data yielded "a minimum viable scale of 19.03 million subscribers." *Ibid.*

Comcast wrongly claims (Br. 41) that the Commission's MVS amounts to a "guarantee" of success "for new, linear, 24/7 cable networks." Comcast appears to assume that under the FCC's rules, any new network will have a 70% likelihood of success after 5 years. But a network will achieve that viability rate only if it obtains carriage on *every* MVPD in the "open field" (*i.e.*, every MVPD other than the largest cable operator). The Commission's rules do not "guarantee" that a network will obtain carriage on *any* of these MVPDs. The horizontal ownership rule is reasonably designed to give networks a fair opportunity to remain viable if the largest cable operator refuses to carry them. The subscriber limit preserves the reasonable possibility that a new network *can* survive if it can sell itself to the other MVPDs, but hardly ensures that any particular network *will* survive.

Although Comcast suggests that the Commission selected an unduly high survival rate when calculating the MVS, a 70% probability of viability is fully consistent with the typical experience of the hundreds of networks surveyed by the *Network Survival Study*. Between 1984 and 2001, "the failure rate" among those 305 networks "was 31.5 percent." *Fourth Report* ¶ 56 (JAXXXX). Thus, an MVS based on a 70% probability of survival was reasonably designed to "reflect the average cable network." *Id.* at n.193 (JAXXXX). To the extent that a large cable operator can drive down a network's probability of survival to below average in a situation where every other MVPD chooses to carry the network, then surely that large cable operator has the power to "impede ... the flow of video programming." 47 U.S.C. § 533(f)(2)(A).

"The Commission is necessarily entitled to substantial deference when it must draw numerical lines in order to balance two congressional policies that cannot both be fully achieved." *National Association of State Utility Consumer Advocates v. FCC,* 372 F.3d 454, 461 (D.C. Cir. 2004)). The Commission reasonably balanced the competing objectives of the subscriber limit statute when it adopted an MVS of 19.03 million subscribers. The resulting subscriber limit protects the flow of video programming to consumers while preserving the ability of cable operators to take advantage of scale economies. *See Fourth Report* ¶ 37 (JAXXXX); 47 U.S.C. § 533(f)(2).

Comcast asserts that the MVS is unreliable because the data on which the FCC relied are stale. Comcast Br. 45-46. It observes that the "*Network Survival Study*'s data sample contained subscriber rates for cable networks between 1984

and 2001." *Id.* at 45. But Comcast points to no evidence in the record concerning subscriber levels for more recent years. If Comcast and other cable operators believed that the record did not contain sufficiently fresh data on subscriber rates, they had ample opportunity to submit more recent information. Having failed to do so, they cannot now complain that the Commission relied on "admittedly imperfect evidence." *Consumer Electronics Association v. FCC,* 347 F.3d 291, 303 (D.C. Cir. 2003); *see also Cable & Wireless PLC v. FCC,* 166 F.3d 1224, 1232-34 (D.C. Cir. 1999).

In any event, Comcast identifies only one recent development that supposedly renders the Commission's data obsolete: the proliferation of "smaller niche networks." Comcast Br. 46. Comcast appears to assume that the network sample analyzed in the *Network Survival Study* included no niche networks. *Id.* at 51. As we explain in Part II.D below, that assumption is incorrect.

C. The Subscriber Limit Is Based On A Reasonable Estimate Of The Subscriber Penetration Rate.

While some MVPD subscribers purchase premium programming packages that include all of the programming tiers offered by the MVPD, most subscribers opt to buy a less expensive package with a more streamlined channel lineup. "Because not all of an MVPD's subscribers receive access to all of the networks carried by the MVPD," the Commission reasonably found that the MVS "must be modified to determine how many of an MVPD's subscribers will also be subscribers to [a particular] program network." *Fourth Report* ¶ 40 (JAXXXX).

For that purpose, the Commission developed a "subscriber penetration rate." *Id.* ¶¶ 58-62 (JAXXXX-XXXX).

Using linear regression to analyze data from the FCC's most recent *Cable Price Survey*, the agency projected that, on average, "a network will be available to 27.42 percent of the subscribers of the [cable operators] that carry the network" five years after its launch. *Fourth Report* ¶ 61 (JAXXXX). This 27.42% penetration rate was lower than the 50% rate that the agency applied in the *Third Report*. The reduced rate reflected intervening changes in the market as well as technology: namely, the fact that many new cable networks were being placed on recently created, higher-priced digital tiers instead of the basic service tiers purchased by most cable subscribers. "A consequence of being placed on a digital tier," the Commission explained, "is a much lower penetration rate." *Id.* ¶ 60 (JAXXXX).

Comcast asserts that the Commission lacks authority to calculate the penetration rate on the basis of MVPDs' decisions to place programs on different tiers. It contends that these "tiering decisions" do not unfairly impede the flow of programming, but rather "'reflect legitimate, independent editorial choices.'" Comcast Br. 48 (quoting *Time Warner II,* 240 F.3d at 1135). This argument misconstrues the Commission's approach. The penetration rate is not designed to address unfair impediments to the flow of programming; it is merely used to assess the reasonable probability that a programming network can succeed even if it is denied carriage by the largest cable operator. Tier placement plainly affects a

network's likelihood of survival because some tiers reach more subscribers than others.

In calculating the penetration rate, the Commission made no judgments as to whether any particular tiering decision was "unfair." Instead, its approach was dictated by basic mathematics. The Commission simply observed the actual penetration rate of networks, which necessarily depended on how many subscribers purchased the tiers on which the networks were placed. If the Commission were barred from considering a network's tier placement, as Comcast maintains, the agency would effectively be precluded from using any penetration rate to calculate the cable subscriber limit. But it was surely reasonable for the Commission to take account of actual industry experience when gauging the probability that a network will reach a sufficient number of subscribers to survive.

The penetration rate provides a reasonable measure for determining the likely number of subscribers a particular network would reach if it were carried by the MVPDs other than the largest cable operator. Although Comcast suggests otherwise, the statute does not preclude the FCC from applying common sense and recognizing marketplace realities in devising a reasonable subscriber limit. Indeed, if a new network's chances for survival (in the absence of carriage by a large cable operator) hinged largely on the decision by other MVPDs to carry that network on a tier that is viewed by all of their subscribers, then it is surely the case – given the realities of the MVPD marketplace – that the large cable operator is in a position to "impede … the flow of video programming." 47 U.S.C. § 533(f)(2)(A).

D. Comcast's Remaining Challenges To The Commission's Formula Are Waived And, In Any Event, Are Meritless.

Comcast makes several other attacks on the Commission's calculation of the penetration rate and the MVS. Comcast Br. 43-44, 49-53. None of these remaining claims are properly before the Court because no party presented these issues to the Commission. *See* 47 U.S.C. § 405; *Qwest Corp. v. FCC,* 482 F.3d 471, 474-77 (D.C. Cir. 2007). In any event, even if these arguments were not procedurally barred, they cannot withstand scrutiny.

Comcast complains that the Commission failed to consider data on DBS subscriber penetration when calculating the penetration rate. Comcast Br. 49-50. It did not raise this issue before the Commission and therefore may not raise it here. *Cf. Freeman Engineering Associates v. FCC,* 103 F.3d 169, 182 (D.C. Cir. 1997) (section 405 barred claim that the Commission failed to consider certain relevant evidence). In any event, the record contained no data on DBS penetration. *See Fourth Report* at n.208 (JAXXXX). And no party asked the Commission to obtain any such data. Although Comcast speculates that such data would have significantly altered the penetration rate, it offers no hard evidence that this additional information would have materially changed either the penetration rate or the subscriber limit.

Comcast also claims that the *Cable Price Survey* – which supplied the data underlying the penetration rate – "included several regional and very specialized networks that were excluded from the *Network Survival Study*" – the source of the data for the MVS. Comcast Br. 51. According to Comcast, the Commission's

reliance "on such mismatched data sets" produced "an artificially low penetration rate, an artificially high minimum viable scale, and ultimately a highly over-restrictive cable subscriber limit." *Ibid.* The problem with this argument is that there was no significant "mismatch" between the data samples. Comcast identifies just one network (Celtic Vision) that was included in the *Cable Price Survey* but excluded from the *Network Survival Study*. Apparently recognizing that this isolated discrepancy is insufficient to call the Commission's calculations into question, Comcast generally asserts that the *Network Survival Study* completely ignored "niche networks." *Ibid.* That is incorrect. The *Network Survival Study* was "based on the same data" as the *Media Bureau Survival Study*. *Fourth Report* at n.182 (JAXXXX). Those data included a host of niche networks – for example, the Ecology Channel, Gospel Music, Gay, My Pet, Russian Television, Shalom USA, and the Computer Network. *See Media Bureau Survival Study* at 33-39 (Appendix 1) (JAXXXX-XXXX).[10]

Finally, Comcast faults the FCC for calculating an "average" MVS and penetration rate. Comcast Br. 44, 52-53. The alternative approach advocated by Comcast – a subscriber limit that protects only certain "niche" networks that need a smaller-than-average number of subscribers to survive – "would allow the largest [cable operator] to impede the flow of programming from networks that require an average amount of subscribers or more to survive, in contravention of [the

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[10] Indeed, niche networks, if anything, were more prevalent in the *Network Survival Study* data than in the *Cable Price Survey* data, and that circumstance would have worked to Comcast's benefit in the calculation of the subscriber limit.

agency's] statutory mandate." *Fourth Report* ¶ 62 (JAXXXX). Although Comcast contends that "[a] growing number of networks are deliberately aimed at niche audiences and markets" (Br. 52), the statute is not concerned solely with protecting "niche" networks. Rather, the Act refers broadly to "the flow of video programming" and directs the Commission to ensure that no cable operator can "unfairly impede" that flow. 47 U.S.C. § 533(f)(2)(A). The term "impede" is broader than "block" or "cut off." Thus, given the broad language of the statute, it was reasonable for the Commission to develop an MVS and penetration rate based on "the average cable network." *Fourth Report* at n.193 (JAXXXX). This approach "fulfills [the statute's] mandate most effectively" by ensuring that a large cable operator cannot unfairly "impede the flow of programming from networks that require an average amount of subscribers or more to survive." *Id.* ¶ 62 (JAXXXX).

E. The Commission Reasonably Found That Competition From Other MVPDs Will Not Constrain The Power Of A Large Cable Operator To Impede The Development Of New Programming Networks.

In *Time Warner II*, the Court observed that "normally 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." *Time Warner II,* 240 F.3d at 1134. Consistent with this elasticity principle, the Court there assumed that "[i]f an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch." *Ibid.*

And in that case, the Court found that the FCC offered "no reason why this logic does not apply to the cable industry." *Ibid.*

In this proceeding, by contrast, the FCC found good reason to question the elasticity assumption. The record here contained substantial evidence that cable subscribers are not likely to switch to another MVPD if their cable operator refuses to offer new programming. Specifically, the record showed that: (1) high switching costs will deter consumers from switching MVPD providers "except when there is a large benefit," *Fourth Report* ¶ 70 & n.236 (JAXXXX); (2) non-video services (such as Internet access and phone service) provided by cable operators "reduce the likelihood of switching," *id.* ¶ 70 & n.237 (JAXXXX); and (3) customers are unlikely to switch MVPD providers simply to gain access to a new network because they cannot be sure of the quality of a network they have never viewed, *id.* ¶ 70 (JAXXXX-XXXX). For all of those reasons, "DBS provides very little competitive pressure when it comes to carriage of new program networks." *Ibid.* (JAXXXX).

The Commission further explained that competitive pressures from DBS "will not provide any assistance to networks that do not launch" at all "due to a lack of financing." *Fourth Report* ¶ 71 (JAXXXX). If fledgling programming networks "are unable to sign contracts with MVPDs that have enough subscribers to ensure reasonable prospects for survival, they may be unable to secure financing." *Ibid.* "Without an open field that is large enough, many new programming networks might not even attempt to enter the market without a

contract [with] the largest cable operator." *Ibid.* Thus, "competitive pressures" alone "cannot ... ensure the flow of programming." *Ibid.*[11]

Comcast asserts (Br. 54) that transaction costs have not deterred customers from switching to DBS. The migration of cable subscribers to DBS, however, could be explained by a number of factors, including differences in service quality and pricing. Comcast points to no evidence that consumers have been willing to bear the costs of switching solely to gain access to a new network. To the contrary, "despite the strong value consumers place on the programming of regional sports networks," Comcast experienced "little harm to its subscribership count" when it refused to carry "the regional sports network MASN in the Washington D.C. area." *Fourth Report* at n.238 (JAXXXX).

Comcast also challenges the Commission's finding that customers will not likely switch MVPDs to obtain new networks because they cannot be certain of the quality of programming they have never seen before. Comcast Br. 55-56. Comcast is barred from asserting that claim here because it failed to present the issue to the Commission. 47 U.S.C. § 405; *Qwest,* 482 F.3d at 474-77. In any event, the claim lacks merit. Although Comcast characterizes the Commission's finding as "dubious" (Br. 56), it offers no basis for questioning the agency's common-sense conclusion that cable subscribers – who cannot be sure of the

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[11] Other evidence in the record confirmed that obtaining carriage on the largest cable system is critical to viability: "[O]f the 92 non-premium nationally-distributed networks with more than 20 million subscribers, only one network ... was able to reach that scale without receiving carriage from the largest cable operator." *Fourth Report* ¶ 72 (JAXXXX) (citing TAC Comments, Aug. 8, 2005, at 56-58 (JAXXXX-XXXX)).

quality of new networks they have never viewed – will not likely be motivated by the availability of new networks on another MVPD system to incur the expense of switching.

Comcast makes much of the FCC's observation that measuring cable operators' downstream market power and its impact on the flow of programming in the upstream market is "quite difficult." Comcast Br. 56 (quoting *Fourth Report* ¶ 69 (JAXXXX)). In making this statement, the Commission was simply acknowledging reality. Although *Time Warner II* highlighted this issue for further consideration, "no commenter" in this proceeding "provided a reliable and appropriate theoretical framework or empirical data by which" to assess the effect of downstream market power on the upstream programming market; and the record here contained no "definitive evidence" on the subject. *Fourth Report* ¶ 69 (JAXXXX). Nonetheless, contrary to Comcast's suggestion, the Commission did not shirk its responsibility to consider the "market structure" of the cable industry and "the dynamic nature of the communications marketplace." 47 U.S.C. § 533(f)(2)(C), (E). On the basis of the record before it, the Commission reasonably determined that downstream competition from other MVPDs would have little effect on the power of a large cable operator to impede the flow of video programming in the upstream market. *Fourth Report* ¶¶ 70-71 (JAXXXX-

XXXX). Comcast has given the Court no reason to doubt that reasonable conclusion.[12]

The Commission frankly acknowledged that any attempt to develop a reasonable subscriber limit involves some inherent uncertainty. *Fourth Report* ¶ 73 (JAXXXX). But Congress has directed the Commission to "*ensure* that no cable operator ... can unfairly impede ... the flow of video programming from the video programmer to the consumer." *Ibid.* (quoting 47 U.S.C. § 533(f)(2)(A)). In the face of that clear statutory command, the Commission reasonably found that "although some uncertainty exists," its "priority should be to make sure that a single cable operator may not significantly undermine the viability of programming network[s]." *Ibid.* The limit adopted here satisfies the statutory mandate.

III. THE HORIZONTAL OWNERSHIP RULE IS CONSTITUTIONAL.

A. The Rule Is Subject To Intermediate Scrutiny.

Comcast and its intervenors ask the Court to review the constitutionality of the horizontal ownership rule under strict scrutiny. However, prior decisions of both this Court and the Supreme Court establish that, as a content-neutral regulation, the horizontal ownership rule is subject only to intermediate scrutiny.

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[12] In any event, Comcast is wrong to suggest that the Commission took no account of DBS competition in calculating its subscriber limit. To the contrary, the data underlying the survival study "account[ed] for the impact of DBS competition on the carriage decisions of cable operators." *Fourth Report* ¶ 52 (JAXXXX).

Strict scrutiny applies to "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("*Turner I*"). "[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *Ibid.* "In general, the 'principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Time Warner I*, 211 F.3d at 1316 (quoting *Turner I* at 642).

There is no question here (and Comcast does not contend otherwise) that the horizontal ownership rule does not regulate the content of a cable operator's speech. This Court twice has already held as much. In *Time Warner I*, the Court held that 47 U.S.C. § 533(f)(1)(A) – the statute that mandates the promulgation of a cable subscriber limit – is subject to intermediate, not strict, scrutiny because Congress's concern in enacting the subscriber limits "was not with what a cable operator might say," but with the prospect that a cable operator "might use ... bottleneck power" to prevent other providers of cable programming from "say[ing] anything at all in the principal medium for reaching much of the public." 211 F.3d at 1317-18. The statute does not distinguish between different speakers with an intent to favor the *content* of one type of speech over another, but only with an "intention that there continue to be multiple speakers." *Id.* at 1318.

Likewise, in *Time Warner II*, the Court held that regulations promulgated pursuant to the statute are also content-neutral. Consistent with *Time Warner I*, the Court applied intermediate scrutiny to the regulations, "not seeing any distinction

between the statute and the regulations for level-of-scrutiny purposes." *Time Warner II*, 240 F.3d at 1130. Because the matter now before the Court involves the same type of regulation that was at issue in *Time Warner II*, the holding there governs review of this case and compels the application of intermediate scrutiny.

Undaunted by this controlling precedent, Comcast and its intervenors nevertheless seek to relitigate the proper standard of review. The cable industry's newly minted argument is that the Court should apply strict scrutiny because "the premise" for applying intermediate scrutiny in *Time Warner I* and *II* – the "determination ... that cable operators possessed unique 'bottleneck monopoly power' over video programming distribution" – "no longer holds today." Comcast Br. 21; *see also* Intervenors Br. 12-19. They further claim the horizontal ownership rule "is a *speaker-based* restriction on speech" that applies only to cable operators and not to DBS operators (Intervenors Br. 9; Comcast Br. 22), which "suggests" that the rule is motivated by a desire to suppress expression (Intervenors Br. 10). Both of those contentions are wrong.

Cable operators retain potential bottleneck control over programming, even as competition has increased in the video distribution market. Despite the advent and growth of DBS systems in the past decade, "the cable industry by far remains the dominant player in the MVPD market, commanding approximately 69 percent of all MVPD households." *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules,* 22 FCC Rcd 21064, 21087 (¶ 49) (2007), *petition for review dismissed, C-SPAN v. FCC,* 545 F.3d 1051. In an order released shortly before the *Fourth Report,* the Commission found that "cable

operators continue to 'exercise control over most (if not all) of the television programming that is channeled into the subscriber's home,'" and that the increased clustering of cable systems in recent years increases "the risk of anticompetitive carriage denials." *Id.* ¶ 50 (quoting *Turner II,* 520 U.S. at 197).

In those circumstances, the "bottleneck" rationale underlying *Time Warner I* and *II* remains valid: Cable's market position "arguably threatens diversity and competition in the provision of cable programming," and "other video programmers such as DBS lack the bottleneck power of cable operators; nor do they reach nearly as many households as does cable." *Time Warner I*, 211 F.3d at 1318. Thus, there is still a need for a cable subscriber cap "to be sure that no single company could be in a position single-handedly to deal a programmer a death blow." *Time Warner II*, 240 F.3d at 1131. Although Intervenors maintain that changes in the market have eliminated "any content-neutral justification" for the horizontal ownership rule (Br. 12-18), the original rationale for the rule – the potential life-or-death power of cable systems over programming networks – remains intact.

In any event, even if cable operators could no longer exercise bottleneck control over consumer access to new programming networks, strict scrutiny still would not apply in the absence of any genuine suggestion that the FCC's regulation was motivated by the content of speech. Comcast's claim rests on the faulty premise that strict scrutiny applies whenever a regulation treats parties differently. *See* Intervenors Br. 9 (differential regulation is "presumptively unconstitutional"). The Supreme Court rejected that notion in *Turner I*, holding

that "[i]t would be error to conclude ... that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium ... but not others." *Turner I*, 512 U.S. at 660. "So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment" and thus not subject to strict scrutiny. *Id.* at 645. Or, as this Court has put it, it is not "the act of 'singling out' by itself, that triggers strict First Amendment scrutiny," but "th[e] suggestion" that "differential treatment of speakers was motivated by the content of their speech." *BellSouth Corp. v. FCC*, 144 F.3d 58, 68-69 (D.C. Cir. 1998).

Turner I and *BellSouth* establish that differential regulatory treatment does not trigger strict scrutiny in the absence of a reason to believe that the distinction is motivated by a content-based preference. Yet Comcast and its intervenors have failed even to suggest what such a motive might be in this case. There is no reason to believe that the regulation is anything other than what the Commission says it is: a reasonable attempt to satisfy the agency's statutory mandate by prescribing a subscriber limit that removes unfair impediments to the flow of video programming.

For that reason, the "strict scrutiny" cases on which Comcast principally relies (Comcast Br. 22-23; Intervenors Br. 9-10) – *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) – are distinguishable. Both of those cases involved taxing regimes that were structured in such a way to raise an inference that the legislature had singled out particular companies for the purpose

of burdening their speech. *See BellSouth*, 144 F.3d at 68-69. No such inference can be drawn here. Indeed, in declining to apply strict scrutiny to a statute that placed publishing restrictions only on some telephone companies but not others, this Court found that *Minneapolis Star* and *Arkansas Writers' Project* "mean[] only that strict scrutiny must be applied to regulations that target a small subset of media organizations in ways that threaten to 'distort the market for ideas.'" *BellSouth*, 144 F.3d at 68 (quoting *Turner I*, 512 U.S. at 660). Comcast does not even attempt to describe any such motive here or suggest any way in which the subscriber cap might distort the market for ideas. In the absence of any indication of an improper motive for the FCC's differential regulation here, strict scrutiny is unwarranted.

B. The Rule Survives Intermediate Scrutiny.

A content-neutral regulation such as the horizontal ownership rule will be upheld under intermediate scrutiny as long as it "furthers an important or substantial government interest ... unrelated to the suppression of free expression" and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner I*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). A regulation "need not be the least speech-restrictive means of advancing the Government's interests. 'Rather, the requirement of narrow tailoring is satisfied so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ibid.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Under this test, a regulation passes muster if it does "not burden

substantially more speech than is necessary to further the government's legitimate interests." *Ibid.* (quoting *Ward,* 491 U.S. at 799). The fit between means and ends does not have to be "perfect"; it need only be "reasonable" and "in proportion to the interest served." *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (internal quotations omitted). The rule at issue here satisfies that standard.

(1) The Rule Advances Important Government Interests.

Time Warner I recognized two important government interests served by a cable subscriber limit: preventing cable operators from "impos[ing] their own biases upon the information they disseminate," and guarding against the possibility that "a few dominant cable operators might preclude new programming services from attaining the critical mass audience necessary to survive." 211 F.3d at 1319. In other words, the statute and the regulation implementing it serve the twin purposes of ensuring public access to diverse information sources and promoting competition in the video programming market. *Time Warner II* likewise acknowledged the government's interest in ensuring that "no single company could be in a position single-handedly to deal a programmer a death blow." 240 F.3d at 1131. The Court stated that a programmer must receive a fair opportunity to "reach the number of viewers needed for viability" even if the largest cable operator declines to carry the programmer's network. *Ibid.*

The current horizontal ownership rule advances those interests. With respect to competition, the Commission wanted "to make sure that a single cable operator [could] not significantly undermine the viability" of programming networks.

Fourth Report ¶ 73 (JAXXXX). With respect to diversity, ensuring that a network has a reasonable opportunity to survive even if it is not carried on the largest system will ensure that it "will not be pressured to make changes in the content and viewpoint of its programming to suit the desires of the largest cable operator." *Id.* ¶ 30 (JAXXXX).

That rationale holds especially true with respect to new programming networks, which do not have an established audience. The Commission found that a new programming network that failed to secure carriage on a cable system with more than 30% market share would not "have a good chance of both gaining carriage on other MVPDs and then induc[ing] enough of the large cable operator's subscribers to switch to the other MVPDs ... or to place substantial pressure on the large cable operator to carry the network within a reasonable period of time." *Fourth Report* ¶ 70 (JAXXXX). Indeed, in the absence of carriage on a system with more than 30% share, "many new programming networks might not even attempt to enter the market." *Id.* ¶ 71 (JAXXXX). If new networks either decline to enter the market, or are doomed to likely failure at the whim of a large cable operator, there will be reduced competition in the programming market, and viewers will be denied the chance to see a new network that might have proven popular had it been given a chance to survive.

Comcast does not fundamentally challenge any of that analysis. Indeed, in its comments before the Commission, Comcast agreed that "the Commission must determine how to ensure that no cable operator should have the unilateral power, by making a decision not to carry certain video programming, to prevent that

programming from reaching the critical mass of viewers necessary to support programming of that type or genre." Comcast Comments, Aug. 8, 2005, at 8 (JAXXXX).

Instead, Comcast claims that the rule does not advance the government's interests because it is pointed at the wrong target. It contends that the rule focuses on the entry and survival of new programming *networks*, whereas the statute, which "requires [the Commission] to examine the flow of *programming*" to consumers, seeks to protect only the creators of video programming. Comcast Br. 25. "Video programmers," Comcast contends, constitute "a different and larger group" than programming networks. *Ibid.* Consequently, Comcast claims, the survival or entry into the market of programming networks themselves "is not an important governmental interest." *Id.* at 26. That claim fails for several reasons.

First, the argument rests on an incorrect reading of the statute. Congress defined the term "video programming" to mean "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). A television broadcast station is equivalent to a programming network; it is the conduit through which programming passes to the consumer. "Video programming" thus refers to programming provided by a network.

If that definition alone does not definitively resolve the matter, Congress's use of the term in the context of the statute does. The channel occupancy provision, which immediately follows the horizontal ownership statute, requires the Commission to limit "the number of channels on a cable system that can be

occupied by a video programmer in which a cable operator has an attributable interest." 47 U.S.C. § 533(f)(1)(B). There, Congress plainly used the term "video programmer" to refer to a programming network – the only type of entity that "occupies" a channel. Independent program producers, which sell programs to distributors such as networks, do not occupy channels. Thus, contrary to Comcast's statutory construction, Congress used the term "video programmer" in 47 U.S.C. § 533(f) to refer to programming networks, not independent program producers.

The Court implicitly accepted that understanding of the statute in *Time Warner II*. That case involved the same type of network-based regulation that is at issue here, and the Court there held that the rule advanced the government's interests. In particular, it found that "[t]he Commission is on solid ground in asserting authority to be sure that no single company could be in a position single-handedly to deal a programmer a death blow." *Time Warner II,* 240 F.3d at 1131. In that context, the Court clearly used the word "programmer" to refer to programming networks. Comcast has not even tried to distinguish that statement from *Time Warner II*.

The FCC's approach is consistent with the everyday experience of MVPD subscribers. Programming networks are the primary conduit for the flow of programming to consumers. Both cable and DBS subscribers tune in to such networks as CNN, the Golf Channel, and the Food Network. The networks have become branded, recognizable commodities in their own right, creating, selecting, and packaging the programming that will best represent and further the network

brand. Thus, golf tournaments do not appear on the Food Network, and the Tour de France does not receive coverage on the NFL Network. Given the integral role that networks play in delivering programs to consumers, Comcast cannot plausibly claim that the "programming" addressed by the statute exists independently of the networks that package and carry the programming. Rather, protecting the survival of networks directly protects the flow of programming to consumers and advances the governmental interests in the unimpeded flow of programming to consumers.

(2) The Problems Addressed By The Rule Are Real.

Employing well-established tools of economic analysis, the Commission showed that a cable operator that captured more than 30% of the total MVPD market would have the power to undermine substantially the viability of a newly established network. Indeed, a would-be network unable to secure carriage with such a large cable operator might not enter the market at all. The agency's analysis demonstrates that the government's interests in restricting the size of cable operators are not merely "speculative" or "conjectural" but supported by record evidence and economic theory as well as common sense. The Supreme Court has upheld prophylactic rules based on similar types of studies. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995); *cf. Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (striking down regulation that was unsupported by "studies" of the matter at issue).

Comcast nevertheless asserts that the governmental interests at stake here are illusory because, in light of a substantial increase in the number of cable

networks in the past few years, "an unprecedented quantity of video programming flows unimpeded to consumers." Comcast Br. 26. Consequently, it claims, the government "cannot meet" its "burden of establishing ... a stifling of the flow of video programming" to consumers. *Id.* at 28.

That claim is incorrect because it fails to come to grips with the FCC's finding that a cable operator with a market share above 30% will likely have the power to doom a fledgling network or to forestall entry of a new network entirely. That type of market power would also allow a sufficiently large cable operator to dictate the content of a new network's programming or to extract economic concessions that otherwise would not be available in a fully competitive market. Those are precisely the harms the statute was intended to avert. If a cable operator is allowed to grow large enough so that it can effectively impede the entry of new networks into the market, the fact that cable and DBS systems currently carry a substantial number of networks will not prevent the problems the statute was designed to address.[13]

Comcast's argument necessarily implies that under current market conditions, so much programming already reaches consumers that any cap at all would be unconstitutional. *See* Comcast Br. 29 (because the record documents an increase in programming available to consumers, it cannot validate "*any* cap"). In

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[13] Contrary to Comcast's contention (Br. 27), the fact that the number of networks grew "even as the largest [cable operators] increased their market shares" does not "refut[e] any argument that the expansion in programming was *due* to the 30% cap." During this period, no cable operator exceeded the 30% cap. Thus, the recent growth in the number of networks was consistent with the FCC's view that a 30% limit is needed to protect the flow of programming.

an amicus brief, the Progress & Freedom Foundation ("PFF") takes the claim to its logical conclusion, arguing that the statute is facially unconstitutional. This Court has upheld the statute, however, and that decision is not open to challenge in this proceeding.[14]

The Intervenors take a different approach, arguing that any government interest in protecting nascent programming networks must be deemed conjectural because the Commission did not conduct a market study of the type discussed in *Time Warner II.* There, the Court stated that "normally 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." *Time Warner II,* 240 F.3d at 1134. Intervenors claim that because the FCC did not determine the elasticity of demand for programming, it has not shown a genuine possibility that a large cable operator could determine the fate of a new network.

As we explained in Part II.E above, however, the record here contained substantial evidence that cable subscribers are not likely to switch to another MVPD if their cable operator refuses to offer a new network. *See Fourth Report* ¶ 70 (JAXXXX-XXXX). For example, given the switching costs documented by the record, the Commission reasonably concluded that cable subscribers would not likely switch to another MVPD just to gain access to a new network that they had never seen before. *Ibid.* Additionally, the Commission found that MVPD

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[14] PFF's claim is also barred by the principle that the Court will "not entertain an *amicus*' argument if not presented by a party." *Michel,* 14 F.3d at 625.

competition would not help prospective networks if they failed to secure the necessary financing to enter the market because they could not obtain carriage from the largest cable operator. *Id.* ¶ 71 (JAXXXX). For these reasons as well as others discussed in Part II.E, the Commission reasonably determined that "competitive pressures" could not "ensure the flow of programming if there is not a sufficiently large open field for entry." *Ibid.*

This analysis satisfies both the Court's concerns in *Time Warner II* and the First Amendment. In accordance with the Court's directive in *Time Warner II,* the Commission reasonably took into account the effect of MVPD competition on the availability of programming. Its sound analysis of this issue, based on record evidence and simple common sense, was also sufficient to satisfy the First Amendment's requirement that the harm addressed by the regulation must be more than conjectural. *See Tennessee Secondary School Athletic Association v. Brentwood Academy*, 127 S. Ct. 2489, 2495-2496 (2007) (in rejecting a First Amendment claim, the Supreme Court held that it did not need "empirical data to credit [a] common-sense conclusion" advanced in support of the restriction at issue); *see also Florida Bar*, 515 U.S. at 628 (speech restriction was justified in part on ground of "simple common sense").

(3) The Rule Does Not Burden More Speech Than Necessary.

The horizontal ownership rule is reasonably designed to prevent any single cable operator from growing large enough to be able "single-handedly to deal a programmer a death blow." *See Time Warner II,* 240 F.3d at 1131. The rule is

narrowly tailored; it does "not burden substantially more speech than is necessary to further the government's legitimate interests" in promoting programming diversity and competition. *See Turner I,* 512 U.S. at 662 (internal quotations omitted). Indeed, although the Commission's formula for calculating the cap supported a 28% limit, the agency decided to set the limit at 30%, making its rule even more permissive. *Fourth Report* ¶ 68 (JAXXXX). Hence, the rule does not offend the First Amendment.

Citing the "availability of competition from a multitude of sources," Comcast argues that "the FCC's 30% cap unnecessarily restricts a substantial quantity of speech." Comcast Br. 29 (internal quotations omitted). Essentially, Comcast contends that the degree of competition alone renders the cap unconstitutional. But the Commission's analysis showed that even in the current competitive environment, a cable operator with more than 30% of the national market could exercise significant bottleneck control over the entry and survival of new networks. It makes no difference whether a cable operator faces no competitors or ten; if the cable operator surpasses the subscriber cap, it will be in a position to impede the flow of video programming to consumers.

Moreover, the Commission's analysis expressly takes into account the market share of DBS and other MVPD providers, as the equation used to calculate the horizontal limit counts *all* MVPD subscribers. If cable's share of the market continues to decline, as Comcast alleges (Br. 30-31), the 30% threshold will become increasingly difficult to reach and will likely restrict no speech at all.

In Comcast's view, *any* limit on horizontal ownership would burden more speech than is necessary, because competition has supposedly eliminated the need for a limit. But the subscriber limit statute – which this Court has found to be constitutional – requires the FCC to formulate a limit; and the Commission has adopted a limit that is narrowly tailored to achieve the policies underlying the statute.

CONCLUSION

The Court should dismiss this case for lack of standing. Alternatively, the Court should deny the petition for review.

Respectfully submitted,

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January 9, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMCAST CORPORATION,	)	
	)	
PETITIONER,	)	
	)	
v.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,	)	NO. 08-1114
	)	
Respondents.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13996 words.

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January 9, 2009

APPENDIX A

STATUTORY APPENDIX

47 U.S.C. § 405
47 U.S.C. § 522(20)
47 U.S.C. § 533

47 U.S.C.A. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5-- WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV-- PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action

complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C.A. § 522

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5-- WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A -- CABLE COMMUNICATIONS
PART I. GENERAL PROVISIONS

§ 522. Definitions

For purposes of this subchapter--

(20) the term "video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5-- WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A-- CABLE COMMUNICATIONS
PART II. USE OF CABLE CHANNELS AND CABLE OWNERSHIP RESTRICTIONS

§ 533. Ownership restrictions

(a) Cable operator holding license for multichannel distribution or offering satellite service

It shall be unlawful for a cable operator to hold a license for multichannel multipoint distribution service, or to offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system. The Commission--

(1) shall waive the requirements of this paragraph for all existing multichannel multipoint distribution services and satellite master antenna television services which are owned by a cable operator on October 5, 1992;

(2) may waive the requirements of this paragraph to the extent the Commission determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming; and

(3) shall not apply the requirements of this subsection to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 543(l) of this title.

(b) Repealed. Pub.L. 104-104, Title III, § 302(b)(1), Feb. 8, 1996, 110 Stat. 124

(c) Promulgation of rules

The Commission may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community served by a cable system.

(d) Regulation of ownership by States or franchising authorities

Any State or franchising authority may not prohibit the ownership or control of a cable system by any person because of such person's ownership or control of any other media of mass communications or other media interests. Nothing in this section shall be

construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person (1) because of such person's ownership or control of any other cable system in such jurisdiction; or (2) in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the delivery of cable service in such jurisdiction.

(e) Holding of ownership interests or exercise of editorial control by States or franchising authorities

(1) Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system.

(2) Any State or franchising authority shall not exercise any editorial control regarding the content of any cable service on a cable system in which such governmental entity holds ownership interest (other than programming on any channel designated for educational or governmental use), unless such control is exercised through an entity separate from the franchising authority.

(f) Enhancement of effective competition

(1) In order to enhance effective competition, the Commission shall, within one year after October 5, 1992, 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;

(B) to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest; and

(C) to consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video programming distributors may engage in the creation or production of video programming.

(2) In prescribing rules and regulations under paragraph (1), the Commission shall, among other public interest objectives--

(A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual 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;

(B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably

restrict the flow of the video programming of such programmers to other video distributors;

(C) take particular account of the market structure, ownership patterns, and other relationships of the cable television industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests;

(D) account for any efficiencies and other benefits that might be gained through increased ownership or control;

(E) make such rules and regulations reflect the dynamic nature of the communications marketplace;

(F) not impose limitations which would bar cable operators from serving previously unserved rural areas; and

(G) not impose limitations which would impair the development of diverse and high quality video programming.

(g) Combination of interests under prior law

This section shall not apply to prohibit any combination of any interests held by any person on July 1, 1984, to the extent of the interests so held as of such date, if the holding of such interests was not inconsistent with any applicable Federal or State law or regulations in effect on that date.

(h) "Media of mass communications" defined

For purposes of this section, the term "media of mass communications" shall have the meaning given such term under section 309(i)(3)(C)(i) of this title.

APPENDIX B

Letters from Comcast to the FCC in MM Docket No. 92-264
Reporting Comcast's Share of the MVPD Market
At Various Points Over the Past Five Years

EX PARTE OR LATE FILED

comcast

Comcast Cable Communications, Inc
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ORIGINAL

September 22, 2003

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

RECEIVED

SEP 22 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Ex Parte* Submission
MM Docket No 92-264

Dear Ms Dortch:

Comcast Corporation ("Comcast") hereby notifies the Commission that it closed a transaction to sell its interest in CC VIII, LLC, which owns cable systems in Michigan, Minnesota, and Wisconsin serving approximately 886,654 subscribers, to Paul Allen on June 6, 2003 In addition, Comcast has closed the following transactions: (1) acquisition of SMATV systems in New Jersey serving approximately 1,200 subscribers from Clearview Cable TV, Inc. on 12/06/02; (2) acquisition of a cable system in Alabama serving approximately 1,200 subscribers from Enstar IX, LP on 12/31/02, (3) acquisition of cable systems in New Jersey serving approximately 450 subscribers from Mullica Cable on 12/31/02, (4) acquisition of a SMATV system in New Jersey serving approximately 1,240 subscribers from A+S Telesecurity Corporation on 12/31/02; (5) acquisition of cable systems in New Mexico serving approximately 4,155 subscribers from USA Media Group, LLC on 1/06/03; (6) acquisition of cable systems in Florida serving approximately 3,470 subscribers from TWI Cable, Inc. on 1/31/03, (7) acquisition of SMATV systems in Florida serving approximately 1,688 subscribers from Time Warner Entertainment-Advance/Newhouse Partnership on 3/01/03; (8) acquisition of a SMATV system in Michigan serving approximately 394 subscribers from Westland Meadows on 4/15/03, (9) acquisition of a SMATV system in Georgia serving approximately 270 subscribers from Tradewinds Television, LLC on 4/25/03; (10) acquisition of cable systems in Kentucky and Tennessee serving approximately 6,182 subscribers from Tele-Media Company of Franklin, Ltd. and Tele-Media Company of Green River on 5/30/03; (11) acquisition of a SMATV system in Washington, D C serving approximately 585 subscribers from Chesapeake Cable Partners on 5/31/03; (12) acquisition of SMATV systems in Georgia and Florida serving approximately 14,457 subscribers from Advanced TeleMedia, LLC on 7/31/03; (13) acquisition of SMATV systems in California and Washington serving approximately 1,057 subscribers from Direct Digital Service, Inc on 7/31/03; and (14) acquisition of SMATV systems in Washington and Oregon serving approximately 17,000 subscribers from Millennium Digital Media Systems L L C and their affiliates on 9/11/03

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Based on available data, and assuming the most inclusive interpretation of the Commission's attribution rules, Comcast estimates that prior to these transactions it was attributed with approximately 27,019,000 MVPD subscribers,[1] and after these transactions closed it is attributed with approximately 26,032,379 MVPD subscribers[2] (or approximately 28.9% of all MVPD subscribers) [3]

Although it is unclear whether Comcast is obligated to notify the Commission of these transactions or their effect on its MVPD subscribership (in light of the D.C Circuit's decision in *Time Warner Entertainment Co v FCC*[4]), Comcast nonetheless is providing the details of these transactions for the Commission's convenience Subject to further instructions from the Commission, Comcast plans in the future to file a subscriber notification letter for any acquisition of an MVPD with 25,000 or more subscribers at the time the applications for transfer of Commission licenses associated with the transaction are filed (or, where no Commission licenses are transferred, prior to closing). Comcast will file a subscriber notification letter semi-annually that accounts for all acquisitions during that period of MVPDs with less than 25,000 subscribers

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1 *See Ex Parte Letter* from James R Coltharp, Comcast Corporation, and Betsy Brady, AT&T Corp , to Marlene Dortch, FCC Secretary, MB Dkt No. 02-70 (Sept 20, 2002) (presenting detail of MVPD subscriber total for Comcast after its acquisition of AT&T Broadband, *i e* , 27,019,000 MVPD subscribers)

2 Comcast's total attributable subscribers referenced above reflect the sale of CCVIII (approximately 886,654 subscribers), the fourteen acquisitions described above (approximately 53,348 subscribers), and a net loss in subscribers (primarily in partnership systems in which Comcast has a partial interest in the partnership and does not manage the systems) of approximately 153,315, *i.e.*, 27,019,000 - 886,654 + 53,348 – 153,315 = 26,032,379.

3 *See Kagan Media Money*, July 22, 2003, at 7 (noting that there are approximately 90 million MVPD subscribers nationwide, thus 26,032,379 – 90,000,000 = 28.9%)

4 240 F 3d 1126 (D C. Cir. 2001) (vacating the cable horizontal ownership rules)

An original and two (2) copies of this letter are submitted herewith in accordance with Section 1.1206(b) of the Commission's rules.

Sincerely,

Peter H. Feinberg
Assistant General Counsel
Comcast Cable Communications, Inc.

cc: See attached service list

CERTIFICATE OF SERVICE

I, Robin Smith, do hereby certify that I caused one copy of the foregoing *Ex Parte* letter of Comcast to be served by hand delivery on all parties below, this 22nd day of September 2003.

Kenneth Ferree
Chief
Media Services Bureau
Federal Communications
Commission
445 12th Street, S.W
Room 3-C754
Washington, D C 20554

William H Johnson
Deputy Chief
Media Services Bureau
Federal Communications
Commission
The Portals
445 12th Street, S.W.
Room 3-C742
Washington, D C. 20554

Qualcx International
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D C. 20554

Robin Smith

EX PARTE OR LATE FILED

Comcast

ORIGINAL

Comcast Cable Communications, Inc
1500 Market Street
Philadelphia, PA 19102-2148
Tel 215 665 1700
Fax 215 981 7790
www comcast com

Peter H Feinberg
215 320 7934 Tel
215 981 8508 Fax

March 22, 2004

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

RECEIVED

MAR 2 2 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Ex Parte* Submission
MM Docket No. 92-264

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), pursuant to its letter of September 22, 2003, hereby notifies the Commission that it has closed the following transactions: (1) acquisition of SMATV systems in Indiana serving approximately 190 subscribers from ProComm on October 15, 2003; (2) acquisition of a cable television system in California serving approximately 10,335 subscribers from Priority Cable on December 31, 2003; (3) acquisition of a SMATV system in California serving approximately 304 subscribers from Ponderosa Woods on October 1, 2003; (4) acquisition of a SMATV system in Indiana serving approximately 128 subscribers from Nova Cablevision, Inc. on October 15, 2003; (5) acquisition of a SMATV system in California serving approximately 125 subscribers from Abundance Systems, Inc. on October 15, 2003; (6) acquisition of a SMATV system in Indiana serving approximately 95 subscribers from Harcom, Inc. on November 21, 2003; (7) acquisition of SMATV systems in California, Utah, and Washington serving approximately 11,100 subscribers from Castle Cable Services, Inc. and its affiliated entities on March 15, 2004; (8) acquisition of SMATV systems serving approximately 7,000 subscribers in Colorado from TV Max on February 29, 2004; (9) acquisition of cable systems serving approximately 3,000 subscribers in Washington and Oregon from US Online Cable on February 29, 2004; and (10) acquisition of a cable system serving 122 subscribers in Pennsylvania from Country Cable on February 27, 2004.[1]

Comcast estimated in its September 22, 2003 letter that it was attributed with approximately 26,032,379 subscribers. Based on Comcast's fourth quarter 2003 subscriber numbers, available data for its partnership subscriber numbers, and assuming the most inclusive interpretation of the Commission's attribution rules, after accounting for the above transactions

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[1] There have been no acquisitions of an MVPD with 25,000 or more subscribers since the September 22, 2003 notification letter

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and adjusting for subscriber growth, Comcast estimates that it is attributed with approximately 26,239,152 MVPD subscribers[2] (or approximately 28.9% of all MVPD subscribers).[3]

Although it is unclear whether Comcast is obligated to notify the Commission of these transactions or their effect on its MVPD subscribership (in light of the D.C. Circuit's decision in *Time Warner Entertainment Co. v. FCC*[4]), Comcast nonetheless is providing the details of these transactions for the Commission's convenience

An original and two (2) copies of this letter are submitted herewith in accordance with Section 1.1206(b) of the Commission's rules.

Sincerely,

Peter Feinberg (MH)

Peter H. Feinberg
Associate General Counsel
Comcast Cable Communications, LLC

cc: See attached service list.

---

2 Comcast's total attributable subscribers is based on the 26,032,379 subscribers reported in the September 22, 2003 letter, plus the following: (1) the ten (10) acquisitions described above (approximately 32,399 subscribers); (2) 130,265 subscribers from Comcast's minority, non-controlling partnership interest in Millennium Digital Media Programming Ventures, L L.C (Comcast inadvertently omitted the Millennium subscribers in its last report); and (3) net internal growth of approximately 44,109 subscribers (*i e.*, 26,032,379 + 32,399 + 130,265 + 44,109 = 26,239,152)

3 *See* Kagan Media Money, Feb 17, 2004, at 5 (noting that there are approximately 90 9 million MVPD subscribers nationwide, thus 26,239,152 – 90,900,000 = 28 9%).

4 240 F.3d 1126 (D C Cir 2001) (vacating the cable horizontal ownership rules)

CERTIFICATE OF SERVICE

I, Robin Smith, do hereby certify that I caused one copy of the foregoing *Ex Parte* letter of Comcast to be served by hand delivery on all parties below, this 22d day of March 2004.

Kenneth Ferree
Chief
Media Services Bureau
Federal Communications
Commission
445 12th Street, S.W.
Room 3-C754
Washington, D.C. 20554

William H. Johnson
Deputy Chief
Media Services Bureau
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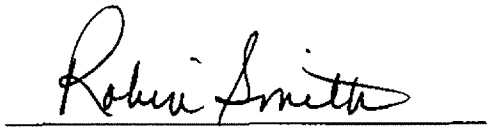

Robin Smith

Comcast Cable
1500 Market Street
Philadelphia, PA 19102

Peter H. Feinberg
215.320.7934 Tel
215.981.8508 Fax

September 22, 2004

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

Re: *Ex Parte* Submission
MM Docket No. 92-264

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), pursuant to its letter of September 22, 2003, hereby notifies the Commission that it has closed the following transactions: (1) acquisition of SMATV systems in Pennsylvania serving approximately 280 subscribers from Video Consultants, Inc. on June 24, 2004; (2) acquisition of SMATV systems in Washington serving approximately 390 subscribers from Sound Cable, Inc. on April 13, 2004; (3) acquisition of CATV systems in Pennsylvania serving approximately 713 subscribers from Anchor Communications Company on July 15, 2004; (4) acquisition of CATV systems in Georgia serving approximately 599 subscribers from LB Cable, LLC on August 31, 2004; (5) acquisition of SMATV systems in Florida, California, and Texas serving approximately 2,084 subscribers from TVMAX on August 31, 2004; (6) acquisition of SMATV systems in Texas and Colorado serving approximately 5,253 subscribers from US Online on August 31, 2004; (7) acquisition of SMATV systems in Virginia serving approximately 156 subscribers from Waverton Cable & Communications, LLC on August 31, 2004; (8) acquisition of SMATV systems in Pennsylvania serving approximately 20 subscribers from Total Cable, Inc. on May 26, 2004; (9) acquisition of CATV systems in Pennsylvania serving approximately 260 subscribers from South Buffalo Cablevision, Inc. on April 30, 2004; (10) acquisition of CATV systems in Tennessee serving approximately 556 subscribers from Celina Cable Communications, Inc. on July 30, 2004; (11) acquisition of a CATV system in Florida serving approximately 4,577 subscribers from Clearlink Communications, LLC on June 30, 2004; and (12) acquisition of SMATV systems in Michigan serving approximately 1,610 subscribers from Entertainment Connections, Inc. on June 4, 2004.[1]

---

[1] There have been no acquisitions of an MVPD with 25,000 or more subscribers since Comcast's March 22, 2004 notification letter except pursuant to Comcast's April 16, 2004 letter notifying the Commission of its intent to acquire approximately 30,000 subscribers from Comcast's partnership with U.S. Cable of Coastal, Texas, L.P. As noted in its April 16, 2004 letter, because Comcast had already been attributed with these subscribers in its partnership, the acquisition had no effect on the total number of MVPD subscribers attributed to Comcast.

Comcast estimated in its March 22, 2004 letter that it was attributed with approximately 26,239,152 subscribers. Based on Comcast's second quarter 2004 subscriber numbers, available data for its partnership subscriber numbers, and assuming the most inclusive interpretation of the Commission's attribution rules, after accounting for the above transactions and adjusting for subscriber growth/loss, Comcast estimates that it is attributed with approximately 26,201,361 MVPD subscribers, or approximately 28.9% of all MVPD subscribers.[2]

Although it is unclear whether Comcast is obligated to notify the Commission of these transactions or their effect on its MVPD subscribers (in light of the D.C. Circuit's decision in *Time Warner Entertainment Co. v. FCC*[3]), Comcast nonetheless is providing the details of these transactions for the Commission's convenience.

An original and two (2) copies of this letter are submitted herewith in accordance with Section 1.1206(b) of the Commission's rules.

Sincerely,

/s/ Peter H. Feinberg
Peter H. Feinberg

cc: Kenneth Ferree, Chief, Media Bureau
William H. Johnson, Deputy Chief, Media Bureau
Best Copy and Printing Inc.

---

2 *See Kagan Media Money*, Aug. 31, 20004, at 7 (noting that there are approximately 90.6 million MVPD subscribers nationwide, thus 26,201,361 ÷ 90,600,000 = 28.9%).

3 240 F.3d 1126 (D.C. Cir. 2001) (vacating the cable horizontal ownership rules).

Comcast Cable
1500 Market Street
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Peter H. Feinberg
215.320.7934 Tel
215.981.8508 Fax

March 22, 2005

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

Re: *Ex Parte* Submission
MM Docket No. 92-264

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), pursuant to its letter of September 22, 2003, hereby notifies the Commission that it has closed the following transactions:

Acquisitions

(1) Acquisition of a SMATV system in California serving approximately 140 subscribers from Castle Cable on September 17, 2004; (2) acquisition of CATV systems in Illinois and Michigan serving approximately 2,100 subscribers from Nova Cable on September 30, 2004; (3) acquisition of a CATV system in California serving approximately 4,972 subscribers from Central Valley Cable on September 30, 2004; (4) acquisition of CATV systems in Wisconsin serving approximately 693 subscribers from Charter Communications on October 28, 2004; (5) acquisition of a SMATV system in Massachusetts serving approximately 290 subscribers from Cimarron Realty Trust on October 28, 2004; (6) acquisition of a CATV system in Washington serving approximately 302 subscribers from Wishkah Cable TV, Inc. on October 31, 2004; (7) acquisition of CATV systems in California serving approximately 926 subscribers from Cable America on October 31, 2004; (8) acquisition of a CATV system in Pennsylvania serving approximately 195 subscribers from Dubois Communications, Inc. on October 31, 2004; (9) acquisition of SMATV systems in Maryland serving approximately 158 subscribers from Avalon Landing on November 8, 2004; (10) acquisition of SMATV systems in Georgia serving approximately 145 subscribers from TradeWinds Television, LLC on November 30, 2004; (11) acquisition of SMATV systems in Oregon, Washington, and California serving approximately 415 subscribers from Priority Systems, LLC on December 31, 2004; (12) acquisition of a CATV system in Washington serving approximately 727 subscribers from GPA Cable.com, Inc. on December 31, 2004; (13) acquisition of SMATV systems in

Massachusetts serving approximately 294 subscribers from Verducci Enterprises on February 25, 2005; (14) acquisition of a CATV system in Colorado serving approximately 1,400 subscribers from Battlement Mesa Communications on February 28, 2005; (15) acquisition of a CATV system in Illinois serving approximately 6,200 subscribers from Western Cable Communications, Inc. of Illinois on February 28, 2005; (16) acquisition of SMATV systems in Maryland serving approximately 1,300 subscribers from Flight Systems on March 7, 2005; and (17) acquisition of SMATV systems in Georgia serving approximately 800 subscribers from Advanced Telemedia, Inc. on March 20, 2005.[1]

Divestitures

(1) Divestiture of 174 CATV subscribers in Washington to Wave Broadband on September 24, 2004; and (2) divestiture of a CATV system in Georgia serving approximately 4,083 subscribers to Ellijay Telephone Company on November 30, 2004.

Comcast estimated in its September 22, 2004 letter that it was attributed with approximately 26,201,361 subscribers. Based on Comcast's fourth quarter 2004 subscriber numbers, available data for its partnership subscriber numbers, and assuming the most inclusive interpretation of the Commission's attribution rules, after accounting for the above transactions and adjusting for subscriber growth, Comcast estimates that it is attributed with approximately 26,272,691 MVPD subscribers, or approximately 28.5% of all MVPD subscribers.[2]

Although it is unclear whether Comcast is obligated to notify the Commission of these transactions or their effect on its MVPD subscribers (in light of the D.C. Circuit's decision in *Time Warner Entertainment Co. v. FCC*[3]), Comcast nonetheless is providing the details of these transactions for the Commission's convenience.

---

1 There have been no acquisitions of an MVPD with 25,000 or more subscribers since the September 22, 2004 notification letter.

2 *See* Kagan Media Money, Mar. 2, 2005, at 7 (noting that there are approximately 92.2 million MVPD subscribers nationwide, thus 26,272,691 ÷ 92,200,000 = 28.5%).

3 240 F.3d 1126 (D.C. Cir. 2001) (vacating the cable horizontal ownership rules).

An original and two (2) copies of this letter are submitted herewith in accordance with Section 1.1206(b) of the Commission's rules.

Sincerely,

/s/ Peter H. Feinberg
Peter H. Feinberg

cc: Deborah Klein, Chief, Media Bureau
William H. Johnson, Deputy Chief, Media Bureau

Comcast Cable
1500 Market Street
Philadelphia, PA 19102

Peter H. Feinberg
Associate General Counsel
215.320.7934 Tel
215.320.3572 Fax

September 22, 2005

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

Re: *Ex Parte* Submission
MM Docket No. 92-264

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), pursuant to its letter of September 22, 2003, hereby notifies the Commission that it has closed the following transactions:

Acquisitions

(1) Acquisition of a SMATV system in California serving approximately 198 subscribers from Equity Residential on March 18, 2005; (2) acquisition of SMATV systems in Washington State, Oregon, and California serving approximately 482 subscribers from Priority Systems on March 18, 2005; (3) acquisition of SMATV systems in Utah and Colorado serving approximately 302 subscribers from American Entertainment Network on March 30, 2005; (4) acquisition of SMATV systems in Massachusetts and Connecticut serving approximately 483 subscribers from Avalon Collateral, Inc. on May 31, 2005; (5) acquisition of a SMATV system in Pennsylvania serving approximately 77 subscribers from Total Cable, Inc. on May 31, 2005; (6) acquisition of a SMATV system in California serving approximately 403 subscribers from Castle Cable Services, Inc. on June 21, 2005; (7) acquisition of SMATV systems in Texas serving approximately 413 subscribers from Data Cablevision on June 30, 2005; (8) acquisition of SMATV systems in Pennsylvania, Maryland, and Massachusetts serving approximately 1074 subscribers from Solantic Systems on June 30, 2005; and (9) acquisition of a cable system in West Virginia serving approximately 819 subscribers from FinCom Corporation on August 1, 2005.[1]

[1] There have been no acquisitions of an MVPD with 25,000 or more subscribers since the March 22, 2005 notification letter.

Divestiture

Divestiture of SMATV systems in Michigan serving 289 subscribers to Charter Communications on April 13, 2005.

Based on Comcast's second quarter 2005 subscriber numbers, available data for its partnership subscriber numbers, and assuming the most inclusive interpretation of the Commission's attribution rules, after accounting for the above transactions and adjusting for subscriber growth, Comcast estimates that it is attributed with approximately 26,020,171 MVPD subscribers or approximately 27.8 % of all MVPD subscribers.[2]

Although it is unclear whether Comcast is obligated to notify the Commission of these transactions or their effect on its MVPD subscribers (in light of the D.C. Circuit's decision in *Time Warner Entertainment Co. v. FCC*[3]), Comcast nonetheless is providing the details of these transactions for the Commission's convenience.

An original and two (2) copies of this letter are submitted herewith in accordance with Section 1.1206(b) of the Commission's rules.

Sincerely,

/s/ Peter H. Feinberg
Peter H. Feinberg

cc: Donna Gregg, Acting Chief, Media Bureau
William H. Johnson, Deputy Chief, Media Bureau

---

2 *See* Kagan Research LLC, *Kagan Media Index*, Kagan Media Money, Aug. 30, 2005, at 8 (noting that there are approximately 93.5 million MVPD subscribers nationwide, thus 26,020,171 ÷ 93,500,000 = 27.8%.)

3 240 F.3d 1126 (D.C. Cir. 2001) (vacating the cable horizontal ownership rules).

Comcast Cable
1500 Market Street
Philadelphia, PA 19102

Peter H. Feinberg
Associate General Counsel
215.320.7934 Tel
215.320.3572 Fax

October 21, 2005

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

Re: *Ex Parte* Submission
MM Docket No. 92-264

Dear Ms. Dortch:

Comcast Corporation ("Comcast") hereby files an addendum to its letter of September 22, 2005, which notified the Commission of acquisitions it had closed since March 22, 2005. The addendum is necessary to reflect the fact that Comcast acquired 4,898 subscribers on July 29, 2005 from Bright House Networks, LLC in Florida. When the September 22, 2005 notification was prepared, a final subscriber count was not available for this transaction and the transaction was subject to post closing adjustments.

Comcast estimated in its September 22, 2005 notification that it was attributed with approximately 26,020,171 MVPD subscribers or approximately 27.8% of all MVPD subscribers. Comcast estimates that with the 4,898 subscribers acquired from Bright House Networks it is attributed with approximately 26,025,069 subscribers and continues to be attributed with approximately 27.8% of all MVPD subscribers (26,020,171 + 4,898 = 26,025,069 subscribers ÷ 93,500,000 subscribers = 27.8%).

Sincerely,

/s/ Peter H. Feinberg
Peter H. Feinberg

cc: Donna Gregg, Acting Chief, Media Bureau
William H. Johnson, Deputy Chief, Media Bureau

Comcast Cable
1500 Market Street
Philadelphia, PA 19102-2148

Peter H. Feinberg
Associate General Counsel
215.320.7934 Tel
215.981.8508 Fax

December 20, 2005

RECEIVED ORIGINAL

DEC 20 2005

Federal Communications Commission
Office of Secretary

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

Re: [redacted]
MM Docket No. 92-264

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 76.503(g), Comcast Corporation ("Comcast") hereby notifies the Commission that during the first half of 2006 it anticipates it will acquire from Susquehanna Cable Co. ("Susquehanna") cable systems in Pennsylvania, Maine, New York, Illinois, Indiana, and Mississippi serving approximately 226,117 subscribers.[1]

In an October 21, 2005 letter to the Commission, Comcast estimated that it was attributed with approximately 26,025,069 cable subscribers or approximately 27.8% of all MVPD subscribers. On December 6, 2005, Comcast acquired approximately 1,400 subscribers in Spokane, Washington from Cable Montana. Accordingly, based on the most recent available data, and assuming the most conservative interpretation of the Commission's current attribution rules, Comcast estimates that it is currently attributed with approximately 26,026,469 cable subscribers, or approximately 27.8% of all MVPD subscribers (26,026,469 ÷ 93,600,000 = 27.8%).[2] After its acquisition of Susquehanna's cable systems, Comcast estimates that it will be attributed with approximately 26,252,586 subscribers, or approximately 28.05% of all MVPD subscribers (26,026,469 subscribers + 226,117 Susquehanna subscribers = 26,252,586 ÷ 93,600,000 total MVPD subscribers = 28.05%).[3]

---

1 Comcast believes that its ownership interest in Susquehanna's 226,117 subscribers is not attributable because Susquehanna has a single majority shareholder. *See* Comcast Petition for Waiver, filed in CSR-6950-X (public noticed Dec. 8, 2005). Concurrently with the filing of this letter, Comcast is filing with the Commission an application for consent to assignment of the licenses identified on the Attachment hereto.

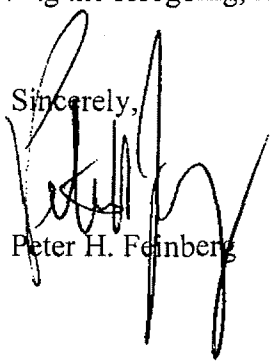
2 *See Kagan Media Money*, Oct. 25, 2005, at 4.

3 Comcast is currently in the process of obtaining approval of transactions involving Comcast, Time

An original and four (4) copies of this letter and attachment are submitted herewith in accordance with Section 1.1206(b) of the Commission's rules.

Should you have any questions regarding the foregoing, kindly contact the undersigned.

Sincerely,



Peter H. Feinberg

cc: See attached service list

Warner Inc., and Adelphia Communications Corp. (the "Adelphia Transactions"). Assuming the proposed Adelphia Transactions close, Comcast will still be attributed with fewer than 30% of all MVPD subscribers nationwide. *See* Comcast Opposition to Free Press et al. Motion, filed in MB Docket No. 05-192, at 5-6 (Nov. 7, 2005).

CERTIFICATE OF SERVICE

I, MARLENE SHOSWARD do hereby certify that I caused one copy of the foregoing Ex Parte letter of Comcast to be served by hand delivery on all parties below, this 20 th day of December 2005.

Donna Gregg
Chief
Media Services Bureau
Federal Communications
Commission
445 12th Street, S.W.
Room 3-C754
Washington, D.C. 20554

William H. Johnson
Deputy Chief
Media Services Bureau
Federal Communications
Commission
The Portals
445 12th Street, S.W.
Room 3-C742
Washington, D.C. 20554

Qualex International
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445 12th Street, S.W.
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Washington, D.C. 20554

Marlene C. Shoswarden

Comcast Cable
1500 Market Street
Philadelphia, PA 19102

Peter H. Feinberg
Associate General Counsel
215.320.7934 Tel
215.320.3572 Fax

March 22, 2006

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

Re: *Ex Parte* Submission
MM Docket No. 92-264

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), pursuant to its letter of September 22, 2003, hereby notifies the Commission that it has closed the following transactions:

Acquisitions:

(1) Acquisition of a SMATV system in Mississippi serving approximately 231 subscribers from Advanced Media Communications LLC on September 23, 2005; (2) acquisition of a SMATV system in Colorado serving approximately 180 subscribers from Denver Broadband on January 19, 2006; (3) acquisition of SMATV systems in California serving approximately 619 subscribers from Guest TV on January 12, 2006; and (4) acquisition of a SMATV system in California serving approximately 158 subscribers from The Telecom Group, Inc. d/b/a/ Gale Telecom Services on January 27, 2006.[1]

Divestiture:

Divestiture of a SMATV system in Colorado serving 75 subscribers to Falcon Video Communications, LP on December 23, 2005.

---

[1] There have been no acquisitions of an MVPD with 25,000 or more subscribers since the March 22, 2005 notification letter. On December 20, 2005, Comcast notified the Commission of its intent to acquire all of the assets of Susquehanna Cable Co. ("Susquehanna"), which serves approximately 226,117 subscribers. *See* Letter from Peter Feinberg, Associate General Counsel, Comcast to Marlene Dortch, Secretary, FCC, filed in Docket No. 92-264 (Dec. 20, 2005). Comcast currently owns an approximate 30% equity interest in Susquehanna and its subsidiaries. Comcast believes that interest is not attributable because Susquehanna has a single majority shareholder. *See* Comcast Petition for Waiver, filed in CSR-6950-X (public noticed Dec. 8, 2005). The acquisition of Susquehanna is still pending.

Based on Comcast's fourth quarter 2005 subscriber numbers, available data for its partnership subscriber numbers, and assuming the most inclusive interpretation of the Commission's attribution rules, after accounting for the above transactions and adjusting for subscriber growth, Comcast estimates that it is attributed with approximately 26,050,359 cable subscribers or approximately 27.6% of all multichannel video subscribers.[2]

Although it is unclear whether Comcast is obligated to notify the Commission of these transactions or their effect on its MVPD subscribers (in light of the D.C. Circuit's decision in *Time Warner Entertainment Co. v. FCC*[3]), Comcast nonetheless is providing the details of these transactions for the Commission's convenience.

In accordance with Sections 1.49(f) and 1.1206(b) of the Commission's rules, this ex parte letter is being filed electronically.

Sincerely,

/s/ *Peter H. Feinberg*
Peter H. Feinberg

cc: Donna Gregg, Chief, Media Bureau
William H. Johnson, Deputy Chief, Media Bureau

---

2 *See* Kagan Research LLC, *Kagan Media Index*, Kagan Media Money, Feb. 28, 2006, at 4 (noting that there are approximately 94.4 million MVPD subscribers nationwide, thus 26,050,359 ÷ 94,400,000 = 27.6%.)

3 240 F.3d 1126 (D.C. Cir. 2001) (vacating the cable horizontal ownership rules).

Comcast Cable Communications, Inc.
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Peter H. Feinberg
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215.981.8508 Fax

September 22, 2006

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

Re: *Ex Parte* Submission
MM Docket No. 92-264

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), pursuant to its letter of September 22, 2003, hereby notifies the Commission that it has closed the following transactions:

Acquisitions:

(1) Acquisition of a SMATV system in California serving approximately 619 subscribers from Pinole Pacific Corporation on January 12, 2006;[1] (2) acquisition of a SMATV system in Florida serving approximately 81 subscribers from Shore Studios, Inc. on March 9, 2006; (3) acquisition of a SMATV system in California serving 266 subscribers from Satview Broadband, Ltd. on March 28, 2006; (4) acquisition of a SMATV system in California serving approximately 21 subscribers from Satview Broadband, Ltd. on April 27, 2006; (5) acquisition of cable systems in Pennsylvania, Maine, New York, Illinois, Indiana, and Mississippi serving approximately 230,000 subscribers from Susquehanna Cable Co. on April 30, 2006;[2] (6) acquisition of a SMATV system in Washington, D.C. serving approximately 154 subscribers from Bragstorm Technology, LLC on June 22, 2006; (7) acquisition of SMATV systems in Illinois serving approximately 1,900 subscribers from TVMAX Illinois, Inc. on June 30, 2006; (8) acquisition of a SMATV system in Georgia serving approximately 421 subscribers from Priority Digital Partners III, LLC on June 30, 2006; (9) acquisition of a SMATV system in West Virginia serving approximately 249 subscribers from Basil O. Ellis d/b/a Bocco Cable Company

---

[1] This acquisition was inadvertently omitted from Comcast's March 22, 2006 subscriber notification letter.

[2] Comcast previously informed the Commission that it was acquiring the Susquehanna subscribers by letter dated December, 20, 2005, from Peter H. Feinberg to Marlene H. Dortch. Apart from the Susquehanna acquisition and the acquisitions from the Adelphia and Time Warner transactions discussed below, there have been no acquisitions of an MVPD with 25,000 or more subscribers since the March 22, 2006 notification letter.

on June 30, 2006; and (10) acquisition of a cable system in Maryland serving approximately 1,432 subscribers from Gans Communications, L.P. on September 21, 2006.

In addition to the above acquisitions, on July 31, 2006, Comcast closed the transactions to acquire certain cable systems from Adelphia Communications Corporation and to exchange certain cable systems with Time Warner Inc.[3]

Based on Comcast's second quarter 2006 subscriber numbers, available data for its partnership subscriber numbers, and assuming the most inclusive interpretation of the Commission's attribution rules, after accounting for the above transactions and adjusting for subscriber growth, Comcast estimates that it is attributed with approximately 26,913,432 MVPD subscribers or approximately 28.1% of all MVPD subscribers.[4]

Although it is unclear whether Comcast is obligated to notify the Commission of these transactions or their effect on its MVPD subscribers (in light of the D.C. Circuit's decision in *Time Warner Entertainment Co. v. FCC*[5]), Comcast nonetheless is providing the details of these transactions for the Commission's convenience.

Sincerely,

/s/ Peter H. Feinberg
Peter H. Feinberg

cc: Donna Gregg, Chief, Media Bureau

---

3 *See* Press Release, Comcast Corporation, *Time Warner and Comcast Complete Adelphia Communications Transactions* (July 31, 2006).

4 See Kagan Research LLC, *Kagan Media Index, Kagan Media Money*, Aug. 22, 2006, at 4 (noting that there are approximately 95.7 million MVPD subscribers nationwide, thus 26,913,432 ÷ 95,700,000 = 28.1%).

5 240 F.3d 1126 (D.C. Cir. 2001) (vacating the cable horizontal ownership rules).

ORIGINAL

Comcast EX PARTE OR LATE FILED

Comcast Cable
1500 Market Street
Philadelphia PA 19102

Peter H Feinberg
Associate General Counsel
215.320.7934 Tel
215.981 8508 Fax

ORIGINAL

May 9. 2007

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

FILED/ACCEPTED
MAY - 9 2007
Federal Communications Commission
Office of the Secretary

Re: Ex Parte Submission
MM Docket No. 92-264

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 76.503(g), Comcast Corporation ("Comcast") hereby notifies the Commission that during the second half of 2007 it anticipates it will acquire from Patriot Media Communications ("Patriot") a cable system serving approximately 80.000 customers in Princeton and in Somerset, Hunterdon, Morris. and Mercer Counties in New Jersey.

In our March 22. 2007 letter to the Commission. Comcast estimated that it was attributed with approximately 26.1X3.315 cable subscribers or approximately 27.05% of all MVPU subscribers. Comcast on March 31, 2007. acquired CATV systems in Pennsylvania and Ohio serving approximately 935 subscribers from Community Television Systems. Inc. and on April 30. 2007. acquired a CATV system in Pennsylvania serving approximately 1,339 subscribers from Eagles Mere/Laporte Cablevision, Inc. Comcast sold CATV systems in Idaho and Utah serving 144 subscribers to Direct Communications Cable LLC on March 30.2007. Accordingly, based on the most recent available data, and assuming the most conservative interpretation of the Commission's current attribution rules, Comcast estimates that it is currently attributed with approximately 26,185,545 cable subscribers (26,183.415 subscribers + 935 subscribers + 1339 subscribers - 144 subscribers), or approximately 27.05% of all MVPD subscribers (26, 185.545 ÷ 96,800.000 = 27.05%).[1] After its acquisition of Patriot's cable system. Comcast estimates that it will be attributed with approximately 26,265,545 subscribers. or approximately 27.13% of all MVPD subscribers (26,185,545 subscribers + 80,000 Susquehanna subscribers = 26.265.545 ÷ 96,800,000 total MVPD subscribers =

[1] *See Kagan Media Money*, January 23, 2007, at 5, (nothing that there are approximately 96.8 million MVPD subscribers nationwide.

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27.13%).[2]

An original and four (4) copies of this letter and attachment are submitted herewith in accordance with Section I.1206(b) of the Commission's rules.

Should you have any questions regarding the foregoing, kindly contact the undersigned.

Sincerely,

Peter H. Feinberg

cc: See attached service list

Comcast is currently in the process of dividing its partnerships with Insight Communications Company. Comcast is currently attributed with approximately 1,322,833 subscribers in those partnerships. After the partnerships' division, Comcast will be attributed with 683,555 subscribers, which will reduce its attributable subscribers by approximately 639,278 subscribers.

CERTIFICATE OF SERVICE

I, Deborah D. Williams, do hereby certify that I caused one copy of the foregoing Ex Parte letter of Comcast to be served by hand delivery on all parties below, this 9th day of May 2007

Monica Desai, Chief
Media Services Bureau
Federal Communications
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445 12th Street, S.W.
Room 3-C754
Washington, D.C. 20554

Rosemary C. Harold, Deputy Chief
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Deborah D. Williams

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March 22, 2007

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

Re: *Ex Parte* Submission
MM Docket No. 92-264

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), pursuant to its letter of September 22, 2003, hereby notifies the Commission that it has closed the following transactions:

Acquisitions: (1) Acquisition of a SMATV system in Illinois serving 3,670 subscribers from TVMAX Illinois, Inc. on September 29, 2006; (2) acquisition of a CATV system in Georgia serving 2,921 subscribers from City of Fairburn on October 14, 2006; (3) acquisition of a CATV system in Indiana serving 349 subscribers from Rapid Communications LLC on October 30, 2006; (4) acquisition of a CATV system in Pennsylvania serving 788 subscribers from Ward Communications on October 31, 2006; (5) acquisition of a SMATV system in California serving 117 subscribers from The Telecom Group, Inc. on November 16, 2006; (6) acquisition of a CATV system in Georgia serving 2,042 subscribers from KLIP, LLC on February 2, 2007; (7) acquisition of a SMATV system in Florida serving 141 subscribers from Advanced Technology Communications LLC on March 2, 2007; and (8) acquisition of a SMATV system in Florida serving 395 subscribers from Infinity Communications Solutions, Inc. on March 2, 2007.

Based on Comcast's subscriber numbers as of December 31, 2006, available data for its partnership subscriber numbers, and assuming the most inclusive interpretation of the Commission's attribution rules, after accounting for the above transactions and adjusting for subscriber growth, Comcast estimates that it is attributed with approximately 26,183,415 MVPD subscribers or approximately 27.05% of all MVPD subscribers.[1]

Although it is unclear whether Comcast is obligated to notify the Commission of these transactions or their effect on its MVPD subscribers (in light of the D.C. Circuit's decision in

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[1] See Kagan Research LLC, *Kagan Media Index, Kagan Media Money*, January 23, 2007, at 5 (noting that there are approximately 96.8 million MVPD subscribers nationwide, thus 26,183,415 ÷ 96,800,000 = 27.05%).

Time Warner Entertainment Co. v. FCC[2]), Comcast nonetheless is providing the details of these transactions for the Commission's convenience.

Sincerely,

/s/ Peter H. Feinberg
Peter H. Feinberg

cc: Monica Desai, Chief, Media Bureau
Rosemary C. Harold, Deputy Chief, Media Bureau

[2] 240 F.3d 1126 (D.C. Cir. 2001) (vacating the cable horizontal ownership rules).

Comcast Corporation
One Comcast Center
Philadelphia, PA 19103-2838

March 24, 2008

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

Re: MM Docket No. 92-264

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), pursuant to its letter of September 22, 2003, hereby notifies the Commission that it has closed the following transactions:

Acquisitions:

(1) Acquisition of a CATV system in California serving approximately 735 subscribers from Matrix Cablevision, Inc. on September 21, 2007; (2) Acquisition of a SMATV system in Florida serving approximately 2,950 subscribers from Strategic Technologies, Inc. on September 30, 2007; (3) Acquisition of SMATV systems in Pennsylvania, New Jersey, and Delaware serving approximately 3,277 subscribers from Viking Communications, Inc. on October 11, 2007; (4) Acquisition of a SMATV system in Tennessee serving approximately 206 subscribers from Telemedia Communications, Inc. on November 30, 2007; (5) Acquisition of a CATV system in Tennessee serving approximately 2,500 subscribers from Covington Cable on December 31, 2007; (6) Acquisition of a SMATV system in Massachusetts serving approximately 932 subscribers from Pinehills Private Network, LLC on January 22, 2008; (7) Acquisition of a CATV system in Pennsylvania serving approximately 156 subscribers from Laurel Cable on January 31, 2008; and (8) Acquisition of a SMATV system in Florida serving approximately 180 subscribers from Stellar Communications, Inc. on January 31, 2008.

Divestitures:

Sale of a CATV system in Kentucky serving approximately 674 subscribers from Comcast of Kentucky/Tennessee/Virginia, LLC to T.V. Service, Inc. on November 30, 2007.

Other Transactions Affecting Comcast's Total Attributable Subscribers:

On January 2, 2008, Comcast and Insight Communications completed a transaction dissolving their partnership that served 1,361,800 subscribers as of September 30, 2007.[1] As a result of the dissolution of the partnership, Comcast received 100% ownership of cable systems in Illinois and Indiana serving a total of 696,000 subscribers while Insight received 100% ownership of cable systems in Kentucky, Indiana, and Ohio serving a total of 665,800 subscribers. Accordingly, Comcast is no longer attributed with Insight's 665,800 subscribers.

Based on Comcast's fourth quarter 2007 subscriber numbers and available data for its partnership subscriber numbers, after accounting for the above transactions, Comcast estimates that it is attributed with approximately 25,356,268 MVPD subscribers or approximately 26.2% of all MVPD subscribers.[2]

Sincerely,

Thomas R. Nathan
Comcast Cable Communications LLC

cc: Monica Desai, Chief, Media Bureau

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1 Press Release, Comcast Corp., *Comcast and Insight Announce Completion of Insight Midwest Transaction* (Jan. 2, 2008).

2 *See* SNL Kagan, *Media Money*, Sept. 18, 2007, at 6 (noting that there are 96.9 million MVPD subscribers nationwide, thus 25,356,268 ÷ 96,900,000 = 26.2%).

Comcast Corporation
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202.379.7100 Tel
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www.comcast.com

September 24, 2008

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

Re: MM Docket No. 92-264

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), pursuant to its letter of September 22, 2003, hereby notifies the Commission that it has closed the following transactions since March 24, 2008: (1) Acquisition of a CATV system in Vermont serving approximately 1084 subscribers from North County Cablevision, Inc. on May 30, 2008; (2) Acquisition of SMATV systems in Mississippi serving approximately 405 subscribers from Apartment Mediaworks, LLC on June 2, 2008; (3) Acquisition of a CATV system in California serving approximately 2149 subscribers from Strategic Technologies, Inc. on June 3 and July 31, 2008; (4) Acquisition of a CATV system in Washington serving approximately 1366 subscribers from Community Cable on July 3, 2008; (5) Acquisition of a CATV system in California serving approximately 545 subscribers from Marcus Cable Associates, LLC.[1]

Based on Comcast's second quarter 2008 subscriber numbers and available data for its partnership subscriber numbers, after accounting for the above transactions, Comcast estimates that, under the FCC's attribution rules, Comcast currently serves approximately 25,153,060 MVPD subscribers or approximately 25.7% of all MVPD subscribers.[2]

Sincerely,

/s/ Thomas R. Nathan
Thomas R. Nathan
Comcast Cable Communications LLC

cc: Monica Desai, Chief, Media Bureau

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1 There have been no acquisitions of an MVPD with 25,000 or more subscribers since Comcast's March 24, 2008 letter.

2 *See* SNL Kagan, *Multichannel Trends: Telcos Gain the Majority of New Video Subscribers*, Aug. 12, 2008 (reporting that there are 97.682 million MVPD subscribers nationwide, thus 25,153,060 ÷ 97,682,000 = 25.7%).

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Comcast Corporation, Petitioner,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing typewritten "Brief for Respondents" was served this 9th day of January, 2009, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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