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

In the Matter of	)	
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)))	CS Docket No. 98-82
	)	CS Docket No. 96-85
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)))	MM Docket No. 92-264
	)	
The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules	))	
	)	MM Docket No. 94-150
Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests	)))	
	)	
Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry	))))	MM Docket No. 92-51
	)	MM Docket No. 87-154
Reexamination of the Commission's Cross-Interest Policy	))	MB Docket No. 02-70
	)	
Applications for the Consent to the Transfer of Control of Licenses, Comcast Corp. and AT&T Corp. Transferors, AT&T Comcast Corp. Transferree	)))	

To: The Commission

WRITTEN *EX PARTE* SUBMISSION

Consumer Federation of America, Consumers Union, the Center for Digital Democracy and the Media Access Project ("CFA, *et al.*") submit the following written submission in support of their initial comments in the above captioned docket demonstrating that the Commission cannot rely on the "any generally accepted industry data" standard for determining MVPD subscribers.

Recent disclosures of questionable subscriber counts and even outright fraud by Multichannel Video Programming Distributors (MVPDs) demonstrates that the Commission cannot reasonably rely on "generally accepted industry data," but must either rely on the more reliable

"homes passed" or collect total subscriber data itself under penalty of sanctions. Given the size of recent mergers, even the difference of a few hundred thousand subscribers can make the difference between a merger that violates the ownership cap and one that does not. The Commission must therefore have accurate and reliable information, rather than depend upon the reports of third parties beholden to those with the incentive to manipulate the data.

Furthermore, the rash of corporate scandals demonstrates the irrationality of the Commission's insulation conditions for partnerships. As Congress has recently recognized, when companies have complex and intertwined relationships, it is inevitable that a company courting the business of another will seek to curry favor even in purportedly unrelated areas. Although Congress addressed this in the context of financial services, *see* Sarbanes-Oxley Act of 2002, Pub. L. 107-204, the same logic holds true in the realm of programming.

Here to, recent events demonstrate the flimsiness of the Commission's insulation criteria as protections of the public interest. As the recent rash of corporate scandals shows, directors and officers of corporations will not merely push the envelope in the name of profit, but will violate the law if they think no one is watching. A promise to the Commission to abide by the insulation rules offers no assurance because the FCC lacks any ability to discover violations involving private conversation or proprietary documents. Indeed, it was because of the difficulty of discovering violations and enforcing sanctions that the Commission adopted attribution rules in the first place. *See Corporate Ownership Reporting and Disclosure By Broadcast Licensee*s*, reconsideration granted in part, denied in part,* 58 R.R.2d 604 (1985) at ¶ 43; *CS Docket No. 98-82, Petition for Reconsideration of CFA, et al.* at 11-14 (filed January 3, 2000), included as Appendix 1 to *Comments of CFA, et al.* filed January 4, 2001.

Absent safeguards, the public can be certain that the Commission's rules ***will*** be violated. Only a structural separation that removes the ability of partners and officers to influence the actions of the licensee by making the interest attributable can protect the public from practical ongoing violations of the Commission's ownership limits.

ARGUMENT

1. Recent Reports of Subscriber Inflation Demonstrate Why the Commission Cannot Rely on "Generally Accepted" Data and Should Use the More Reliable "Homes Passed."

On April 19, 2002, a Wall St. Journal article detailed how DirecTV inflated its subscriber figures by counting as subscribers those who had expressed interest in the service, but had not actually signed a contract ("pending customers"), many of whom did not ultimately take the service. In addition, DirecTV also counted delinquent customers whose service it had suspended. *See Wall St. J.*, "The Heats On Hughes For Inflating Subscriber Claims," April 19, 2002 ("Heats on Hughes"). According to the article, DirecTV adjusted its number of subscribers downward by over 500,000 subscribers, or 6%, as a result of discontinued counting of these non-customer "subscribers." Indeed, the article asserts that at times "subscribers" not actually receiving service accounted for 10% of DirecTV's subscriber count. *Id.*

Nor is DirecTV alone in inflating its subscriber claims. On August 17, the Associated Press reported that Charter had apparently kept 145,000 "marginal subscribers," *i.e.*, subscribers not paying their bills, on the rolls as subscribers. *Associated Press Newswire,* "Charter Under Investigation for Accounting Practices," August 17, 2002. A shareholder suit alleged Charter further inflated its numbers by counting Internet-only subscribers as video subscribers. *Id.* Adelphia, may have far exceeded that, with analysts estimating that Adelphia inflated its subscriber count by as many as 500,000 phantom subscribers. *Wall St. J. Sunday*, "Adelphia May Not Be the Bargain It

Seemed," June 9, 2002; *Los Angeles Times*, "California Adelphia Shares Fall on New Reports Telecom: Cable firm may have kept two sets of accounting books and inflated subscriber base,"June 8, 2002.

These stories provide concrete evidence of the arguments raised by CFA, *et al.* in the comments to this proceeding. As Commentors observed, smaller cable companies and rival MVPDs have every incentive to inflate their subscriber counts to impress Wall Street. As a result, the pool of total MVPD subscriber is inflated, reducing the apparent percentage of the largest MVPDs. At the same time, the largest MVPDs have incentive to "low ball" their subscriber counts to avoid violating the limit.

In the face of the above cited evidence, the Commission cannot dismiss such concerns as "idle speculation" as the cable operators urge. These articles demonstrate a pattern of behavior throughout the industry of "creative accounting" of subscribers – in some cases amounting to outright fraud. Nor did industry analysts question these numbers. Even if they had wished to do so, the industry analysts upon whom the Commission proposes to rely have no means of auditing the numbers released by the cable MSOs and other MVPDs.

Rather than trust data that has proven unreliable in the past, the Commission should rely on the much more reliable "homes passed" measure. "Homes passed" is subject to verification by those wishing to challenge a proposed merger, who can simply check reports to local franchising authorities.

Alternatively, the Commission could require all MVPDs to regularly file subscriber counts with the Commission under penalty of sanctions for falsifying information. The Commission would, of course, need to assume the administrative burden of formulating a proper form and tabulating

results. Only this, however, will provide the necessary certainty if the Commission insists on using subscriber counts rather than the more reliable "homes passed."

At the least, if the Commission is determined to rely on the demonstrably unreliable "generally accepted industry data," the Commission should immediately put all MVPD licensees on notice that it will consider deliberate overcounts provided to private entities or government agencies – such as in statements to the Securities and Exchanges Commission – evidence of bad character and that licensees jeopardize their licenses by engaging in such activities.

While the Commission might not deal so harshly with artful misrepresentations or outright lies between one private party and another, or between a private party and another federal agency, the Commission proposes here to rely the data with no means of checking its veracity. Accordingly, the same considerations that compel the Commission to require complete candor in all dealings with the Commission apply equally strongly here. *See generally Schoenbohm v. FCC*, 204 F.3d 243, 246-47 (D.C. Cir. 2000)(observing importance to Commission processes of complete candor by licensees).

2. Recent Corporate Scandal Also Demonstrate the Ineffectiveness of the Insulation Criteria.

The rash of corporate scandals has also demonstrated the folly of relying on certifications of officers and corporations that they will abide by the insulation criteria. As the ongoing revelations that WorldCom, Adelphia, and a host of other companies falsified information or engaged in "creative" accounting techniques to circumvent the clear rules of the Securities and Exchange Commission for reporting earnings.

Yet those engaged in such behavior had a far greater chance of being caught than those who would violate the insulation criteria established by the Commission. The Commission merely

requires that officers or limited partners make an unenforceable promise not to discuss programming decisions. As Commentors explained at length in previous comments, the Commission itself has previously recognized that it cannot reasonably enforce these criteria and therefore imposed the previous safeguards.

The recent events must drive home to the Commission that any system without a means of detecting violations and imposing sanctions has no chance of deterring those willing to circumvent the law. Even if the Commission blinds itself to the risk that any Commission licensee would willingly violate the law – a trust that must be regarded as willful blindness following the example of Adelphia – it does not remove the risk of "creative interpretation" in obeying the insulation criteria. As events have shown, officers and partners can convince themselves that actions which a neutral observer would find questionable or in violation are above reproach.

In the wake of these scandals, Congress recognized that its previous trust in the accounting industry had been horribly misplaced. However honest and law abiding individuals may be, the overwhelming power of self-interest must be recognized and addressed in the law. Congress recognized that most recently when it passed the Sarbanes-Oxley Act of 2002. The FCC must similarly recognize the same basic truth, that some positions create a "fundamental conflict of interest," Public Company Reform and Accounting Act of 2002, S. Rep. 107-205 at 18, and eliminate the insulation criteria.

CONCLUSION

Recent events have demonstrated the fallibility of self-reported numbers and that intrinsic conflicts of interest require structural safeguards to protect the public. The Commission should apply these lessons to the above captioned proceedings and (a) apply the "homes passed" measure rather than the "generally accepted industry data" measure of total MVPD subscribers, and (b) eliminate the "insulation criteria and make partnerships wholly attributable.

Respectfully submitted,

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