Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92-542

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| In the Matter of | ) | |
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| Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 | ) | MM Docket No. 92-264 |
| | ) | |
| Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions | ) | |

# NOTICE OF PROPOSED RULE MAKING AND NOTICE OF INQUIRY

Adopted: December 10, 1992 Released: December 28, 1992

Comment Date: February 9, 1993
Reply Comment Date: March 3, 1993

By the Commission:

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## I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992.[1] By this Notice of Proposed Rule Making and Notice of Inquiry ("Notice") we seek comment on the interpretation and implementation of the cross-ownership and anti-trafficking provisions of the 1992 Cable Act. We also seek comment on the adoption of limits on horizontal concentration and vertical integration in the cable industry.

## II. BACKGROUND

2. Section 13 of the 1992 Cable Act adds a new Section 617 to the Communications Act of 1934, as amended,[2] which establishes a three year holding requirement for cable systems. This cable anti-trafficking rule, with certain exceptions, prohibits the sale or transfer of ownership in a cable system within three years following the acquisition or initial construction of such system. Section 11 of the Cable Act of 1992 establishes several restrictions on the ownership and sale of cable systems. First it modifies Section 613(a) of the Communications Act of 1934, as amended, to prohibit the common ownership of a cable system and a multichannel multipoint distribution service ("MMDS") or a cable system and a satellite master antenna television service ("SMATV"), apart from the franchised cable service, within a franchise area. Section 11 of the new Act also amends Section 613 of the Communications Act of 1934 by adding a new subsection (f)(1), which requires the Commission to conduct a proceeding: (1) to prescribe reasonable limits on the number of cable subscribers a person can reach through cable systems owned by such person ("subscriber limits"); (2) to prescribe reasonable limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an ownership interest ("channel occupancy limits"); and (3) to consider the necessity and appropriateness of imposing limitations on the degree to which "multichannel video programming distributors" may participate in the creation or production of video programming.

3. The MMDS and SMATV cross-ownership restrictions and the anti-trafficking rule contain no specific effective date and thus, pursuant to Section 28 of the 1992 Cable Act, became effective on December 4, 1992 (the effective date of the 1992 Cable Act). However, the provision of the anti-trafficking rule which limits the amount of time that a franchise authority has to disapprove a request to transfer a cable system, will not become effective until the Commission adopts regulations regarding the information

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("Cable Act of 1992" or "1992 Cable Act").

[2] The Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. ("Communications Act of 1934").

required in connection with such requests.[3] The Cable Act of 1992 also requires the Commission to conduct a proceeding to establish subscriber and channel occupancy limits, and to consider the need for establishing limits on the participation of multichannel video program distributors in the creation and production of video programming, within one year from the date of enactment of the 1992 Cable Act (i.e., by October 5, 1993).

4. Neither the 1992 Cable Act nor its legislative history[4] makes plain Congress' rationale in enacting the anti-trafficking rule. The House Report suggests only that Congress intended this provision to restrict profiteering transactions, which are likely to adversely affect cable rates or service in the franchise area.[5] In this proceeding, we seek to identify the proper interpretation of the anti-trafficking rule and to establish an appropriate system of implementation.

5. The 1992 Cable Act and its legislative history demonstrate Congress' concern regarding horizontal concentration and vertical integration in the cable television industry. The vertical and horizontal limits required by Section 11 of the 1992 Cable Act are intended to address these concerns. In particular, Congress sought to prevent large, vertically integrated cable systems from creating barriers to entry for new programmers and from causing a reduction in the number of media voices available to consumers. In addition, the 1992 Cable Act was intended to curb the ability and the incentive of cable operators' to favor their affiliated programmers over other programming services. Congress also sought to restrict the degree to which vertically integrated program suppliers favor their affiliated cable operators over unaffiliated cable operators and other program distributors.[6]

6. In drafting the 1992 Cable Act, however, Congress also recognized that certain benefits derive from vertical integration and horizontal concentration. For example, the House Report acknowledges that vertical relationships promote diversity and make the creation of new, innovative and risky programming services possible.[7] Further, the House Report suggests that vertical relationships may be an efficient way of financing new services

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[3] 47 U.S.C. § 537 (e).

[4] See House Committee on Energy and Commerce, H.R. Rep. No. 102-628 ("House Report"), 102d Cong., 2d Sess. (1992); Senate Committee on Commerce, Science and Transportation, S., Rep. No. 102-92 ("Senate Report"), 102d Cong., 1st Sess. (1991); House Committee on Energy and Commerce, H. R. Conf. Rep. No. 102-862 ("Conference Report"), 102d Cong., 2d Sess. (1992).

[5] The House Report also indicates that the anti-trafficking rule was not meant to prevent lenders from obtaining a security interest in connection with providing financing for cable system acquisitions. House Report at 42.

[6] Cable Act of 1992, Sec. 2.

[7] House Report at 41.

and compensating cable operators for assuming some of the risk associated with the launch of new cable programming services.[8] With respect to horizontal concentration, the House Report recognizes that consolidation in the cable industry has benefited consumers by allowing efficiencies in administration, distribution, and programming procurement. Further, the House Committee concluded that large multiple system operators ("MSOs") are able to take risks that small operators would not, and that such MSOs provide a sufficient subscriber base to encourage new program entry.[9] In establishing the subscriber limits and channel occupancy restrictions required by the 1992 Cable Act, the Commission must balance the concerns expressed by Congress with the efficiencies and benefits gained by such increased concentration and integration.

## III. SALES OF CABLE SYSTEMS

7. Section 13 of the 1992 Act establishes a three-year holding period for cable systems. This restriction is largely self-executing and, thus, became effective on December 4, 1992.[10] Under the cable anti-trafficking rule, with certain exceptions, "no cable operator may sell or otherwise transfer ownership in a cable system within a 36-month period following either the acquisition or initial construction of such system by such operator."[11] For purposes of this provision, multiple system transfers which provide for the subsequent transfer of one or more such systems shall be considered part of the initial transaction. Since we intend to codify the anti-trafficking restriction into our rules, we seek comment on its interpretation and implementation.

8. Jurisdiction and Enforcement. The 1992 Cable Act does not address enforcement of the anti-trafficking rule. The 1992 Cable Act does, however, authorize the Commission to grant waivers of the rule, but only after approval by the local franchise authority, if such approval is required. We believe that the local franchise authority should have primary responsibility to monitor and enforce the anti-trafficking rule. Since local franchising authorities are responsible for awarding cable franchises and for approving sales and transfers of such franchises, we tentatively conclude that local franchise authorities can most efficiently monitor and enforce compliance with the anti-trafficking restriction. We propose to require cable operators seeking to transfer ownership in a cable system to certify to the franchise

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8 Id.

9 Id. at 43.

10 Unlike the remainder of Section 13, the 120-day limitation on franchise authority consideration of transfer requests does not become effective until the Commission adopts regulations regarding the information that a cable operator must provide to the franchise authority in connection with such requests. Conference Report at 83.

11 47 U.S.C. 537 (a).

authority that the proposed transfer satisfies the three-year holding requirement or is exempt under one of the exceptions contained in the rule. If the terms of the franchise agreement do not require approval of the franchise authority for transfer or assignment of a cable system, the cable operator should nonetheless certify to the franchising authority that such transfer is not in violation of the three year holding requirement. Operators making such a certification will be presumed to be in compliance with the anti-trafficking rule unless the local franchise authority finds to the contrary. Alternatively, a cable operator may seek a waiver of the anti-trafficking rule from the Commission in appropriate circumstances. Commenters are asked to address whether these procedures are suitable for enforcing the anti-trafficking rule. We also invite comment regarding how these procedures could best be crafted.

9. Transfer of Ownership. The term "Cable Operator" is defined in Section 602(5) of the Communications Act of 1934.[12] However, neither the Communications Act of 1934 or the 1992 Cable Act specify what shall constitute a "transfer of ownership in a cable system" subject to the anti-trafficking rule. We seek comment on the appropriate interpretation of "transfer of ownership in a cable system" for purposes of applying the three year holding period. The House Report indicates only that this provision was intended to prevent profiteering transactions and other transfers that could affect cable television rates or service.[13] The Act, itself, also indicates that Congress intended to exempt inter-company transfers of ownership. We ask commenters to identify the types of transactions Congress sought to include within the anti-trafficking rule.

10. In commenting on this matter, parties are asked to consider existing Commission rules restricting the transfer of broadcast licenses and construction permits. Specifically, we note the Commission's one-year holding requirement applicable to broadcast licenses obtained through the comparative hearing process or pursuant to our Minority Ownership Policy.[14] This one-year holding requirement is applicable only to applications for assignment or transfer of control of such licenses or construction permits pursuant to Section 310(d) of the Communications Act of 1934.[15] Thus, transfers of ownership interests which do not result in a transfer of

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12 "Cable Operator" is defined as "any person or group of persons who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. § 522 (5).

13 House Report at 119.

14 See 47 C.F.R. § 73.3597 (a).

15 Section 310(d) of the Communications Act of 1934, as amended, requires Commission approval prior to the transfer or assignment of a construction permit or station licenses or transfer of control of any corporation holding such permit or license. 47 U.S.C. § 310 (d).

control or assignment of license are not subject to this restriction. Similarly, the Commission's previous broadcast anti-trafficking rule was applicable only upon assignment or transfer of control of the broadcast license.[16] Commenting parties are asked to address whether "transfer of ownership in a cable system" should be defined by reference to the broadcast transfer of control standards implemented pursuant to Section 310(d) of the Communications Act of 1934.[17]

11. In this regard we note that, for purposes of Section 310(d) of the Communications Act of 1934, "transfer of control" is not limited to transfer of legal control in a formal sense, but may also consist of transfer of actual control by virtue of the particular facts presented.[18] Thus, transfers of control are not limited to transfers of majority stock ownership, but may include any transfer of actual working control in whatever manner exercised (i.e. transfers of minority stock interests or changes in the ability to appoint the board of directors).[19] Accordingly, determinations regarding what constitutes a transfer of control in the broadcast area are made by the Commission on a case-by-case basis.

12. We tentatively conclude that our broadcast transfer of control standards are appropriate to implement the cable anti-trafficking rule. We ask commenters to indicate whether those standards will provide cable operators and franchise authorities with sufficient guidance regarding application of the anti-trafficking restriction, and encompass the types of transfers that Congress intended to restrict. Alternatively, it may be preferable to establish a fixed transfer of ownership threshold for purposes of applying the anti-trafficking rule. For example, the anti-trafficking rule could be interpreted to apply only to changes in who controls 50% or more of the outstanding equity in a cable system. We ask commenters to indicate whether this definition would be consistent with the objectives of the anti-trafficking rule or whether a standard based on transfer of some lesser percentage of ownership (e.g. 25%, 30%, 40%) would be more appropriate. Finally, the attribution criteria contained in Section 73.3555 (Notes) of our Rules could also be used to define ownership interests subject to the anti-trafficking rule.[20] However, it does not appear that Congress

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16 See Report and Order in Docket No. 13864, 32 FCC 689 (1962). The three-year holding period was eliminated by the Commission in 1982 and the underlying anti-trafficking policy was revised. Report and Order in MM Docket No. 84-19, 101 FCC 2d 402 (1984).

17 47 U.S.C. § 310(d).

18 See Lorain Journal Co. v. FCC, 351 F. 2d 824 (D.C. Cir. 1965), cert den., 383 U.S. 967 (1966).

19 See 47 C.F.R. § 73.3555 (Note 1); 47 C.F.R. § 76.501 (Note 1).

20 The attribution criteria generally define what interests held in or relationships to media entities will be considered "cognizable" for purposes of applying the multiple ownership rules. They constitute the means by which

intended the anti-trafficking rule to restrict transfers of such noncontrolling ownership interests. Such transfers are unlikely to be engaged in for purposes of profiteering or to affect cable rates or service. We invite comment regarding which of these standards would be most appropriate in implementing the cable anti-trafficking provision in accordance with Congressional intent.

13. We also invite comment regarding what, if any, procedures the Commission should establish for resolution of complaints arising from determinations under this provision. Commenters should indicate whether the Commission or the federal or state courts should resolve complaints involving the application of the anti-trafficking rule to a particular transaction. Preliminarily, we believe that such complaints should be resolved at the local level, either according to relevant procedures contained in the franchise agreement or by commencement of an action in the state or federal courts. Alternatively, we ask commenters to indicate whether the Commission should establish specific procedures to be followed in resolving disputes regarding application of the anti-trafficking rule to ensure consistency in the interpretation of the rule and to allow for participation by all interested parties. If such procedures are appropriate, commenters should indicate whether the provisions of Section 76.7 of the Commission's rules (the special relief rules), or some modified form of these procedures, would be acceptable. The Cable Act of 1992 is also silent regarding what, if any, sanctions should be applicable to willful violations of the anti-trafficking rule. Commenters should address what sanctions would be appropriate for transfers in violation of the anti-trafficking rule. We note that although some sanctions such as forfeiture may be applicable (via Section 503 of the Communications Act), we do not interpret the anti-trafficking provision as necessarily requiring reversal of transfers of ownership based on good faith interpretation of the rule, where such transfers are subsequently found to violate the rule.

14. The 1992 Cable Act does not indicate how the three-year holding period should be calculated. Initial construction might commence, for example, on the date of activation of a constructed system or upon award of a cable franchise. Similarly the date of an acquisition or transfer might be the effective date of the transfer or assignment agreement or it may be the date an application for transfer or assignment is filed with the local franchise authority. Commenters are requested to specify what dates should be used when calculating the period between initial construction and transfer or assignment of a cable system. Commenters should also specify what dates

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the broadcast multiple ownership rules are implemented. Under existing standards, all non-voting stock interests are generally not attributable. Voting stock interest of 5% or more are generally considered attributable. Passive investors may hold up to 10% of a company's voting stock without incurring attribution. The Commission is currently considering raising the attribution threshold from 5% to 10% and from 10% to 20% for passive investors, and expanding the class of passive investors. <u>See</u> <u>Notice of Proposed Rule Making and Notice of Inquiry</u> in MM Docket No 92-51, 7 FCC Rcd 2654 (1992) ("Capital Formation Proceeding").

should apply when calculating the period between initial acquisition of a cable system and transfer or assignment of such system.[21] In this regard, it may be relevant to note that the one-year holding period applicable to broadcast licenses commences on the date of initiation of program tests and terminates on the date the application for transfer or assignment of license is filed with the Commission.[22] We seek comment regarding the appropriate treatment of MSO transfers under this provision. It does not appear that the anti-trafficking restriction was meant to forestall MSO transfers; however, it is unclear whether the three-year holding period must be satisfied for each system owned by an MSO. Commenters should indicate whether the Commission should establish separate procedures for determining compliance with the anti-trafficking provision for transfers or assignments of MSOs.

15. Exceptions. The Cable Act of 1992 establishes three exceptions to the anti-trafficking restriction. We seek to clarify implementation of these exceptions, and ask commenters to indicate what types of transactions are contemplated by each exception. The first exception excludes any transfer or assignment of a cable system which is not subject to Federal income tax liability. This exception seems to address transactions involving tax certificates issued by the Commission pursuant to Section 1071 of the Internal Revenue Code ("Code"), which allow deferral of gains taxes for businesses acquired by minorities.[23] This exception may also be applicable to so-called "tax free" exchanges of assets under Section 1031 of the Code and to "tax free" reorganizations under Section 368 of the Code. Although these transactions are referred to as tax free, they essentially allow deferral of income recognition. We tentatively consider all of these transactions to be eligible for this exception. These transactions are not subject to current tax liability and are consistent with the objectives of the anti-trafficking provision. We seek comment, however, regarding whether the payment of cash or other taxable consideration, to equalize the value of assets in like system exchanges, should render such a transaction ineligible for this exception. Commenters are requested to address these tentative conclusions and to identify any other transactions that may qualify for this exception.

16. The second exception excludes any sale required by operation of any law, or by any act of any Federal agency, any state or political subdivision

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21 We note that we do not believe that the date of acquisition should be effected by "installment" or "stepped" transactions, where either payment or transfer of ownership is incremental. In our view, the date of acquisition in such incremental transactions should relate back to the date of the transaction that initially transfers control as ultimately defined in this proceeding.

22 47 C.F.R. § 73.3597 (b).

23 We note that the one-year broadcast holding period, contained in Section 73.3597 (a) of the Commission's Rules includes, inter alia, an exemption for transactions involving an assignment or transfer to a minority owned or minority controlled entity.

thereof, or any franchising authority. We believe that this exception was intended primarily to enable franchise authorities or other government entities to require the transfer of a cable system that is in violation of its franchise agreement or that is otherwise providing inadequate service. This exception may also be interpreted to include transfers of cable systems in the context of bankruptcy proceedings or other types of receivership. We seek comment on these interpretations and on any other types of transactions that may be contemplated by this exception. We also note that Section 7 of the 1992 Cable Act permits local and municipal authorities to operate cable systems in their franchise area without obtaining a franchise. We ask commenters to indicate whether sales of municipally operated cable systems were also intended to be exempt from the anti-trafficking rule pursuant to this exception.

17. Third, the 1992 Cable Act exempts any sale, assignment or transfer to one or more purchasers, assignees or transferees controlled by, controlling, or under common control with the seller, assignor or transferor. We believe that this exception was intended to apply to pro forma transfers as defined in Section 73.3540(f) of our Rules. The House Report indicates that a broad definition of control was intended to apply to this exception. The House Report suggests that this provision was meant "to exempt transfers between affiliated entities, whether the purchasing entity is controlled by, controlling, or under common control with the selling entity by virtue of stock ownership, other equity or debt ownership or management control."[24] We ask commenters to indicate what other inter-company transfers should be included within this exception. We note that we interpret this provision as not requiring a new three-year holding period to commence following each transfer to an affiliated entity. We thus tentatively conclude that the acquisition date following a transfer between affiliated entities should relate back to the original date such system was constructed or acquired by the affiliated transferor.

18. Finally, it is our initial view that cable operators seeking to transfer ownership of a cable system prior to the expiration of the statutory three-year holding period should submit to the franchise authority all information necessary to support a certification that the proposed transfer satisfies one of the stated exceptions. We ask commenters to indicate what types of information should be required in order to establish eligibility under each of these exceptions.

19. Waivers. The 1992 Cable Act empowers the Commission, consistent with the public interest, to waive the three-year holding requirement. The Commission is specifically directed to use its waiver authority to permit "appropriate transfers in cases of default, foreclosure, or other financial distress." It is unclear whether Congress intended to grant the Commission general waiver authority, while specifying certain conditions in which the Commission should exercise its waiver authority, or whether Congress intended to limit the Commission's waiver authority to only those specific circumstances. We seek comment on which interpretation Congress intended.

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24 House Report at 119.

If the Commission is granted general waiver authority by this provision, we request comment on whether we should establish specific waiver criteria regarding the types of showing that would be required in connection with waiver requests. In addition, the 1992 Cable Act does not define the term "financial distress." Commission Rules currently provide an exception to the one-year broadcast holding period where a broadcast station establishes that because of the unavailability of capital a proposed assignment or transfer would satisfy the public interest.[25] We ask whether this or some similar criterion should be used to define "financial distress" in this context.

20. If the approval of the franchise authority is required, the 1992 Cable Act provides that the Commission shall not waive such requirements unless the franchise authority has approved a proposed transfer. We propose that in such circumstances, the Commission may nonetheless grant waivers prior to franchise authority consideration, provided such waivers are contingent upon ultimate approval by the franchising authority. We believe that such procedures are consistent with Congressional intent and will enhance the speed and efficiency of the waiver process. We ask commenters to indicate whether such conditional waivers would be appropriate under the 1992 Cable Act. We also ask commenters to indicate whether franchise authority approval should create a presumption that the Commission will grant a waiver authorizing a particular transfer.

21. Limitation on Duration of Franchise Authority Power to Disapprove Transfers. Subsection (e) of the anti-trafficking rule limits the amount of time that a franchising authority has to disapprove a transfer of a cable system. After the initial 36-month period following the construction or acquisition of a cable system, the franchise authority has 120 days to act upon a request for transfer of such system, if franchise authority approval is required. If the franchise authority fails to act within 120 days, such request shall be deemed granted, unless the requesting party and the franchise authority otherwise agree.

22. Subsection (e) also indicates that the Commission will establish regulations establishing the information that will be required in connection with such a request for transfer. The language of the 1992 Act implies that the 120-day approval period will not commence unless a transfer request is accompanied by all information that the Commission requires in connection with such transfer requests. The 1992 Cable Act does not specifically direct the Commission to adopt regulations establishing informational requirements in connection with transfer requests. The Conference Report, however, indicates that the 120-day period will not apply to any transfer request prior to Commission adoption of such regulations.[26]

23. We seek comment regarding what type of informational requirements the Commission should establish in connection with transfer requests. The House Report suggests that such information requirements may include detailed

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25 47 C.F.R. § 73.3597(a)(4).

26 Conference Report at 83.

financial information showing the effect of the proposed transfer on rates and service in the franchise area, all contracts and agreements underlying the proposed sale or transfer; information concerning the legal, technical and financial qualifications of the proposed transferee; and information concerning the transferee's plans regarding expansion or elimination of services.[27] The franchise authority may also in its discretion ask for such other information as it deems appropriate in evaluating the effects of a proposed transfer. We question whether such extensive information is necessary in connection with every transfer of a cable system. We request comment on what types of information are necessary for franchise authorities to evaluate requests for approval of transfers or assignments of cable systems. We seek to establish a minimum standard for such informational requirements and allow franchise authorities to request any additional information that may be necessary to evaluate a particular transfer.

## IV. MMDS/SMATV CROSS-OWNERSHIP PROHIBITION.

24. Section 11 of the 1992 Cable Act amends Section 613(a) of the Communications Act of 1934, as amended, to add a prohibition against common ownership of a cable system and either a multichannel multipoint distribution (MMDS) or a satellite master antenna television (SMATV) service in its franchise area.[28] Specifically, the statute provides that a cable operator may not hold a license for MMDS service or offer SMATV service that is separate from and in addition to its franchised cable service in the franchise area served by its cable system. This provision is intended to address Congress' concern that common ownership of different means of video distribution may reduce service competition.[29]

25. We have already adopted regulations implementing a cable/MMDS cross-ownership prohibition in a recently concluded rulemaking initiated to facilitate the provision of "wireless cable" service[30] to the public.[31] The fundamental purpose of that proceeding coincides with that underlying

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27 House Report at 120.

28 The new section is designated as Section 613(a)(2). See 47 U.S.C. § 533(a). This provision is self-executing and became effective on December 4, 1992 (the effective date of the 1992 Act).

29 Senate Report at 46.

30 Wireless cable is a multichannel video service that is similar to cable television in the type of programming it provides, but differs from cable in that it uses designated microwave radio channels rather than hardwire to transmit that programming to subscribers.

31 Report and Order in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (1990); Order on Reconsideration in Gen. Docket Nos. 90-54 and 80-113, 6 FCC Rcd 6764 (1991); Second Report and Order in Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991).

Congress' promulgation of the subject cross-ownership prohibition: "to enhance the potential of wireless cable as a competitive force in the multichannel video distribution marketplace."[32] The recently adopted rules "prohibit, directly or indirectly, ownership interests in, control of, or leasing of ... MMDS ... by cable television companies in geographic areas which overlap the ... MMDS protected service areas ... for cable franchise areas lacking two or more competing cable television companies."[33] Our current rules include the attribution rules and definitions of "control," "areas" and "overlap" necessary to effectuate this prohibition. (47 C.F.R. §21.912.) Our rules also provide for limited exceptions to the general prohibition which the Commission has already determined will be in the public interest, i.e., a exception for rural areas (47 C.F.R. §21.912(d)(1) and an exception for local programming (47 C.F.R. §21.912(e)).

26. We believe these recently adopted rules are consistent with and effectively implement the cross-ownership prohibitions of the 1992 Cable Act as regards the MMDS service.[34] We believe the same rules and their implementing criteria are appropriate for the cross-ownership prohibitions as they relate to SMATV. Commenters are invited to address these tentative conclusions. We note that in the wireless cable rule making, we rejected the use of the broadcast attribution rules for this provision. In light of our recent protracted rule making efforts on this issue, we do not believe it is necessary or appropriate to reopen this issue as it pertains to MMDS (and SMATV) cross-ownership restrictions.[35] We also observe that the legislative history indicates that this provision is not intended to prevent the common ownership of a SMATV system that itself qualifies as a "cable system" under section 602(7)[36] of the Communications Act of 1934, as amended, and a second separate stand-alone SMATV system.[37]

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32 Second Report and Order in Gen. Docket No. 90-54, 6 FCC Rcd 6792, 6793 (1991).

33 Order on Reconsideration in Gen Docket Nos. 90-54 and 80-113, 6 FCC Rcd 6764 at para. 55 (1991).

34 We have not determined whether, and to what extent, the existing cable/MMDS cross-ownership rules and the 1992 Cable Act cross-ownership restriction apply to Local Multipoint Distribution Service ("LMDS"). This issue is addressed more fully and comments are requested in the Notice of Proposed Rulemaking in CC Docket 92-297, released December 10, 1992.

35 In its discussion of horizontal concentration and vertical integration, the Senate Report indicates that it is the "intent of the Committee that the FCC use the attribution criteria set forth in Section 73.3555 (notes) or other criteria the FCC may deem appropriate." See 47 C.F.R. § 73.5555, the ownership attribution rules for broadcast stations.

36 47 U.S.C. § 522 (7).

37 Senate Report at 81.

27. The 1992 Cable Act provides for the grandfathering of cross-ownership situations that already existed on October 5, 1992 (the enactment date of the 1992 Cable Act).[38] We note that the current Commission Rules grandfathered those cable/MMDS cross-ownership interests that existed on their effective date. In view of our tentative position that our existing rules fulfill the 1992 Cable Act's mandate with respect to MMDS, we propose to continue to grandfather only those cable/MMDS cross-ownership interests. No additional cable/MMDS cross-ownership relationships would be grandfathered pursuant to the terms of the 1992 Cable Act in any event. By contrast, cable/SMATV cross-ownership interests will be grandfathered as of October 5, 1992. Furthermore, the 1992 Act permits the Commission to waive the statutory prohibition against cable/MMDS and cable/SMATV cross-ownership to the extent that we determine that cross-ownership is needed to ensure that all significant portions of a franchise area are able to obtain video programming.[39] We request comment on whether the existing public interest waiver standard for cable/MMDS situations is sufficient or whether we should establish additional rules or criteria for such waivers in the context of this proceeding. If we adopt such criteria, what types of information would be needed to indicate that cross-owned systems serving the same franchise area provide the only means to distribute multichannel video program service to the public? Finally, we note that the rules and procedures specified in Section 76.7, the special relief rules, are applicable for the filing of most requests for waiver of the cable television rules. Should waivers of these cross-ownership rules also be subject to these provisions? Are there any modifications needed to implement these specific cross-ownership waiver requests?

28. The 1992 Cable Act does not address enforcement of this cross-ownership provision nor require the Commission to monitor ownership in this regard. With respect to enforcement, we believe that the Commission should establish procedures for consideration of complaints. We ask for comment regarding what procedures should be adopted to allow participation by all interested parties. We also seek comment on whether we should apply the provisions of Section 76.7 of the Commission's rules (the special relief rules), or some modified form of these procedures, in such cases.[40] Alternatively, cable operators could be required to provide information regarding ownership of MMDS services or SMATV systems in filings required of

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38 47 U.S.C. § 533 (a)(2)(A).

39 47 U.S.C. § 533 (a)(2)(B).

40 In particular, we note that Section 8 of the Communications Act of 1934 as amended requires parties filing requests for special relief in the cable area to pay filing fees, yet mass media enforcement actions are generally exempt from the fee requirement. See 47 U.S.C. § 158. See also 47 C.F.R. § 76.7.

cable systems, such as the annual Form 325 or on CARS license applications.[41] We ask commenters to consider whether this type of reporting requirement is necessary. We seek to develop the least burdensome approach that is consistent with ensuring compliance. In this regard, we request suggestions regarding the specific information that would be useful should a reporting requirement be deemed necessary.

## V. SUBSCRIBER LIMITS.

29. Seeking to enhance competition in the development, acquisition and delivery of video programming, Section 11 of the 1992 Act requires the Commission within one year to conduct a proceeding to establish horizontal ownership limits. Specifically, Section 11 requires the Commission to "prescribe 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."[42]

30. In establishing subscriber limits, as well as the other ownership limits mandated by Section 11, the 1992 Cable Act directs the Commission to consider the following public interest objectives of the legislation: (A) to ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer; (B) to ensure that cable operators do not favor affiliated video programmers in determining carriage and do not unreasonably restrict the flow of video programming of unaffiliated video programmers to other video distributors; (C) to take account of the market structure, ownership patterns, and other relationships of the cable industry, including the market power of the local franchise, joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests; (D) to take into account any efficiencies and other benefits that might be gained through increased ownership or control; (E) to ensure that such rules and regulations reflect the dynamic nature of the communications marketplace; (F) to impose limitations that will not prevent cable operators from serving previously unserved rural areas; and (G) to impose limitations that will not impair the development of diverse and high quality programming.[43] In commenting on the provisions of Section 11, commenters are urged to consider these objectives.

31. The establishment of subscriber limits is intended to address Congress' concern regarding increasing horizontal concentration in the cable industry. Horizontal concentration in this context is based on the share of subscribers served by individual cable companies through their ownership or control of local cable systems. The Senate Report noted that TCI, the

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41 For example, these forms could be amended to require certification that the cable operator is in compliance with the rules or they could require more specific information regarding actual ownership of these media.

42 47 U.S.C. § 533 (f)(1)(A).

43 47 U.S.C. § 533 (f)(2).

nation's largest cable operator, serves 14.3 million subscribers (about 24% of the nation's cable subscribers), Time-Warner reaches about 6.4 million subscribers (12% of the nation's subscribers) and the next three largest MSOs, Continental, Comcast and Cox, together control about 5.8 million subscribers (11% of the nation's subscribers).[44] According to information provided to Congress, the top five firms thus serve almost half of the nation's cable subscribers. Congress concluded that this degree of concentration, though low relative to other industries, may enable some MSOs to exercise excessive market power, or monopsony power, in the program acquisition market.[45]

32. In the 1992 Cable Act, Congress found that the increased concentration in the cable industry had the potential to create barriers to entry for new programers and to reduce in the number of media voices available to consumers.[46] Although under traditional antitrust analysis the cable industry is relatively unconcentrated, the 1992 Cable Act requires the Commission to establish limits on the number of subscribers a single entity can reach through cable systems owned by such person.[47] The Conference report is silent regarding what shall constitute reasonable limits for this purpose. The House Report, however, suggests that antitrust analysis should not be the sole measure of concentration in the cable industry.

33. The Commission's own analysis regarding horizontal concentration also concluded that the cable industry has become increasingly concentrated. In its 1990 Report to Congress, the Commission noted that in 1989 the two largest MSOs together served almost 34% of all cable subscribers nationwide,

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[44] The Committee's statistics are derived from Paul Kagan Associates data and were current as of 1990. More recent data regarding the number of subscribers reached by the 100 largest MSOs can be obtained by reference to Warren Publishing, Inc., Television & Cable Fact Book, Cable & Services Volume No. 59 (Services-Part III), 1992 Edition, p. C-389.

[45] House Report at 42-43.

[46] 1992 Cable Act, Section 2 (a)(4).

[47] Under the two prevailing measures of market concentration -- the four firm concentration ratio ("Four Firm Ratio") and the Hirfindahl-Hirschman Index ("HHI"), the cable industry is not concentrated. The Four Firm Ratio measures the percentage of the market captured by the four largest companies in the market. The HHI reflects the distribution of market share among all firms in a given market, giving proportionately greater weight to the market shares of the larger firms. A market is generally considered concentrated when one firm, or a small group of firms, has a sufficient share of the market to exercise power over it. The Justice Department considers an industry concentrated when the HHI exceeds 1800 (although an HHI that exceeds 1000 prompts further evaluation) or when the four firm ratio exceeds 50%. According to the House Report, the HHI for the top 20 MSOs is 491 and the Four Firm ratio for the largest MSOs is 36%, well below the Justice Department's threshold. See House Report at 42.

and that the top 10 cable companies served 32.9 million of the nation's 53 million subscribers.[48] We indicated that this degree of concentration among companies that frequently enjoy a monopoly franchise raised "the question of whether MSOs (particularly the largest MSOs) have attained sufficient market power to extract unreasonable concessions from program suppliers and to unfairly restrain competition from alternative distribution services."[49] The Commission also indicated that, on the local level, relatively few cable operators face competition from other multichannel video distributors for either programming or subscribers.[50] In fact, we concluded that it was this level of local concentration that provided MSOs with the potential to take anticompetitive action against programming services and competing multichannel providers.[51]

34. On the other hand, the Commission indicated in its 1990 Cable Report that consolidation in the cable industry produced significant benefits and efficiencies to consumers.[52] We noted that higher concentration levels enabled cable companies to take advantage of economies of scale and foster investment in more and better original programming and a wealth of viewing options for consumers. Further, we found that the growth of MSOs had produced significant efficiencies in administration, distribution and procurement of programming which can promote the introduction of new programming services. The Senate Report similarly acknowledged that horizontal concentration may reduce programmers' transaction costs by eliminating the need for negotiation with each of thousands of local cable systems throughout the country.[53] Congress also recognized that horizontal concentration may help promote the introduction of new services into an increasingly competitive programming market by providing capital and a ready subscriber base for such new services.[54]

35. In prescribing subscriber limits, we must, as a preliminary matter, determine the markets in which such subscriber limits should be established. Horizontal concentration may be measured on a local, regional

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48 Report in MM Docket No. 89-600, 5 FCC Rcd 4962, 5005 (1990) ("1990 Cable Report").

49 Id at 5003.

50 Id. at 5004.

51 Id at 5006. In view of our finding in the 1990 Cable Report, we seek comment regarding whether it would be appropriate in calculating compliance with the national subscriber limits to subtract the number of subscribers reached or homes passed by cable systems in areas where effective competition is established.

52 1990 Cable Report at 5009.

53 Senate Report at 33.

54 House Report at 43.

or national basis. The legislative history of the 1992 Cable Act focuses upon the establishment of national subscriber limits, although regional concentration is also mentioned.[55] In the 1990 Cable Report, we concluded that the level of national concentration in the cable industry was not sufficient to warrant regulatory intervention. We nonetheless indicated that "some cable networks operate on a regional rather than a national basis and an MSO could be sufficiently concentrated to occupy an anticompetetive position at the regional level without possessing a large enough market share to disrupt the national markets."[56] Commenters are asked to indicate whether regional or national subscriber limits, or both, are necessary or appropriate to implement the objectives of the 1992 Cable Act.

36. The Cable Act of 1992 does not define the term "reach" in the context of subscriber limits. Thus, the Commission may prescribe subscriber limits either as a share of cable subscribers or as a share of homes passed. Commenters should address which of these measures should be used to implement the subscriber limits established in this proceeding. We recognize that subscriber-based measures have traditionally been used for purposes of analysis. Nonetheless, we believe that homes passed may be a more appropriate and practical measure for this purpose, since it encompasses all television households for which a particular cable operator provides access to cable programming. Moreover, existing Commission rules applicable to cable/network cross-ownership apply a homes passed measure to implement both national and local subscriber limits.[57] In the Cable/Network Order, we determined that use of a homes passed measure was preferable because a subscriber-based limit could discourage systems from adding new subscribers. We observed that a homes passed measure would be more stable than a subscriber based limit, given the frequent changes in cable subscribership. For the foregoing reasons and to provide consistency in the interpretation of our rules, we tentatively propose to use a homes passed measure to implement the cable subscriber limits established in this proceeding. We seek comment on this proposal.

37. Commenters are also asked to indicate what percentage of homes passed nationally would constitute a reasonable limit on horizontal concentration. Considering the existing market structure and ownership patterns, and the efficiencies and economies of scale resulting from horizontal relationships, we ask whether a limit in the range of 25% to 35% of homes passed would be reasonable or whether some other percentage would be more appropriate. In this regard, commenters should indicate at what

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55 Senate Report at 32-3.

56 1990 Cable Report, 5 FCC Rcd at 5006.

57 47 C.F.R. § 76.501 The cable/network restriction was recently relaxed to allow national networks to own cable systems, provided that no such combination exceeds 10% of homes passed by cable nationwide or 50% of homes passed by cable within an ADI. See Report and Order in MM Docket No. 82-434, 7 FCC Rcd 5781 (1992) ("Cable/Network Order") (petitions for recon. pending).

percentage of homes passed a single MSO could preclude the success of a new cable service. Are there recent examples of this type of conduct? How many subscribers must be cleared nationally to launch and sustain a new cable programming service? Does the number of subscribers needed vary depending on the type of programming involved? Is it relevant that the Commission's broadcast multiple ownership rules limit the audience reach of television stations in which a person can hold an attributable interest to 25% of television households nationwide?[58] Is it relevant that Commission Rules permit national television networks to own cable systems which reach 10% of the homes passed nationally? This 10% limitation applicable to network-owned cable systems takes into consideration the national audience reach and ability to control programming associated with a broadcast network and, therefore, may not be particularly relevant in the context of crafting national ownership limits for non-network-owned cable systems. It is also important to note that the Senate Report indicates that the 1992 Cable Act was not intended to imply that any existing MSO must be divested.[59] Accordingly, commenters are asked to indicate whether divestiture should be required in connection with the subscriber limits we ultimately adopt.

38. The 1992 Cable Act and the Conference Report are silent regarding the appropriate standard for determining ownership of cable systems in connection with application of the subscriber limits. The Senate Report, however, indicates that the Commission should use the attribution criteria set forth in Section 73.3555 (Notes) of our Rules, or such other criteria as the Commission deems appropriate in determining ownership for purposes of applying the subscriber limits.[60] The attribution criteria contained in Section 73.3555 of our Rules may be useful for determining ownership in connection with the subscriber limits we ultimately establish.[61] It should be noted, however, that these attribution criteria were intended to include

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[58] 47 C.F.R. § 73.3555. This section also provides for increased ownership of broadcast stations representing up to 30% of the television households nationwide if the additional stations are minority owned. We seek comment on whether we should adopt a similar provision in the cable context. The Commission currently has pending a Notice of Proposed Rulemaking in MM Docket No. 91-221 which proposes to relax or eliminate the national audience reach limits applicable to broadcast television. 7 FCC Rcd 4111 (1992).

[59] Senate Report at 34. According to the recent data from Warren Publishing, Inc., Television & Cable Fact Book, Cable & Services Volume No. 59 (Services-Part III), 1992 Edition, p. C-389, TCI, the nation's largest MSO, currently reaches 24% of homes passed nationally, and thus it appears that divestiture would not be required if the limit set is within our suggested range of 25% to 30% of homes passed (or higher).

[60] Senate Report at 80.

[61] In the event that we increase the attribution threshold or otherwise modify the attribution criteria as proposed in the Capital Formation Proceeding, commenters should indicate whether we should similarly modify those criteria for purposes of the cable ownership rules.

ownership thresholds which may impart the ability either to influence or control management or programming decisions of a broadcast licensee, and consequently these criteria may not be appropriate to address the concerns at issue in this proceeding. We seek comment regarding whether these attribution criteria (or a modified version thereof) are appropriate for implementing cable subscriber limits or whether some other attribution criteria would be more suitable. In this regard, commenters should also indicate if there are other types of ownership interests, such as non-equity interests, that should be cognizable for purposes of determining ownership under this provision.

39. Jurisdiction and Enforcement. The 1992 Cable Act does not specifically address how subscriber limits are to be monitored and enforced. In considering this issue it is important to note that presently few if any cable systems are in the range of the proposed subscriber limits. Moreover, subscriber information is publicly available from numerous sources. Consequently, we tentatively conclude that reporting requirements may be unnecessary in connection with enforcing the subscriber limits we ultimately adopt. In the alternative, we believe that a system of certification would be an appropriate means of enforcing the subscriber limits imposed. For example, we could propose requiring cable operators upon transfer or assignment of a cable system to certify that such transfer will not result in ownership of cable systems exceeding the subscriber limits established by the Commission. We seek comment regarding whether such a certification should be made to the local franchise authority, having jurisdiction over the cable system being acquired, or to the Commission. If a system of certification is appropriate, we request comment on whether all cable systems should be required to make the requisite certification or only the five or ten largest cable systems. We also request comment on whether such a certification is necessary at all. Alternatively, we may enforce the subscriber limits on a complaint only basis, pursuant to which parties believing that a particular acquisition would result in a violation of the subscriber limits, would notify the local franchise authority of the acquiring station of the potential violation. We seek comment on these proposals and ask commenters to indicate if there are other more appropriate procedures to enforce the subscriber limits. We also seek comment on whether waivers or exceptions to the subscriber limits should be obtainable in appropriate circumstances. For example, should waivers be granted allowing additional ownership interests for cable systems that expand existing systems to previously unserved rural areas?

40. The Senate Report states that because the cable market is dynamic, the Commission should revisit these limitations at appropriate times to ensure that they continue to accurately reflect the objectives of the legislation.[62] We believe that periodic review of the ownership limits is important to the continued growth and development of the cable industry. Consequently, we propose to institute a review of the subscriber limits every five years to determine whether such limits are reasonable under the prevailing market conditions. Commenters are asked to indicate whether such

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62 Id. at 80.

review procedures are adequate to ensure that subscriber limits continue to serve the objectives for which they were established.

## VI. CHANNEL OCCUPANCY LIMITS.

41. Section 11 of the 1992 Cable Act requires the Commission within one year to "prescribe 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."[63] Vertical integration in this context refers to common ownership of both cable systems and program networks, channels, services or production companies.

42. In the 1992 Cable Act, Congress concluded that the cable industry has become vertically integrated and that cable operators have the ability and the incentive to favor their affiliated programmers. Such concentration, Congress determined, could make it difficult for non-cable affiliated programmers to secure carriage on cable systems.[64] Similarly, Congress found that, vertically integrated program suppliers also have the incentive and the ability to favor their affiliated cable operators over nonaffiliated operators and program distributors using other technologies.[65] The Senate Report noted that Viacom owns programming services such as MTV, Showtime and Nickelodeon, and that TCI has financial interests in American Movie Classics, the Discovery Channel, QVC and Encore.[66] In addition, the House Report stated that according to a study by the National Cable Television Association, 39 of the 68 nationally delivered cable video networks have some ownership affiliation with the operating side of the cable industry.[67]

43. With respect to channel occupancy limits, Congress sought to reduce the incentive and ability of cable operators to favor their affiliated programming services to the disadvantage of unaffiliated programmers. Similarly, Congress intended to discourage vertically integrated programming services from favoring their affiliated cable operators over other cable operators and multichannel video providers. According to the House Report, some vertically integrated MSOs favor programming services in which they have an ownership interest, denying system access to programmers affiliated with rival MSOs. Such vertically integrated MSOs may also discriminate against rival programming services with regard to price, channel positioning, and promotion.[68] In addition, Congress was concerned that vertical integration

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63 47 U.S.C. § 533 (f)(1)(B).

64 Cable Act of 1992, Section 2 (a)(5).

65 Id.

66 Senate Report at 25.

67 House Report at 41.

68 Id at 43.

limits diversity of cable programming and reduces the number of voices available to the public. In this respect, the Senate Report likens the channel occupancy limits to the Commission's broadcast one-to-a-market rule, which are similarly designed to increase the diversity of voices available to the public.[69]

44. On the other hand, the House Report cites a 1988 study by the National Telecommunications and Information Administration ("NTIA"), which concluded that common ownership of cable systems and cable programming services did not appear to affect adversely the supply of cable programming or diversity of viewing choices for cable subscribers.[70] NTIA found that none of the top five MSOs showed a pattern of favoring basic services with which they were affiliated. Congress also acknowledged that significant benefits have resulted from vertical relationships in the cable industry. In particular, Congress cited C-Span, CNN, Black Entertainment Television, Nickelodeon, and the Discovery Channel as examples of innovative programming that would not have been feasible without the financial support of cable system operators.[71]

45. In preparing the 1990 Cable Report, we requested and obtained data from nine of the major MSOs regarding the nature and degree of their attributable ownership interests in cable programming services. The data we obtained were current as of December 31, 1989, and are contained in Appendix G to the 1990 Cable Report.[72] In the 1990 Cable Report, we indicated that TCI owned equity interests in 22 cable networks, Time Warner held interests in eight cable networks and Cox Cable had equity interests in six cable programming services.[73] Overall, we found that MSOs had equity interests in 13 of the top 20 national basic cable networks and in six of the top eight pay cable networks.[74] We concluded that vertical integration had accelerated in the cable industry, but that such vertical relationships had increased both the quality and quantity of cable programming services. We found that MSO investment was responsible for the development and survival of many of the most popular programming services. We also determined that vertical integration of MSOs with significant subscribership has contributed to program diversity by providing new programming services with financial

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69 Senate Report at 80. The one-to-a-market rule is contained in Section 73.3555 of the Commission's Rules.

70 House Report at 41, citing Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-223, June 1988, p. 102.

71 Id.

72 Id. at 5106-5127.

73 1990 Cable Report, 5 FCC Rcd at 5007.

74 Id.

support, an extensive subscriber base and information regarding viewer taste and desire for new programming.

46. The 1992 Cable Act does not indicate the ownership standard that should be applied in connection with channel occupancy limits. The Senate Report indicates that the Committee intended for the Commission to use the attribution criteria set forth in Section 73.3555, or such other criteria as the Commission may deem appropriate in implementing channel occupancy limits. We request comment on whether the attribution criteria contained in Section 73.3555 of our Rules, which are designed to identify ownership interests that afford influence or control over station operations or programming, are appropriate for this purpose. Commenters should indicate whether any modifications should be made for purposes of determining ownership affiliations between cable operators and program services. Commenters are asked to address how application of these attribution rules would affect investment by cable operators in new cable programming services. Parties also are asked to indicate whether higher attribution thresholds are warranted in connection with this restriction in order to provide cable operators with the flexibility to continue investing in new cable programming services.[75]

47. We seek comment on the procedures that should be used in calculating the cable channel occupancy limits we ultimately adopt. The 1992 Cable Act and its legislative history are unclear on this issue. The Senate Report suggests that the Commission may establish such limits based on the number of activated channels, less the number of over-the-air broadcast channels, public, educational, governmental and leased access channels carried. Under this approach, using a hypothetical 20% channel occupancy limit, a system with 54 channels, 14 of which are over-the-air channels, would have a channel occupancy limit of 8 channels for MSO affiliated programming.[76]

48. Parties are requested to comment on whether the procedures for calculating channel occupancy limits outlined in the Senate Report are appropriate and reasonably serve the objectives of the legislation. In addressing this issue, commenters should consider that one of the objectives of vertical ownership limits is to ensure that unaffiliated cable programmers have a reasonable opportunity to gain access to vertically integrated cable systems. In this regard, we question whether it is appropriate to subtract the over-the-air broadcast channels and public, educational, governmental and leased access channels in calculating a system's channel capacity. Broadcast channels contain programming that is competitive with cable programming, and leased access channels provide alternative outlets for unaffiliated video programmers. In addition, the

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75 In the event that we increase the attribution threshold or otherwise modify the attribution criteria as proposed in the Capital Formation proceeding, commenters should indicate whether we should similarly modify those criteria for purposes of the cable ownership rules.

76 Senate Report at 80.

commercial and educational broadcast channels are subject to must-carry requirements, pursuant to Section 4 of the 1992 Cable Act. To the extent that carriage of these signals is mandatory, we question whether it is appropriate for such channels to be subtracted from the total number of channels in calculating channel occupancy limits. We seek comment on how such a procedure would serve the statutory objectives of increasing diversity and expanding the number of cable voices available to consumers. We further seek comment regarding how pay channels, such as HBO, Showtime and pay-per-view channels, should be treated for purposes of calculating the channel occupancy limits, since not all subscribers receive these channels. In addition, what provisions should be made for "multiplexing" of pay channels, where the same programming is shown on several different channels at different times? Commenters should also indicate whether channel occupancy limits apply only to vertically integrated national programming networks, or whether such limits should also apply to vertically integrated regional programming networks.

49. It is also unclear from the statutory language and the legislative history how Congress intended such channel occupancy limits to be applied. For example, it is unclear whether such limits were meant to apply only to video programmers affiliated with the particular cable operator or whether such limits were intended to apply to any cable affiliated video programer. It is similarly unclear if the latter interpretation is used, whether the channel occupancy limit should be applied so that a total of eight channels could be occupied by all vertically integrated programming combined or whether such a limit should be applied so that the programming of each MSO could occupy up to the maximum of eight channels on such a system. The Senate Report could be read to suggest that the channel occupancy limits should apply to the number of channels that any cable operator can devote to any vertically integrated programming, regardless of whether a programmer is affiliated with that particular cable operator.[77] Commenters are asked to indicate how the channel occupancy limits we ultimately adopt should be applied to most effectively address Congress' concerns.

50. Given the uncertainty surrounding the application of the channel occupancy limits, we believe that the more reasoned approach is to apply such limits only to video programmers affiliated with the particular cable operator. We note that such an interpretation would be consistent with Congress' objectives of increasing diversity and expanding the number of voices available to consumers. Moreover, such an interpretation addresses Congress' goal of reducing the ability and the incentive of cable operators' to favor their own affiliated video programmers. Commenters are asked to indicate whether this proposal is appropriate. In considering this issue, commenters should consider whether vertically integrated programing has an adverse effect on diversity. In this regard, we note that, as discussed in paragraph 45, vertical relationships between cable operators and programming services provide essential investment in the development of new programming and enables program producers to spread the risk of developing new and more innovative program services.

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77 Id.

51. We also seek comment on how we should determine what constitutes a reasonable channel occupancy limit. What criteria should be used to establish such limits? Are there other regulatory analogies that would be useful in determining what percentage of a cable system's channels should be occupied by vertically integrated program services? In addressing this issue, commenters are asked to consider the vertical relationships and ownership patterns that were reported in Appendix G to the 1990 Cable Report. Commenters are asked to provide relevant information, such as the average number of channels occupied by vertically integrated program services. We also request comment on how the availability of leased access channels should affect the establishment of channel occupancy limits. Commenters are asked to indicate the degree to which vertical integration threatens the ability of rival programming services to obtain cable carriage. We note that our intention is to establish a channel occupancy limit that maximizes the number of voices that are available to cable viewers without impairing the ability or incentive of cable operators to invest in new and existing programming services. In this regard, we note that MSO investment has been essential to the development and continuation of many of the most popular and innovative programming services.

52. We tentatively conclude that we should establish a percentage limit on the number of channels that can be occupied by vertically integrated programming services. We ask commenters to indicate what percentage of cable channels would be most appropriate to prevent competitive abuses without discouraging investment relationships between cable operators and program services. In suggesting the appropriate percentage limit, commenters are asked to consider the other structural and behavioral restrictions included in Sections 12 and 19 of the 1992 Cable Act. These restrictions are similarly designed to prevent the adverse effects of vertical integration. Moreover, commenters should consider the must-carry[78] and leased access requirements[79] applicable to cable systems in commenting on this issue.

53. We also seek comment on what effect emerging technologies such as digital signal compression and fiber optic cable should have on the channel occupancy limits. Currently 64% of subscribers receive between 30 and 53 channels, while 28% of cable subscribers receive 54 or more channels.[80] Digital compression technology promises to dramatically expand the capacity of existing cable plant. Time Warner is currently testing a cable system with a 150 channel capacity and TCI recently announced plans to introduce a 500 channel system. We believe that such expanded channel capacity will eliminate the need for channel occupancy limits to ensure diversity and prevent discrimination against unaffiliated programming services. Cable systems with such dramatically expanded capacity will require programming

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[78] 47 U.S.C. § 534.

[79] 47 U.S.C. § 532.

[80] Warren Publishing, Inc., Television & Cable Fact Book, Cable & Services Volume No. 59 (Services-Part III), 1991 Edition, p. C-389.

from many different sources in order to program so many additional channels. Thus, we propose to establish a threshold beyond which the channel occupancy limits would no longer be applicable. We ask commenters to indicate the appropriate number of total channels for establishing such a threshold. Pursuant to this proposal, the channel occupancy limits would be applied so that a certain percentage of a system's channels could be occupied by vertically integrated programming up to the threshold number of channels, with no limits applicable for channels in excess of the threshold. We believe that this approach is consistent with the objectives of the 1992 Cable Act -- to ensure that the regulations prescribed reflect the dynamic nature of the communications marketplace and do not impair the development of diverse and high quality video programming.[81]

54. Finally, we seek comment on whether channel occupancy limits should be phased out in communities where effective competition has developed. Once effective competition has been established and a cable operator no longer occupies a program access bottleneck position, channel occupancy limits may no longer be necessary or desirable. With such developments, the incentive and ability of a cable system to favor its own programming over unaffiliated programming is diminished, and alternative outlets for programming should be available to the public. In seeking comment on this issue, we ask whether phasing out channel occupancy limits under these conditions is consistent with Congressional intent. In addition, we ask whether channel occupancy limits should be lifted for any cable system that meets the effective competition criteria, or whether only certain of those criteria would justify removing the limits.

55. Jurisdiction and Enforcement. The 1992 Cable Act and its legislative history are silent on the issue of enforcement of the channel occupancy limits. We propose that the local franchise authorities have primary responsibility for enforcement of such limits, since they are most familiar with the channel capacity and programming services carried on the systems within their jurisdiction. Because we seek to minimize the burden imposed on local franchise authorities and cable operators by these restrictions, we propose that such channel occupancy limits should be enforced by certification. Accordingly, cable operators would be required to certify annually to the franchise authority that they are in compliance with the channel occupancy limits ultimately adopted. In order to ensure continuous compliance, cable operators would be obligated to notify the franchise authority within 30 days of any changes during the course of the year which would affect compliance with the channel occupancy restrictions. In addition, a franchise authority would be entitled to request any additional information it reasonably determined to be necessary to establish the accuracy of a system's certification, if such certification was challenged. We believe that such a system of certification is appropriate to enforce the channel occupancy limits and will avoid unduly burdening local franchise authorities and cable operators. We also propose to grandfather any existing vertical relationships which exceed the channel occupancy limits at the time such limits are adopted. We believe that divestiture or deletion

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[81] 47 U.S.C. § 533(f)(2)(E) and (G).