method of calculation based solely upon the number of cable subscribers or cable homes passed. By a number of means, the 1992 Cable Act encourages the development of multichannel video distributors other than traditional cable operators. See, e.g., 1992 Cable Act §19, 47 U.S.C. § 548. As multichannel video distributors other than traditional cable operators become more numerous and successful, it can be anticipated that the number of cable subscribers (and, quite possibly, the number of cable homes passed) will diminish. As the legislative objective is thus achieved, however, any ability of cable operators to impede or hinder programming distribution will wane. Ironically, if subscriber limits are based solely upon a given operator's proportion of cable subscribers or cable homes passed, then, under such circumstances, operators could find themselves unable to achieve needed efficiencies and economies of scale through consolidation, and could be frozen into a position that mandated sub-optimal investments in programming, technology, customer service and the like. 4/

4/ This effect would be especially great upon a cable operator whose own subscriber base was decreasing at a much lower rate than that at which the number of cable subscribers or homes passed was decreasing on the national level, even though such an operator would, presumably, be an especially effective competitor to other multichannel video distributors.

Although TWE believes that any measure based solely on cable statistics is inappropriate, TWE agrees with the Commission that a homes passed measure is preferable to a measure based on numbers of actual cable subscribers if only cable is taken into account. As the Commission notes (NPRM ¶ 36), a measure based on numbers of subscribers could discourage subscriber growth. Such a measure could also penalize a cable operator that gains new subscribers by providing diverse and high quality programming. In addition, as the Commission has observed, a homes passed measure is potentially more stable than a subscriber-based limit, because cable subscribership may fluctuate significantly over time. NPRM ¶ 36.

C. Thirty to Forty Percent Is an Appropriate Subscriber Limit.

The Commission suggests that a limit in the range of 25% to 35% of homes passed nationally would take into account the existing market structure and ownership patterns in the cable industry and the efficiencies and economies of scale resulting from horizontal relationships. NPRM ¶ 37. The Commission seeks comment on whether a limit in this range would be reasonable or whether some other percentage would be more appropriate. Id.

TWE believes that 30% to 40% would be a reasonable subscriber limit. It is unlikely that a cable operator that accounts for less than 30% to 40%, measured either on the basis suggested by TWE above or as a percentage of all cable homes passed, would be able to adversely effect competition in the distribution of programming, even if it wished to do so. In such circumstances, an affected programmer could still sell to, at a minimum, at least 60% to 70% of all multichannel subscribers (under TWE's proposed method) or of all cable homes passed (under the Commission's suggested method). Where such large selling opportunities exist, it is unlikely that the actions of a single operator could significantly impair the distribution of video programming.

Under antitrust analysis, it is well recognized that a single firm ordinarily cannot exercise monopoly power if it controls less than 50% of the relevant market. 5/ See, e.g., Broadway Delivery Corp. v. United Parcel Service, Inc., 651 F.2d 122, 129 (2d Cir.), cert. denied, 454 U.S. 968 (1981); United Airlines, Inc. v. Austin Travel Corp., 867 F.2d 737, 742 (2d Cir. 1989) (market share of 31%); Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.,

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5/ TWE notes that for purposes of antitrust analysis with respect to the cable industry, the relevant market is not limited to multichannel video distributors. Broadcast television, videocassettes, theatrical motion pictures, concerts, sporting events and a multitude of other video and non-video sources of news, information and entertainment also compete with cable operators and must be factored into any antitrust analysis.

614 F.2d 832, 841 (2d Cir. 1980) (market share of 33% to 48%); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945). The commentators are also in agreement that a market share of 40% or less cannot alone support claims of monopolization. See P. Areeda & H. Hovenkamp, Antitrust Law ¶ 518.3 (1991 Supp.) (monopolization claims involving 50% or lower market shares should presumptively be rejected); 2 E. Kintner, Federal Antitrust Law § 12.6, at 352 (1980) ("the minimum market share required for a direct inference of monopoly power from evidence of market share alone is approximately 70 to 80%"). For that reason alone, the 30% to 40% limit recommended by TWE should be sufficiently low to avert any competitive problems.

Moreover, it has been held that "a 33% market share does not even approach the level required for dangerous probability of success" necessary to make out a claim of attempted monopolization under the antitrust laws. Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990); see also H. L. Hayden Co. v. Siemens Medical Systems, Inc., 879 F.2d 1005, 1018 (2d Cir. 1989) (20% market share not sufficient); Nifty Foods Corp., 614 F.2d at 841 (33% share insufficient).

Similarly, in considering a market foreclosure claim based on a tying theory, the Supreme Court has held that possession of 30% of the relevant market in the tying product is insufficient to support a finding that the "market as a whole" had been adversely affected, and it concluded, therefore, that there was no "adverse effect on competition" upon which to "make out a case under the antitrust laws". Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 31 (1984); see also id. at 45 (O'Connor, J., concurring) (30% foreclosure of relevant market did not violate antitrust laws). There are numerous other decisions to similar effect. See, e.g., Kuck v. Bensen, 647 F. Supp. 743, 746 (D. Me. 1986) (37% foreclosure; no violation); Gonzales v. Insignares, 1985-2 Trade Cas. (CCH) p. 66,701 (N.D. Ga. 1985) (40% foreclosure; no violation).

In connection with this issue, the Commission seeks empirical data for guidance in selecting an appropriate subscriber limit. Specifically, the Commission asks "at what percentage of homes passed a single MSO could preclude the success of a new cable service", and it seeks recent examples, if any, of such conduct. NPRM ¶ 37. The Commission also asks how many subscribers must be cleared nationally to launch and sustain a new programming service, and whether the number of subscribers varies depending on the type of programming. Id. 6/

The number of subscribers that a given programming service will need in order to survive depends upon the economic characteristics of that service. First, services may achieve revenues from license fees paid by cable operators and other distributors, or from the sale of advertising time, or, most commonly, from some mix of those two sources. A service that opts to emphasize license fees as a source of revenue may need less penetration (assuming a satisfactory cost structure) than will a service that is primarily dependent upon advertising revenues.

Second, the cost structure of the service will determine the revenue level (and will thus influence the degree of penetration) that the service must reach to achieve profitability. Programming costs typically

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6/ In this connection, the Commission also seeks comment on the relevance of its broadcast multiple ownership rules, which limit the audience reach of television stations in which a person can hold an attributable interest to 25% of television households nationwide, 47 C.F.R. § 73.3555, and of its rules permitting national television networks to own cable systems which reach 10% of cable homes passed nationally, id. § 76.501. TWE believes that neither standard is particularly instructive with respect to the issues raised by the subscriber limits. TWE notes, however, that the 25% figure applies to all television households--a considerably larger base number than would be used under either TWE's recommended approach or a homes passed measure.

represent a significant portion of the cost of operating a programming service. A service that offers relatively expensive programming, such as recently released theatrical motion pictures, will have a higher cost structure, and will thus need to achieve greater revenues, than will a service that depends upon less expensive programming such as news programming, older motion pictures, syndicated television programs and the like. Even here, however, the revenue level needed for profitability is not necessarily linked to broad subscribership. For example, premium networks typically offer costly programming, but are able to thrive at subscriber penetration levels considerably lower than those of the most popular non-premium services because the license fees paid by distributors are comparatively high.

Further, with respect to services that depend more heavily upon advertising revenues, it must be remembered that those revenues will depend not only upon the degree of penetration achieved by the service, but also upon the service's success in attracting viewers in those areas where it is offered. For example, a service that is heavily dependent upon advertising revenues may enjoy nearly universal penetration and yet fail to garner sufficient revenues to stay in business if prospective advertisers perceive that the service is little watched. (By the same token, a service having these characteristics would probably not enjoy nearly universal penetration for very long.)

The historical record shows that the success of a given programming service does not depend on its attaining any particular level of subscriber penetration, and clearly does not depend on achieving anything approaching universal penetration. There are numerous program services that have been in business for a number of years (and so may be presumed to meet their owners' criteria for commercial viability), and yet have done so with penetration levels well below 60% to 70%. For example, BET was founded in 1980 and has been in business continuously since then, even though its penetration has never reached 70%. Country Music TV was founded in 1983 and remains in business with a penetration level below 40%, as does VISN/ACTS, which was founded in 1984. The Nostalgia Channel, founded in 1986, has a penetration level below 30%, while that of Bravo, founded in 1988, is below 20%, and that of Galavision, founded in 1982, remains below 10%. See Paul Kagan Associates, Cable TV Programming, Dec. 30, 1992, at 8.

In addition, it must be borne in mind that new program services rarely achieve overnight success. For example, the Family Channel, launched in 1977, had achieved less than 10% penetration of all cable homes by its second year of operation, achieved only 22.1% penetration in its third year, but approached 60% penetration by its sixth year of activity. Paul Kagan Associates, Cable TV Programming, Sept. 23, 1991, at 3. Nickelodeon, the innovative children's programming service, achieved only 15.1% penetration in its second year of operation and enjoyed a penetration level that was still well below 40% in its fifth year of operation (id.), yet today it enjoys over 90% penetration (Paul Kagan Associates, Cable TV Programming, Dec. 30, 1992, at 8). Relatively low penetration levels in the early years of a service's operation may reflect any number of factors, such as a product that is being refined or improved, or a product so innovative that it must develop its own audience rather than appealing to established viewer habits and tastes.

TWE believes that its proposed 30% to 40% subscriber limit will preserve the efficiencies created by horizontal relationships, and that any risk of the exercise of market power by large cable operators that may be perceived to remain at the 30% to 40% level is more than adequately addressed by the Commission's behavioral regulations under §§ 19 and 12. (See pp. 9-13 above.) In addition, the Commission's initiatives under § 9 of the 1992 Cable Act, 47 U.S.C. § 532, which empowers the Commission to regulate maximum rates for leased access channels, will create additional opportunities for programmers to gain distribution on cable systems even if the cable operator otherwise refuses to do business with the programmer. See Notice of Proposed Rule Making in MM Docket No. 92-266, FCC 92-544 (released Dec. 24, 1992). A subscriber limit of 30% to 40% will enable operators to undergo some degree of further consolidation to the extent that available efficiencies and economies of scale render it economically rational to do so. In light of the manifest inability of an operator below the proposed limit to effect significant distortions in programming distribution, it would serve little purpose to set the limit at a lower level.

In short, the 30% to 40% limit proposed by TWE is supported by antitrust analysis and empirical data, preserves valuable efficiencies and economies of scale, and leaves the Commission ample powers to correct any remaining risk of improper conduct that may be perceived. 7/

7/ The Commission notes that the Senate Report states that "the legislation does not imply that any company must be divested." NPRM ¶ 37, quoting Senate Report at 34. Given the 30% to 40% limit that TWE has proposed, divestiture of existing systems is not an issue because, at present, no existing system operator exceeds the limit. TWE believes that divestiture could be properly ordered if a 30% to 40% limit was exceeded in the future.

D. <u>The Commission's Attribution Criteria Should Focus on Management Control.</u>

The Commission asks whether the attribution criteria set forth in 47 C.F.R. § 73.3555 are appropriate for determining ownership of cable systems in connection with the application of subscriber limits. NPRM ¶ 38.

Section 73.3555 provides that "partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock" shall be "cognizable" for purposes of the Commission's regulations concerning cross-ownership and multiple ownership of radio and television broadcast licensees, as well as cross-ownership of such licensees and newspapers or cable systems. 47 C.F.R. 73.3555, n.2(a). TWE believes that the attribution criteria contained in § 73.3555 are not appropriate for determining ownership in application of the subscriber limits.

The 5% threshold does not address the congressional objective of ensuring that operators do not improperly impede the flow of programming from programmers to consumers. With respect to that objective, a 5% interest is so small as to be essentially meaningless and irrelevant. A person having a 5% ownership interest in a cable system will have little, if any, voice in the programming choices made by that system and so could not influence the system's dealings with programmers. A 5% interest-holder will almost inevitably be a mere passive investor. For that reason, TWE believes that the 5% attribution threshold specified in 47 C.F.R. § 73.3555 is far too low to have any utility in application of the subscriber limits.

TWE believes that the ownership standard established should focus on the ability of the given cable operator to control the programming choices of the particular cable system. Ordinarily, such control is achieved by majority ownership. Absent such a power of control, however, an operator will have little, if any, ability to use a given system for purposes of exerting "leverage" upon a programmer.

The recommended control standard need not be applied on a "bright line" basis. The Commission should have the authority to investigate particular situations on a case-by-case basis if it has reason to believe that an operator that lacks control of a given system or systems is nonetheless exploiting its investment in such systems in a fashion that impedes the flow of programming.

E. <u>Enforcement at the Commission's Own Initiative Is Sufficient.</u>

The Commission notes that, at present, no cable operators are in the range of its proposed subscriber limits of 25% to 35% of homes passed. NPRM ¶ 39. The Commission suggests a system of certification and asks whether such certification should be made to the local franchise authority or to the Commission. TWE believes that such a certification system is unnecessary, particularly at the local level, and that such a system would entail great administrative burdens upon cable operators which would have virtually no utility for the Commission or anyone else.

TWE submits that, given the proposed 30% to 40% limit, neither a certification system nor any other system of reporting requirements is required. If the limit is set at the level TWE proposes, no cable operator would at present be in any danger of exceeding the limit. To require operators to certify (either to local franchise authorities or to the Commission) that they are in compliance with such a limit would not serve any useful purpose, but would merely generate unnecessary paperwork. Further, a system of certification at the local level would create a real risk that operators would be subjected to inconsistent reporting requirements and inconsistent or inexpert application of the Commission's rules.

For similar reasons, enforcement of the limits on a complaint basis, with the complaint directed in the first instance either to the local franchise authority or to the Commission, would have little utility relative to the burdens imposed. In the first place, franchising authorities have neither the resources nor the expertise to assess the compliance of a cable operator with the subscriber limits, and there would be a heightened risk of inconsistent or erroneous application of the Commission's regulations. Although the Commission, of course, has the requisite expertise, there is no prospect of any violation of the limit absent major additional consolidation in the industry if the limit is set at 30% to 40% as TWE recommends. TWE therefore believes that entertaining complaints, at least at this time, may place needless burdens upon the Commission's resources.

TWE submits that the Commission should have sole authority to enforce the subscriber limits, and that it should do so only at its own initiative, rather than through the resolution of third parties' complaints. Publicly available subscriber information, while not precise, is perfectly adequate to alert the Commission if any MSO approaches the recommended 30% to 40% threshold. This approach will allow consistency in enforcement and will prevent either the Commission, local franchising authorities, or cable operators from being unnecessarily burdened.

In this connection, the Commission asks whether waivers or exceptions to subscriber limits should be obtainable and, if so, whether such waivers should be granted for cable systems that expand existing systems to previously unserved rural areas. NPRM ¶ 39.

TWE submits that waivers and exceptions should be obtainable. By adopting a flexible approach to the subscriber limits, the Commission can ensure that the statutory objectives are achieved, but will avoid arbitrarily jeopardizing the benefits that efficiencies and economies of scale can provide to subscribers. For example, the Commission's proposal for a waiver that permits expansion into unserved rural areas (NPRM ¶ 39) comports with the statutory directive that the Commission's rules "not impose limitations which would bar cable operators from serving previously unserved rural areas". 47 U.S.C. § 533(f)(2)(F). TWE believes that temporary waivers should also be available in other circumstances where commercial exigencies may temporarily place an operator over the limits, as, for example, when an operator acquires a group of systems, intending to dispose of some of them or of others that it already owns, but is temporarily unable to complete the sale on commercially reasonable terms. The Commission already permits temporary waivers of its various cross-ownership rules in such circumstances. See Second Report and Order, 50 FCC 2d 1046 (1975). There is no reason not to make similar procedures available here.

F. Review Every Five Years Is Appropriate.

The Commission proposes to review the subscriber limits every five years to determine whether the limits are reasonable under prevailing industry conditions. NPRM ¶ 40. TWE agrees that a review every five years would be appropriate and consistent with the statutory purposes. Because the market is dynamic, conducting reviews any more frequently would not allow sufficient time for industry trends to develop.

III. PROPOSED RULES REGARDING CHANNEL OCCUPANCY LIMITS.

As amended by 11(c) of the 1992 Cable Act, § 613(f)(1)(B) of the Communications Act of 1934, 47 U.S.C. § 533(f)(1)(B), directs the Commission, within one year after October 5, 1992, to establish "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". In enacting this provision, Congress sought to reduce the perceived ability of cable operators to favor their affiliated programming services to the disadvantage of unaffiliated programmers and to discourage vertically integrated programmers from favoring their affiliated cable operators and multichannel distributors. Senate Report at 25-26; House Report at 41; NPRM ¶ 43.

The Commission identifies seven principal issues on which it seeks comment with respect to the channel occupancy limits: (1) the proper attribution criteria to be applied (NPRM ¶ 46); (2) whether broadcast, PEG and leased access channels should be taken into account in applying channel occupancy limits (NPRM ¶¶ 47-48); (3) whether such limits should apply only to video programmers affiliated with the particular cable operator or to any vertically integrated programmer (NPRM ¶¶ 49-50); (4) the criteria to be used in determining a reasonable channel occupancy limit and the form that limit should take (NPRM ¶¶ 51-52); (5) the effect of emerging technologies upon the channel occupancy limits (NPRM ¶ 53); (6) the propriety of enforcing the limits in communities where effective competition has developed (NPRM ¶ 54); and (7) appropriate enforcement procedures (NPRM ¶ 55).

Briefly stated, TWE's position on these issues is that (1) attribution criteria should focus on the existence of common control; (2) broadcast, PEG and leased access channels must be counted in applying the limits; (3) the limits should apply only to programmers affiliated with the particular cable operator; (4) in determining the channel occupancy limits, the Commission should set a limit that is high enough to preserve the benefits of vertical integration and should consider exempting from the limits services that have demonstrated such popularity that an operator's carriage could not conceivably result from favoritism, but only because of subscriber demand; (5) emerging technologies that expand channel capacity justify phasing out the channel occupancy limits for systems having expanded capacity; (6) the channel occupancy limits should not apply in communities where effective competition has developed; and (7) the Commission should enforce the channel occupancy limits on a complaint basis. These issues are discussed separately below.

A. The Commission's Attribution Criteria Should Focus on Control.

The Commission asks whether the attribution criteria contained in 47 C.F.R. § 73.3.555 are appropriate for use in implementing channel occupancy limits. NPRM ¶ 46. TWE submits that the § 73.3555 attribution criteria are highly inappropriate for application in this context, and that the Commission should employ attribution criteria which, like those recommended above with respect to the subscriber limits, focus on the presence of control.

As Congress, the Commission and NTIA have all recognized, investments by cable operators in cable programming services have been essential in fostering the wide diversity of programming that characterizes cable communications today. See pp. 6-8 above. As recounted by NTIA and the Commission, several well-known cable programming services, including such highly popular services as C-Span and CNN and services serving minority audiences such as Black Entertainment Television, exist today largely because of the willingness of cable operators to make enormous--and enormously risky--investments in them. 1988 NTIA Report at 91 (operators' $550 million investment in Turner Broadcasting Corp. preserved the financial health of Turner services such as CNN); 1990 Cable Report ¶ 83 (operators' financial backing of BET essential in ensuring availability of network aimed at black Americans).

Precisely because investments in programming services, especially fledgling services, are extremely risky, operators frequently take only a minority position when they invest in a program service. In this fashion, the risk of the venture can be spread among a number of investors, increasing the willingness of each to invest and thus providing capital that is often desperately needed by fledgling services.

Application of the 5% attribution standard of § 73.3555 carries real potential to discourage needed investment in new program services. In the first place, a 5% interest is so small that it cannot confer control and is necessarily just a passive investment.

Furthermore, programmers encourage investment by cable operators precisely in order to encourage the operator to carry the service on its systems and thus enhance the service's chances of success. 8/ There is nothing wrong or inimical to competition in an investment made on that basis: it is well-established that vertical integration, without more, is not a threat to competition. See, e.g., United States v. Columbia Steel Co., 334 U.S. 495, 525 (1948) (vertical integration in itself does not violate Sherman Act); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 710 (7th Cir.) ("vertical integration is a universal feature of economic life and it would be absurd to make it a suspect category under the antitrust laws"), cert. denied, 469 U.S. 1018 (1984). Moreover, as the Commission itself has recognized, vertical integration enhances efficiency and has many procompetitive benefits. 1990 Cable Report ¶¶ 83-85. In particular, in the cable context, vertical integration has made possible the development of a wealth of programming services that otherwise simply would not exist.

8/ The Commission's regulations under § 12 will address any risk that operators will in effect extort an equity interest in the programmer in exchange for distribution.

Where an operator's investment position is clearly a minority position and absent any special corporate governance arrangements, there is little if any risk that the operator will control the programmer's business decisions or have any meaningful opportunity to cause the service to refrain from dealing with other multichannel video distributors in an anticompetitive fashion, or to deal with such distributors only on anticompetitive terms. In these circumstances, subjecting the service in question to channel occupancy limits with respect to an operator who has no ability to control the programmer (or is not under common control with it) would discourage operators from making such investments, without advancing the statutory objectives in any way. Given the importance of operator investment in maintaining the diversity of programming available to the public, such an outcome would be inconsistent with the statutory purpose and should be avoided at all costs.

B. <u>The Channel Occupancy Limits Must Take Any Broadcast, PEG and Leased Access Channels into Account.</u>

The Commission asks what procedures should be used in calculating the channel occupancy limits, and it refers to a suggestion contained in the Senate Report that limits be based on the number of activated channels, less the number of over-the-air broadcast channels, public, educational and governmental ("PEG") channels and leased access channels that the operator carries. NPRM ¶ 47, citing Senate Report at 80. The Commission questions the propriety of subtracting the enumerated types of channels. NPRM ¶ 47. TWE agrees with the Commission's assessment of the methodology discussed in the Senate Report, and it strongly believes that broadcast, PEG and leased access channels must be taken into account in the base against which the limits are applied.

TWE believes that disregarding broadcast, PEG and leased access channels is inappropriate for precisely the reasons that the Commission notes. Such channels provide unaffiliated and diverse programming "voices". In particular, leased access provisions require operators to set aside channels for unaffiliated program services, and leased access users may well be the unaffiliated programmers for whom the channel occupancy limits also attempt to reserve space. Moreover, cable operators already are subject to reduced channel capacity pursuant to the must-carry requirements of §§ 4 and 5 of the 1992 Cable Act and the PEG and leased access obligations, limiting their ability to offer a full selection of the diverse cable programming "voices" that are available. In light of these considerations, TWE submits that disregarding broadcast, PEG and leased access channels for purposes of the channel occupancy limits, as the Senate Report suggests, is fundamentally misguided. 9/

In addition, such a methodology would discourage investment in cable programming services. An operator that is subject to extensive must-carry, PEG and leased access requirements will have a smaller number of channels available for vertically integrated services under the method suggested in the Senate Report. Having relatively few such channel "slots" available, the operator will wish to use those slots for program services that have already proven their appeal to cable audiences, and it will have an obvious disincentive against using them for new or fledgling services. Such disincentives against offering a new or unproven service necessarily militate against investing in such a service.

In short, if the Commission concludes that a percentage-based method of computing channel occupancy limits is warranted, then the percentage selected should be

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9/ Ironically, it is precisely where diversity is maximized by an operator's carriage of many broadcast, PEG and leased access channels that the method suggested in the Senate Report would most drastically impair the operator's ability to offer vertically integrated channels, for such an operator would have a larger number of channels subtracted from its capacity before application of any prescribed percentage.

applied against a base number which includes broadcast, PEG and leased access channels.

In this connection, the Commission asks how premium and pay-per-view channels should be treated in any channel occupancy calculation in view of the fact that they are not received by all subscribers. In addition, the Commission asks what provision should be made for multiplexing. NPRM ¶ 48.

TWE submits that because premium and pay-per-view channels are not received by all subscribers, they should not be counted as "occupied" channels in any calculation under the channel occupancy rules (although they must obviously be included in the system's number of activated channels). Premium channels and pay-per-view programming are delivered only to those subscribers who wish to pay a fee to receive them. Typically, only a fraction of a given system's subscribers will subscribe to any given premium channel or order pay-per-view programming, but the operator must reserve a channel throughout its system for each premium service or pay-per-view channel that it carries, so that subscribers who wish to receive the channel may do so. Applying channel occupancy limits to premium and pay-per-view services may discourage operators from carrying them. Alternatively, TWE submits that premium and pay-per-view channels should be added into the calculation according to the percentage of subscribers who actually receive them. For example, if a vertically integrated premium service has 30% penetration in a given system, it would count as three-tenths of a channel for purposes of any channel occupancy calculation.

In addition, TWE submits that a multiplexed service should not be counted as multiple "occupied" channels in any channel occupancy calculation (all channels used for multiplexing would be included in the number of activated channels). Multiplexing is an innovative technique, pioneered by HBO, that is intended to enhance viewing options, increase subscriber satisfaction and enhance HBO's ability to compete with other sources of programming. When multiplexed, the HBO Service is exhibited to subscribers on two or three, and Cinemax on two, different channels, generally at no additional charge, using differentiated scheduling so that different types of programs appear on each of the channels at any given time. Cable operators will engage in multiplexing only when they have channel capacity available for doing so. The very fact that an operator has a capacity level that permits multiplexing, however, suggests that the operator is carrying a full array of programming from all available sources, so that there is little if any risk of favoritism toward affiliated services. For that reason, channel