occupancy limits should not apply to multiplexed premium services. Alternatively, a multiplexed service should be regarded as only a single service for purposes of such a computation. Otherwise, innovative programming techniques such as multiplexing will be discouraged, to the detriment of cable subscribers.

The Commission also asks whether the channel occupancy limits should apply only to vertically integrated programmers who operate nationally, or whether vertically integrated regional programmers should be covered as well. NPRM ¶ 48. TWE submits that the limits should apply only to national programming services. Nothing in the statute or its history suggests that cable operators exhibit undue "favoritism" toward regional programmers with which they are affiliated. In addition, cable operators often develop local programming to respond to the needs and tastes of a particular community. For example, TWE's systems in the New York City area recently launched New York 1, a 24-hour, all news service devoted to covering local events. Application of channel occupancy limits to such services would discourage their development.

C. <u>The Channel Occupancy Limits Should Apply Only to Programmers Affiliated with the Particular Operator.</u>

The Commission proposes that the channel occupancy limits should be applied only to video programmers affiliated with the particular cable operator, rather than to any vertically integrated programmer. NPRM ¶ 50. TWE agrees. Because there is simply no reason for an operator to favor a programmer with which it is not affiliated, application of channel occupancy limits to vertically integrated programmers generally would not further the objectives of the legislation in any respect. Moreover, to apply channel occupancy limits to any vertically integrated programmer would plainly discourage investment in the development of new programming. As soon as <u>any</u> operator invested in such a service, its distribution opportunities among <u>all</u> operators would be impaired. Further, such an approach could actually increase favoritism toward the operator's own services--if the limit applies to all vertically integrated services, the operator will lose distribution opportunities for its own services to the extent it carries services of other operators.

In this connection, the Commission asks whether vertical integration has had an adverse effect on diversity. NPRM ¶ 50. The answer is plainly no. As NTIA has observed, "common ownership of cable systems and cable programming services does not appear to affect adversely the supply of cable programming or the diversity of viewing choices for cable subscribers". 1988 NTIA Report at 102. Moreover, as reported in a major study of vertically integrated cable operators performed in 1989, "although vertically integrated MSOs are carrying to a somewhat greater extent the programming which they have ownership interests, they were not systematically discriminating against" unaffiliated programmers. Benjamin Klein, The Competitive Consequences of Vertical Integration in the Cable Industry, 39 (1989) (hereinafter "Klein Study"). Moreover, the Klein Study found that a "cable operator with a network ownership interest is more likely to carry the network in which it has an ownership interest and also more likely to carry other of the top 28 networks in which it has no ownership interests". Id. at 48 (emphasis in original). As these studies indicate, vertical integration does not reduce diversity and does not foster discrimination. On the contrary, as previously discussed, vertical integration actually promotes diversity by facilitating investment in new, innovative and inherently risky programming ventures. See pp. 6-8, 37-38 above.

The Commission asks, if the limits adopted apply to any cable affiliated programmer, whether the limit should be applied so that there is a single number of channels that could be occupied by all affiliated programmers (e.g., 8 channels), or so that the programming of each MSO could occupy up to the maximum specific number of channels (e.g., programming of each MSO could occupy up to 8 channels).

NPRM ¶ 49. TWE submits that this attempt to apply the limits to any vertically integrated programmer illustrates one difficulty of that approach: it results in the compounding of inherently arbitrary numbers. The application of limits to only those programmers affiliated with the particular operator will provide the flexibility needed to preserve the beneficial effects of vertical integration.

D. <u>In Determining the Channel Occupancy Limits, the Commission Should Adopt a Limit High Enough to Preserve the Benefits of Vertical Integration.</u>

The Commission invites comment on how it should determine what constitutes a reasonable channel occupancy limit. In this connection, the Commission also requests comment on how the availability of the leased access channels should affect the establishment of channel occupancy limits and on the degree to which vertical integration threatens the ability of rival programming services to obtain cable carriage. The Commission states its intention to establish a 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". NPRM ¶ 51. The Commission tentatively concludes that it should establish a percentage limit on the number of channels that could be occupied by vertically integrated programming services, and it requests comment on the appropriate percentage. NPRM ¶ 52.

TWE submits that the criteria for establishing channel occupancy limits are those spelled out in the statutory language and legislative history: such limits should ameliorate the perceived risk that operator favoritism toward affiliated program services will impede "the flow of video programming", but must do so in a fashion that preserves the benefits of vertical integration. See pp. 5-8 above. TWE also believes that the availability of leased access channels to unaffiliated programmers and the many other regulatory and enforcement measures available to the Commission are sufficient to prevent any improper use of vertical integration, see pp. 9-12 above, so that channel occupancy limits can be set at a comparatively high level.

TWE also believes that vertical integration simply does not threaten the ability of rival program services to obtain cable carriage. There is significant evidence to show that vertical integration does not threaten carriage of unaffiliated programming services at all. As noted above, the Klein Study found that vertically integrated operators carried more of their own services and more of those services affiliated with others. Klein Study, at 48. In a similar vein, NTIA concluded that "[w]hile ownership affiliation does indeed increase the probability that a service will be carried by a particular system, carriage of affiliated services generally does not occur to the exclusion of unaffiliated services". 1988 NTIA Report at 102 (emphasis added).

The Commission proposes adoption of a percentage-based channel occupancy limit. TWE believes that unless such a limit is set at a comparatively high level--well above the 20% discussed in the NPRM--such a limit may jeopardize the flow of investment into new programming services even if broadcast, PEG and leased access channels are taken into account.

Although including broadcast, PEG and leased access channels in the channel occupancy calculation would yield a larger number of channels available for exhibiting vertically integrated services than would the method discussed in the Senate Report because it starts with a higher base, an operator with extensive programming investments will nonetheless find that, unless the permissible percentage figure is set at a level well above the 20% level suggested by the Commission in its NPRM, application of the percentage will still create disincentives toward investment in new programming. This effect will be exacerbated to a very significant degree if the Commission uses the 5% attribution criterion specified in § 73.3555.

TWE itself provides several cases in point. TWE is a major investor in cable programming services. In addition to the HBO Service and Cinemax, which TWE wholly owns, TWE and/or TWI have ownership interests, ranging from approximately 5% to approximately 50%, in 13 other programming services; most of these are minority investments of 33% or less. Under the 5% attribution criterion specified in § 73.3555, and assuming that premium and pay-per-view services were included in the analysis on the same basis as other services, 10/ all 15 of the programming services in which TWE has an interest would be subject to channel occupancy restrictions.

Applying the computational method suggested by the Commission to several of TWE's own systems using the 20% channel occupancy limit mentioned in the NPRM (¶ 47) shows that, under such a scenario, TWE would be forced to drop from its channel lineups several of the program services in which it has an interest. For example, TWE's cable system in San Diego, California, has 45 activated channels and offers 11 TWE-affiliated services. After applying the 20%

10/ As discussed above, TWE believes that because of the distinct characteristics of premium and pay-per-view services, they should not be included in the channel occupancy analysis, or, at a minimum, should be treated differently from channels received by substantially all subscribers.

percentage suggested by the Commission in accordance with the assumptions stated above, the San Diego system would be permitted to have only nine TWE-affiliated programming services (20% of 45), and would therefore be required to drop two of the affiliated program services that it now carries. Moreover, it would be required to do so even though the system already offers nine broadcast channels and is obligated to provide three PEG channels and between three and four leased access channels.

Similarly, the TWE system located in Indianapolis, Indiana, has 42 activated channels and offers 10 TWE-affiliated services. Using the 20% factor suggested by the Commission, the system would be permitted to have approximately eight TWE-affiliated program services (20% of 42) and would be required to drop two such services currently in its lineup. Moreover, the Indianapolis system would be compelled to take such action even though it offers eleven broadcast channels and is obligated to provide eight PEG channels and three leased access channels.

Many other TWE systems would suffer similar impairment of their current channel lineups even though, contrary to the apparent congressional expectation, <u>no</u> TWE system carries <u>all</u> of the program services in which TWE has an interest.

Under such circumstances, the systems in question would undoubtedly be reluctant to drop highly popular services like CNN or TNT, for to do so would risk subscriber outrage. Far more likely, the systems would drop the newer services in which TWE has invested, such as Court TV, Comedy Central or E!, that have not yet achieved full audience acceptance. Alternatively, depending upon subscriber tastes and demographic characteristics in the particular system's service area, the system could be compelled to drop a service that serves crucial needs for a relatively small proportion of its subscriber population, such as BET. In either case, investment in new programming services would inevitably be discouraged. 11/

11/ Indeed, depending upon the percentage employed and the method of calculation, the operator could find itself forced to drop such services as CNN, Headline News and TNT, which are among the most popular cable services. For example, using the same 20% figure suggested by the Commission, but adopting the methodology discussed in the Senate Report, would require TWE's San Diego system to drop not just two, but five of the eleven TWE-affiliated program services it now carries (45 activated channels, less a total of 15 broadcast, PEG and leased-access channels, times 20%, yields a limit of six affiliated channels). Similarly, TWE's Indianapolis system would be required to drop six of the ten TWE-affiliated services it now carries (42 activated channels, less a total of 22 broadcast, PEG and leased-access channels, times 20%, yields a limit of four affiliated channels). In these examples, the disincentive to investment in programming--and the potential for subscriber dissatisfaction--are readily apparent.

Because application of such formulas can yield results that discourage investment in new programming and because the extent of such effects ultimately depends upon the Commission's resolution of such issues as attribution, treatment of premium and pay-per-view services and whether the limits will apply only to services affiliated with the particular operator or to all vertically integrated services, TWE strongly urges that the limit should be set at a relatively high level. Alternatively, TWE believes that it would be prudent for the Commission to defer establishing a percentage limit at this time. Particularly because the Commission need not promulgate channel occupancy rules until October 1993, it makes sense to seek further input from commenters before finally fixing a channel occupancy limit.

In any event, TWE strongly believes that the channel occupancy limit should not be applied to any vertically integrated programming service that has achieved a level of distribution such that it is available to 40% or more of the subscribers of non-affiliated operators. Under TWE's proposal, subscribers of any operator affiliated with the service in question would be disregarded, and in order to be exempt from the channel occupancy limit, it would be necessary for the service to be received by over 40% of the subscribers of non-affiliated cable systems nationally. For example, in the case of a service owned by operators accounting for 20% of cable subscribers nationally, the service would be exempt if it were available to 40% or more of the subscribers of non-affiliated operators, who in this example would account for 80% of the nation's cable subscribers.

This proposed exemption is both consistent with the statutory purpose and needed to preserve the benefits of vertical integration. The channel occupancy limits address Congress's concern that operators may favor programmers with which they have an ownership affiliation in determining carriage on their cable systems. See 47 U.S.C. § 533(f)(2)(B). Where a program service has achieved broad distribution among non-affiliated operators, however, there is little reason to suppose that an operator affiliated with the service is carrying it because of any corporate affiliation, as opposed to the demonstrated consumer appeal of the service. Under such circumstances, the congressional concern about discriminatory carriage decisions has no force.

Moreover, if vertically integrated services having broad popularity are not exempted from the channel occupancy limits, then the limits will actually discourage an operator from carrying less popular services in which it has invested, and will thus ultimately discourage operators from investing in new programming services. As discussed above, under any regime of channel occupancy limits, an operator will have only a limited number of channel "slots" available for affiliated services, and the operator will want to fill those "slots" with services that will best maximize subscriber satisfaction. If affiliated services of proven popularity are counted for purposes of the limits, the operator will inevitably prefer to offer them, rather than risk subscriber dissatisfaction by offering a new, unproven service. Such disincentives to carriage are also disincentives to investment in the first place. If services of proven popularity are eliminated from the channel occupancy analysis, however, then the operator may devote one of its affiliated service "slots" to a fledgling program service. In this fashion, congressional concerns are satisfied, and incentives to programming investment are also preserved.

E. Emerging Technologies Justify Less Stringent Channel Occupancy Limits for Systems with Expanded Channel Capacity.

The Commission asks what effect emerging technologies such as digital compression and fiber optic cable should have on channel occupancy limits. The Commission proposes to establish a threshold beyond which the limits would no longer apply and asks what the appropriate total number of channels for establishing such a threshold would be. The Commission suggests that the limits would continue to apply to those channels below the threshold, with no limits applicable for channels in excess of the threshold. NPRM ¶ 53.

TWE agrees that emerging technologies and expansion of channel capacity warrant a threshold beyond which the channel occupancy limits should no longer apply. With recent advances in compression technology and the increasing use of fiber optics, the ability to expand channel capacity is far greater than the ability to develop new programming. As an operator's channel capacity increases, however, so do distribution opportunities for programmers who are not affiliated with the operator, and the legislative concerns about possible discrimination in favor of affiliated programmers cease to have any force.

TWE submits that 54 channels would be an appropriate channel capacity threshold, above which channel occupancy limits would no longer apply. As the Commission noted, 64% of subscribers receive between 30 and 53 channels, while 28% of cable subscribers receive 54 or more channels. NPRM ¶ 53, citing Warren Publishing, Inc., Television & Cable Fact Book, Cable & Services Volume No. 59 (Services--Part III), 1991 Edition, p. C-389. A 54 channel threshold, therefore, is well above the average number of activated channels received by cable subscribers today.

Adopting such a rule would in fact encourage operators to upgrade their systems and thus further the congressional purpose of promoting diversity.

F. The Channel Occupancy Limits Should Not Apply in Communities Where Effective Competition Has Developed.

The Commission asks whether channel occupancy limits should be phased out in communities where effective competition has developed, and whether such phasing out would be consistent with congressional intent. The Commission also asks whether the limits should be lifted for cable systems that meet any of the effective competition criteria, or whether the limits should be lifted where only certain of those criteria are met. NPRM ¶ 54.

TWE believes that the channel occupancy limits should not apply in communities where effective competition exists. In an area where effective competition has developed, either the operator serves such a small proportion of the population that it lacks any ability to affect competition, 47 U.S.C. § 543(1)(1)(A), or it faces successful competition from another multichannel video distributor, 47 U.S.C. § 543(1)(1)(B)(i), (ii). In the latter situation, the competitive alternative system will provide unaffiliated programmers with a means of access. As stated in the Senate Report, the congressional concern that "[p]rogrammers either deal with operators of such systems or face the threat of not being carried in the market" is addressed by the ability of the programmer to be carried by the competitor. Senate Report at 24. Although a competing distributor is not necessarily present in the former situation, TWE submits that no useful purpose is served by imposing channel occupancy limits upon an operator demonstrably devoid of any degree of market power.

G. The Channel Occupancy Limits Should Be Enforced on a Complaint Basis.

The Commission proposes that local franchise authorities have primary responsibility for enforcement of the channel occupancy limits, and that the limits be enforced by annual certification to the franchising authority and by imposing a 30 day notice requirement to the franchising authority of any changes that affect compliance. NPRM ¶ 55.

TWE believes that the suggested approach is unworkable, and that the Commission alone should have responsibility for enforcing the limits. This approach would provide consistency in enforcement and avoid placing the burden of enforcement on franchise authorities. Moreover, TWE believes that a system of certification would probably create significant burdens of compliance by operators and review by the Commission, all to little real regulatory advantage. The Commission should enforce the channel occupancy limits on a complaint basis only. When coupled with the Commission's numerous other enforcement powers under other provisions of the Act, such an approach will be perfectly adequate to ensure that the statutory purposes are achieved.

In this connection, the Commission proposes that existing vertically integrated relationships which exceed the limit be grandfathered, rather than requiring deletion of programming or divestiture. NPRM ¶ 55. TWE agrees that existing relationships should be grandfathered to avoid disruption of service to the public. TWE also notes that divestiture of an operator's interest in a particular program service would be an extreme, indeed a radical, step.

IV. PARTICIPATION IN PROGRAM PRODUCTION.

As added by § 11(c) of the 1992 Cable Act, ¶ 613(f)(1)(C) of the Communications Act of 1934, 47 U.S.C. § 533(f)(1)(C), directs the Commission, within one year after October 5, 1992, "to consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video programming distributors may engage in the creation or production of video programming".

The Commission notes that Congress included this provision to address the same concerns about cable operators' perceived ability to impede "the flow of video programming" to which the subscriber limits and channel occupancy limits are directed. As the Commission correctly notes, §§ 12 and 19 of the 1992 Cable Act were enacted to prevent anticompetitive conduct concerning the acquisition of programming and to prevent the hindrance of competition between cable operators and other multichannel distributors. Section 9 of the Act also serves similar ends. The Commission proposes that, at present, no additional restrictions on the ability of multichannel distributors to engage in the creation or production of video programming are warranted. NPRM ¶¶ 56-60.

TWE strongly agrees that no additional limits are warranted and that other provisions of the 1992 Cable Act already fully address the concerns of Congress. Restricting the production of programming would not achieve any beneficial results, but would instead stifle the creativity and innovation that have been essential to the rich array of cable programming that exists today. Indeed, because cable operators have been the driving force in the video programming revolution, forbidding operators to produce or create programming could cause sharp reductions in the quality, amount and diversity of video programming available to the public. Further, such a measure would discourage operators from developing innovative local programming services, such as New York 1, a 24 hour local news service that was recently launched by TWE's New York City cable systems. There is simply no reason to take such a radical, unwarranted step.

CONCLUSION

TWE urges the Commission to adopt subscriber limits under which a cable operator's cable subscribers could not account for more than 30% to 40% of all multichannel video subscribers nationally. Such a limit will ensure that cable operators lack the potential to impair program distribution, but will also preserve the efficiencies created by horizontal relationships. The statute does not provide for regional limits, nor is there any apparent need for them. The Commission should adopt attribution criteria that focus on control. The Commission should have sole authority to enforce the limits and this authority should be exercised at its own initiative. Commission review of the subscriber limits every five years is appropriate.

With regard to channel occupancy limits, TWE urges the Commission to establish flexible limits that will preserve the benefits of vertical integration, particularly essential investment incentives. As with subscriber limits, attribution criteria should focus on control. Moreover, broadcast, PEG and leased access channels should be included in the calculation of the limits, and the limits should apply only to video programmers affiliated with the particular operator. TWE urges the Commission to adopt a limit that is sufficiently high to maintain the efficiencies and other benefits created by vertical relationships. In addition, TWE strongly urges the Commission to exempt from the application of the limits those programming services that have achieved a distribution level of 40% or more among non-affiliated operators. The Commission should establish a 54 channel capacity threshold above which the limits would no longer apply, and the limits should not be applied in areas where effective competition exists. The Commission should have sole authority to enforce the limits and should do so on a complaint basis only.

Finally, TWE strongly agrees with the Commission that no additional restrictions on the ability of multichannel distributors to engage in the creation or production of programming are warranted.

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Respectfully submitted,

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