Commission believes that the objective of any such restriction may be fully addressed by other provisions of the Cable Act. NPRM at ¶60. Viacom supports this conclusion.

As the Commission notes, the Cable Act imposes a wide variety of structural and behavioral limits on the actions of vertically-integrated cable operators, all designed, in one form or another, to increase diversity, preclude discrimination and promote competition. Before the Commission adopts the ultimate, and constitutionally dubious, sanction of precluding operators from participation in the creation of new program services or other programming, it should determine whether the existing restrictions are sufficient to achieve the goals of Congress.

This is especially significant given that multichannel video distributors in general, and cable operators in particular, have been at the forefront of developing new program services. To preclude such cable operator participation could result in decreased diversity by foreclosing new program services. Accordingly, Viacom submits that the best policy is to take no action limiting the ability of multichannel video distributors to participate in program production at this time. If, in the future, the Commission finds abuses or determines that the current regulations are not achieving the desired effect, it will have every opportunity to consider the imposition of additional regulations.

III. Sales Of Cable Systems

Section 13 of the Cable Act establishes a three-year holding period for cable systems. 47 U.S.C. §537(a). The provision was designed to prohibit "profiteering" transactions that would adversely affect rates or services in the community served by the transferred cable system. House Report at 119. The Commission asks whether each system owned by an MSO must meet the three-year holding period before the MSO could be sold. NPRM at ¶ 14.

Viacom submits that there is no need for each franchise or system involved in a multiple system transfer to have been held for three years in order to prevent the abuses discerned by Congress. Rather, it is appropriate to allow sales in which a portion of the systems proposed to be sold were acquired within the three years prior to the proposed sale. Restricting such sales would discourage operators from acquiring systems, even where the acquisitions would lead to increased operating efficiencies. For example, an operator that has owned a cable system in an urban area for ten years might be deterred from acquiring a nearby small suburban system if it feared its ability to sell the urban system would be impaired by the three-year holding rule, even though the acquisition would result in operating efficiencies that would benefit subscribers to both systems. Thus, a strict application of the three-year holding period to multiple system transfers would ultimately harm consumers.

Accordingly, Viacom proposes that a sale of more than one system should be considered to be in compliance with the anti-trafficking provision as long as no more than 50% of the homes passed by the systems subject to the sale were acquired or (in the case of a "new build")[24] built within the three-year holding period. The 50% standard is appropriate because other provisions of the Act -- especially rate regulation and customer service standards -- provide the safeguards against the harms that the anti-trafficking provision was designed to prevent (i.e., an increase in rates and/or a decrease in customer service occasioned by increased costs arising from a cable operator's having to service high levels of debt or otherwise pay for recently-acquired cable assets). The 50% standard, although high, will exclude speculators who invest in cable for a short term gain. At the same time, the standard will not unduly restrict long-term operators from achieving efficiencies that benefit consumers.

A similar issue may arise in the case of a single system that has recently expanded into a neighboring franchise area,

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[24] Viacom uses the term "new-build" to describe a new franchise under which a system is being constructed for the first time. This is to be distinguished from an operator that continues to build out an existing franchise. Viacom submits that the holding period should run from the time the operator first provides service to any subscribers in the franchise area rather than to subsequent line extensions within an existing franchise area. To apply the holding period to line extensions would dissuade operators from continuing to build out their existing franchise.

either through a "new build" or the acquisition of an existing operator. In this case, a single integrated system may be composed of separate franchise areas that were acquired or awarded at different times. For example, Viacom has operated a cable system in Salem, Oregon, for many years. Recently, the Salem system acquired a system serving Amity, Oregon, a nearby community, which increased Salem's subscriber base by approximately 7.5%, and integrated it into its operations. Under a strict reading, Viacom would not be able to sell its integrated system until three years after the Amity acquisition. Such integrations, however, should be encouraged because they result in economies of scale and more efficient operations. Moreover, they are not the type of "profiteering" transaction that the Act seeks to prevent. Accordingly, Viacom submits that as long as no more than 50% of the homes passed by the system were acquired or (in the case of a "new-build") built within the three-year holding period, a sale within that holding period should be deemed to be in compliance. By applying this standard, existing operators will benefit from flexibility and greater efficiencies which also will benefit subscribers, while the Commission can be confident that the sale will not result in the abuses that Congress found to arise from the trafficking of systems.

IV. Cross-Ownership Restrictions

Section 11 of the Act also prohibits a cable operator from owning a satellite master antenna television ("SMATV") system in its franchise area. 47 U.S.C. §533(a). This provision, however, does not preclude a cable operator from acquiring a SMATV system located within its franchise area and incorporating that system into its cable system. Of course, in acquiring a SMATV system, there often will be some lag time before the SMATV system can be incorporated into the cable system. Accordingly, Viacom submits that a cable operator should be given a period of 2 years in which to integrate the SMATV system into its cable operations.[25]

Similarly, when a cable operator is building out its system, it often finds that there are scattered pockets within the franchise area that are sufficiently populated to warrant rapid provision of service but, at the same time, are too distant from the first phase of construction for it to be feasible to link to the core system. Viacom submits that the Commission should presumptively find that in these situations a cable operator is justified to operate a SMATV system in order to "ensure that all significant portions of a franchise area are able to obtain video programming." 47 U.S.C. § 533(a)(2)(B). The cable operator

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[25] In addition, the cable operator should be allowed to seek a waiver of this period if build-out schedules or other exigencies make it unfeasible for the cable operator to comply within the 2 year period.

should be given 2 years to integrate such "SMATV" systems into its cable operations.[26]

V. Conclusion

For the reasons set forth above, Viacom submits that the important constitutional rights affected by the channel occupancy limits compel the Commission to afford the broadest latitude possible under the Act for the selection and carriage of programming. Viacom submits that its proposals set forth herein accomplish this result and, accordingly, urges the Commission to incorporate the proposals into any regulations ultimately adopted.

Respectfully submitted,

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[26] Again, a waiver should be available if the area is so discrete that it would be economically infeasible to integrate the SMATV system.