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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 92-264

In the Matter of:)
)
Implementation of Sections 11 and 13)
of the Cable Television Consumer)
Protection and Competition Act of 1992)
)
Horizontal and Vertical Ownership)
Limits, Cross-Ownership Limitations)
and Anti-Trafficking Provisions)

To: The Commission

COMMENTS OF DISCOVERY COMMUNICATIONS, INC.

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I. The Commission Must Take Care to Ensure That Its Channel Occupancy Rules Do Not Limit the Ability of Cable Operators to Implement New Services That Will Enhance Subscriber Welfare

In the initial round of comments in this proceeding, many commenters, including Discovery, urged the Commission to establish a channel capacity threshold beyond which the channel occupancy limits would not apply. See Comments of Discovery at 17; Comments of NCTA at 32-33. They demonstrated that the channel occupancy limits will become unnecessary because the increased capacity resulting from the introduction of fiber optic and digital compression technology will necessarily require cable operators to increase their carriage of unaffiliated program services. See, e.g., Time-Warner Comments at 56-58.

The Commission, while recognizing and supporting the establishment of such a "ceiling" beyond which the channel occupancy limits would not apply, has tentatively concluded that it is "premature" to set a specific ceiling at this time. FNPRM at ¶ 226. Discovery urges the Commission to reconsider this decision. Discovery submits that the establishment of a ceiling in this proceeding will better serve the public interest than delay because it: (i) better promotes fundamental First Amendment values; and (ii) will allow cable operators to plan and implement new services that, while not by themselves increasing the total amount of programming available to consumers, will enable consumers to access programming services quickly and easily.

As Discovery demonstrated in its prior comments in this proceeding, the imposition of channel occupancy limits raises significant First Amendment concerns. Discovery Comments at 3. Although the precise parameters of a cable operator's status under the First Amendment have not yet been fully defined, there is no question that cable operators are speakers entitled to the protection of the First Amendment. See, e.g., Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986). Thus, any limits established by the Commission should, at the least, be narrowly tailored to achieve a substantial governmental interest.

The Commission has recognized that advances in technology "most likely" will eliminate the need for channel occupancy limits. FNPRM at ¶ 226. To establish restraints on speech in a situation in which they most likely will not be needed to promote the goals of the channel occupancy provision cannot withstand constitutional scrutiny.¹ Thus, consistent with its constitutional obligations, the Commission should establish, at the outset, a threshold that is consistent with existing channel capacity -- where Congress has discerned a problem. For the reasons demonstrated in Discovery's prior comments, Discovery submits that the ceiling should be set at 54 channels. Discovery Comments at 17.²

¹ Indeed, there is serious question whether any limits could withstand constitutional scrutiny.

² In the event the Commission determines that the limit it sets has not sufficiently promoted diversity, it can re-address the issue at that time.

In addition to the constitutional imperatives for establishing a ceiling now, the Commission must recognize that enhanced channel capacity will not only be used to increase the total amount of traditional program services available to the consumer, but will be used to provide the consumer with a wide variety of other new services. For example, Discovery is developing Your Choice TV™ ("YCTV"), a technologically advanced program packaging and delivery system that will permit virtual video-on-demand and will also make the emerging multi-channel video environment user friendly. YCTV will provide viewers with an effective and quick way to evaluate their program options and to select the program of their choice.

In order for a cable operator to provide YCTV service to its subscribers, a portion of the capacity available over the cable system must be devoted to YCTV. Overly restrictive channel occupancy limits that restrict the amount of system capacity that can be used to make YCTV -- or other new services -- available to consumers do not serve the public interest. For example, if a cable operator was contemplating an expansion of channel capacity for the express purpose of accommodating YCTV (or a similar service),³ it might not proceed with the expansion unless there

³ Services, such as YCTV, will utilize increased channel capacity to dramatically enhance the accessibility of individual programs -- by offering them to subscribers in a wide variety of different time periods. While this use may not represent the widest possible "diversity" of program choices, such diversity is not the only attribute of cable service that is important to consumers. Such factors as convenience of scheduling and

(continued...)

was certainty that the added channels could be used for their intended purpose. Certainly, the operator should not be expected to submit a petition for rulemaking, and await a modification of the FCC's channel cap rules, before moving forward with construction plans.

In sum, in order to best promote fundamental First Amendment interests and to give cable operators the flexibility to introduce services that will benefit subscribers, Discovery respectfully urges the Commission to establish a 54-channel threshold beyond which the channel occupancy limits do not apply.

II. Discovery Supports Many of the Commission's Other Proposals

The FNPRM also sets out a variety of other proposals for implementing the channel occupancy rules. Discovery supports, and urges the Commission to adopt, the proposals set forth briefly below:

- The Commission proposes to apply the channel occupancy limits "only to video programmers that are vertically integrated with the particular cable operator." FNPRM at ¶ 180. The Commission has properly recognized that cable operators have no incentive to favor unaffiliated program services.
- All of a cable system's activated channel capacity, including PEG, leased access and broadcast channels, will be used in calculating a system's channel capacity for purposes of

³(...continued)
accessibility of desired programming also make important contributions to consumer welfare and should be accommodated within the framework established by the Commission's rules.

implementing the channel occupancy rules. FNPRM at ¶ 189. Because these services all serve to increase diversity -- the goal of channel occupancy limits -- it would be "unreasonable" to exclude them from the calculation.

- Channel occupancy limits will be eliminated for systems subject to effective competition. Competition will ensure diversity. Cable operators in such an environment should have unfettered discretion to select programming of their own choosing.
- Cable operators will be allowed to continue carriage of all program services carried on the system as of December 4, 1992. Grandfathering existing carriage will minimize disruption to both consumers and existing relationships of program services.

III. Conclusion

In sum, Discovery urges the Commission to establish, in this proceeding, a 54-channel threshold beyond which the channel occupancy limits will not apply. The establishment of such a threshold is more consistent with the First Amendment and will

give cable operators the flexibility to introduce new services that will benefit consumers.

Respectfully submitted,

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