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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
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	)	

COMMENTS OF LIBERTY MEDIA CORPORATION

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SUMMARY

The Commission should preserve the efficiencies achieved through multiple cable system ownership and the substantial benefits resulting from investment in programming by adopting less restrictive ownership and channel occupancy limits than those proposed in the Further Notice. The potential harms perceived by Congress have not materialized, and the comprehensive behavioral regulations adopted by the Commission ensure that they will not occur in the future.

Contrary to the concerns expressed by Congress, cable operators cannot "control the dissemination of information" to consumers. Cable subscribers already enjoy a greater diversity of programming options than ever before, and must-carry, leased access and PEG obligations ensure that they will continue to receive multiple independent sources of information. Of course, innumerable television and radio stations, newspapers, magazines and other media sources also are available to consumers.

Although Congress was concerned that cable consolidation and vertical integration might "create barriers to entry" for programmers, the Commission found that "many of the most popular cable programming services...were initiated or sustained with the help of MSO investment." Further Notice at ¶208. The Commission also found "a lack of evidence that might indicate a pattern of vertically integrated MSO's denying system access to unaffiliated programmers." Id. at ¶182.

Thus, the record clearly supports adoption of less restrictive horizontal and vertical limits in order to preserve the recognized benefits of cable consolidation and investment in programming. An ownership limit of 35 percent of homes passed nationwide would provide for additional efficiencies without adversely affecting consumers or programmers. However, a lower limit which freezes or reduces existing ownership levels would sacrifice efficiencies without providing any significant benefits.

Although Liberty Media continues to believe that channel occupancy limits are unnecessary and constitutionally suspect, there is substantial record evidence to support the Commission's proposals to: (a) base any such limits on all activated channels; (b) apply them only to services affiliated with the operator of the particular system in question; and (c) exclude local and regional programming services. Liberty Media also supports the bandwidth proposal advanced by TCI, which will promote development of new programming and deployment of new technologies.

The Commission should raise the equity threshold for the channel occupancy attribution standard because there is no evidence that ownership of a small percentage interest in a programming service would provide a sufficient incentive for a cable operator to favor that service over other, more popular, but unaffiliated programming services. A higher threshold also will encourage continued investment in new programming services.

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COMMENTS OF LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty Media") submits these comments in response to the Commission's Further Notice of Proposed Rule Making ("Further Notice") in this proceeding. The comprehensive behavioral controls already adopted under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") -- and the record developed in this proceeding -- support adoption of less restrictive ownership and channel occupancy limits than those proposed in the Further Notice.

Preliminary Statement

To date, the Commission has conducted over thirty separate rulemaking proceedings implementing various provisions of the 1992 Cable Act. Among other things, those statutory provisions and Commission regulations are intended to: (1) protect cable subscribers from excessive rates for basic and other cable program services; (2) mandate carriage of local broadcast signals on the basic cable service tier; (3) promote development of alternative distribution media and ensure their non-discriminatory access to cable programming; (4) establish reasonable rates, terms and conditions by which programmers can lease access on cable systems; and (5) prohibit cable operators from unreasonably restraining an unaffiliated programming vendor's ability to compete fairly.

Despite the wide array of statutory and regulatory protections afforded to consumers, broadcasters, alternative distributors, and independent programmers, Congress determined that the Commission also "must adopt some limitations" on multiple system ownership and carriage of affiliated programming services. However, it has given the Commission considerable "discretion in establishing the reasonable limits." Cable Television Consumer Protection Act of 1991, S. Rep. No. 92, 102d Cong., 1st Sess. 80 (1991) ("Senate Report"). In establishing ownership and channel occupancy limits, the Commission must balance the real and significant benefits for consumers and programmers resulting from multiple system ownership and cable investment in programming services, as demonstrated by substantial record evidence in this proceeding, against the potential harms perceived by Congress as possibly arising from such ownership and investment.

In contrast to the behavioral regulations adopted in other proceedings, the horizontal and vertical restraints at issue here affect the very structure of the cable industry.

overly restrictive horizontal ownership and channel occupancy limits would stifle cable investment in innovative programming and technology, adversely affecting programmers and viewers over the long term. Because there is no suggestion in the record that the potential harms perceived by Congress have occurred and the 1992 Cable Act and the Commission's implementing regulations minimize the likelihood of their future occurrence, the Commission should adopt less restrictive ownership and channel occupancy limits.

I. The Potential Harms Perceived By Congress Have Not Occurred And Are Addressed Directly By Other Statutory And Regulatory Provisions.

There is little dispute that cable multiple system ownership and investment in programming have produced substantial benefits to cable subscribers and programmers. The Commission acknowledges that consolidation of cable ownership yields "the economies of scale necessary to encourage investment in new programming services and the deployment of advanced cable technologies," both of which benefit consumers and programmers. Further Notice at ¶147. Likewise, the Commission concedes that "MSO investment in cable programming services has provided cable subscribers with a variety of high quality cable programming services." Id. at ¶208.

Nevertheless, Congress expressed concern that increasing consolidation of ownership and vertical integration in the cable industry might adversely affect consumers and programmers. Specifically, Congress stated that increasing consolidation in the cable industry could "create barriers to entry for new programmers" or "reduce the number of media voices available to consumers," thereby enabling cable operators to "control the dissemination of information." Further Notice at ¶132; Senate Report at 32. The channel occupancy limits arose from similar concerns that consumers "receive a diversity of voices, not just programming in which the particular cable operator has an ownership interest" and that "unaffiliated programmers are able to obtain access to vertically integrated cable systems." Further Notice at ¶175 n.169. However, the potential harms identified by Congress have not materialized and are addressed directly by other provisions of the 1992 Cable Act and the Commission's implementing regulations.

A. The 1992 Cable Act And The Commission's Implementing Regulations Ensure That Cable Operators Cannot Control The Dissemination Of Information To Consumers.

Contrary to Congressional concerns that cable multiple system ownership and vertical integration may reduce the number of media voices available to consumers, the record evidence confirms that such consolidation and investment in programming have provided cable subscribers with a greater diversity of programming choices than ever before. In addition to the marketplace incentives which have motivated cable operators to provide a wide selection of popular programming from multiple sources, applicable provisions of the 1992 Cable Act and the Commission's regulations place significant limits on the editorial discretion of cable operators and ensure that they cannot "control the dissemination of information."

Since the Commission released its initial Notice in this proceeding, the United States District Court for the District of Columbia has upheld the constitutionality of the "must-carry" provisions of the 1992 Cable Act, and the Commission has adopted regulations implementing those provisions and issued numerous decisions enforcing them. Pursuant to the must-carry requirements, cable operators must devote up to one-third of their channel capacity to carriage of local commercial broadcast stations and/or low-power television stations. See 47 C.F.R. §76.56(b)(2) and (3). Cable operators also must carry additional non-commercial television stations. Id. at §76.56(a). These provisions guarantee that cable viewers receive numerous channels programmed by sources other than the cable operator, and clearly moot any concern that a cable operator could "control the dissemination of information" to viewers.

Additional carriage requirements imposed by statute and local franchising authorities guarantee other sources of information for cable subscribers. Section 612(b) of the Communications Act requires that cable operators set aside up to 15 percent of their activated channels for leased access. Likewise, Section 611 of the Communications Act permits franchising authorities to require that cable operators designate certain channels for public, educational or governmental

("PEG") use and prohibits a cable operator from exercising "any editorial control" over such PEG channels. Thus, PEG and leased access channels provide subscribers with additional sources of information which are not subject to cable operator editorial control.

Of course, all of these diverse sources of information, which cable systems must provide pursuant to statute, are supplemented by the numerous television and radio stations, newspapers, magazines and other media sources readily available to consumers. Consequently, there is no realistic threat that less restrictive cable ownership and channel occupancy limits could somehow adversely affect viewers by enabling cable operators to control the dissemination of information or by reducing the number of media voices available to viewers.

B. Less Restrictive Ownership And Channel Occupancy Limits Will Not Stifle The Development Of New Programming.

The record evidence confirms that less restrictive ownership and channel occupancy limits will not adversely affect the development of new programming. Contrary to Congressional concerns that cable investment in programming services may create "barriers to entry for new programmers," the record developed in this proceeding -- particularly the submissions of programmers -- demonstrates that cable investment has facilitated new entry and that the potential harms perceived by Congress have not materialized. The

Commission expressly acknowledges that "many of the most popular cable programming services...were initiated or sustained with the help of MSO investment" and that there is "a lack of evidence that might indicate a pattern of vertically integrated MSO's denying system access to unaffiliated or competing cable programmers." Further Notice at ¶¶182, 208.

Moreover, other provisions of the 1992 Cable Act and the Commission's implementing regulations protect programmers from potentially anticompetitive conduct by cable operators. Section 12 of the Act prohibits a variety of anticompetitive conduct by cable operators in their carriage decisions. For example, Section 12(a)(3) prohibits a cable operator from:

> [E]ngaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

In addition, the Commission has adopted regulations intended to promote the use of leased access channels and to establish reasonable leased access rates, terms and conditions of use. Thus, existing statutory and regulatory provisions minimize the likelihood of anticompetitive conduct and provide alternative carriage opportunities through leased access.

Finally, the Commission has stated that it expects that "in the near future, cable operators may experience significant competition in delivery of video programming to consumers." Notice of Proposed Rulemaking, MM Docket No. 93-215, FCC 93-353 (rel. July 16, 1993), at ¶9. Over one hundred MMDS systems already are in commercial operation in cities throughout the country. See Comments of Wireless Cable Association International, Inc., filed Jan. 25, 1993 in MM Docket No. 92-265, at 9. In addition, the Commission has granted Section 214 authorization for video dialtone tests in several areas, and two DBS operators are scheduled to begin commercial service in the spring of 1994. Consequently, numerous additional media outlets are becoming available for programmers, and the competition from such distribution media ensures that cable operators will respond to their subscribers' viewing demands without regard to the affiliation of particular programming services.

* * *

In short, the potential harms perceived by Congress have not materialized, and existing provisions of the 1992 Cable Act and the Commission's implementing regulations will prevent such harm in any event. Therefore, the Commission should preserve the recognized benefits of the consolidation of cable system ownership and vertical integration by adopting less restrictive ownership and channel occupancy limits.

II. The Horizonal Ownership Limits Should Be No Lower Than 35 Percent Of Homes Passed Nationwide.

Congress charged the Commission with the task of establishing subscriber limits "high enough to preserve the benefits of horizontal concentration, while ensuring that cable operators cannot impede the flow of video programming." Further Notice at ¶148. Despite its acknowledgement that "there is some indication in the record that a higher limit of 30%-35% would be reasonable to allow for future MSO growth without precluding the launch or success of new programming services" (id.), the Commission proposes to adopt an ownership limit of 25 percent of all homes passed nationwide. Id. at ¶147. Liberty Media respectfully submits that the Commission's proposed limit is too low and is inconsistent with the record in this proceeding.

A. The Record Offers No Support For A Limit Which Freezes Or Reduces Existing Ownership Levels.

Although it proposes to adopt ownership limits "of approximately 25%," the Commission "continue[s] to seek comment on subscriber limits in the range of 20%-35%" of cable homes passed nationwide. Id. Liberty Media supports the Commission's tentative conclusion to adopt only national ownership limits. See Liberty Media Comments at 30-35; Reply Comments at 30-32. However, the record in this proceeding and the statutory and regulatory proceedings described above support adoption of a horizontal limit in excess of the 25 percent limit proposed by the Commission.

Although the Commission solicited comments on limits as low as 20 percent, there clearly is no basis for imposing such unreasonably and arbitrarily low ownership limits. Congress unequivocally stated that Section 11 of the

1992 Cable Act should not be interpreted to require "that any existing company must be divested" of its current cable holdings. Senate Report at 34; Further Notice at ¶147. However, Congress and the Commission have acknowledged that Tele-Communications, Inc. ("TCI") owned, controlled or had investments in systems serving approximately 24 percent of the nation's subscribers when Section 11 was enacted. See Notice of Proposed Rulemaking and Notice of Inquiry, 8 FCC Rcd. 210 (1992), at ¶31; Senate Report at 32. Consequently, unreasonably low subscriber limits plainly would be inconsistent with Congress' stated intent that no divestiture of existing cable ownership be required.

The Commission's present proposal represents the lowest possible subscriber limit consistent with this stated Congressional intent. However, the proposed 25 percent limit essentially would freeze TCI and all affiliates at existing ownership levels. Such a limitation would be arbitrary and capricious where the Commission admittedly has before it record evidence indicating that "a higher limit...would be reasonable to allow for future MSO growth without precluding the launch or success of new programming services" or otherwise adversely affecting consumers or programmers. See Further Notice at ¶148.

B. Higher Ownership Limits Would Not Impede The Development Of New Programming.

Aside from the statutory and regulatory protections described above, there is substantial credible evidence in the record demonstrating that ownership of systems serving 40 percent of homes passed nationwide would not prevent the development of new programming. Even if a cable operator controlling 40 percent of the homes passed by cable attempted to block the launch of a new programming service, the record indicates that it would be unsuccessful. In the face of a hypothetical refusal to deal by an MSO with 40 percent of all homes passed by cable, a universe of over 53 million cable homes passed and 33 million cable subscribers would remain available to new programmers seeking to distribute their services. See Liberty Media Comments at 35. This exceeds the total number of cable subscribers in 1985, when there were no fewer than 49 national cable programming services. Further, there are at least 39 national "basic" cable services today with fewer than 33 million subscribers. Id. at 35 n.15. Other commenters provided numerous examples of successful cable programming services which were launched and sustained with penetration levels well below 30 to 40 percent of all cable subscribers. Comments of Time Warner Entertainment Company, L.P. (Horizontal and Vertical Ownership Limits) at 27-29; TCI Comments at 24-25.

Proponents of more restrictive national limits do not dispute this analysis. Rather, they claim that more restrictive limits are required because, "if more than one operator approaches the 25 percent concentration figure, an independent programmer may find its potential market access limited to only 50 percent" of the market. Reply Comments of Motion Picture Association of America, Inc. at 4. Implicit in this argument, however, is the presumption that the two cable operators would act in concert and refuse to carry the services of unaffiliated programmers. There is no basis for such presumption, and the concerted refusal presumably would be prohibited in any event by Section 12(a)(3) of the 1992 Cable Act. See supra at 7.

Rather than permanently freezing the cable system ownership of the largest MSO at its current level, the Commission should preserve the opportunity for additional economies and efficiencies by adopting a national ownership limit no lower than 35 percent of homes passed. Lower national ownership limits are unsupported by the record.

III. The Commission's Channel Occupancy Limits Should Promote New Programming Services And New Technologies.

Congress directed the Commission to establish channel occupancy limits because it was concerned that vertically integrated cable operators may have "the ability and the incentive to favor their affiliated programmers" in carriage decisions. Further Notice at ¶167. However, after reviewing the comments and replies submitted in response to its initial Notice, the Commission concedes that "the record in this proceeding, as well as other empirical sources, demonstrate a lack of evidence that might indicate a pattern of vertically integrated MSO's denying system access to unaffiliated or competing cable programmers." Id. at ¶182. In the absence of any credible evidence of such discrimination, the Commission should adopt channel occupancy limits which will promote continued cable investment in programming services and the deployment of new technologies.

A. Any Channel Occupancy Limits Must Be Based On All Activated Channels And Apply Only To National Program Services Affiliated With The System Operator.

Liberty Media continues to believe that channel occupancy limits are unnecessary and constitutionally unsound.[1] However, to the extent that the Commission is obligated to adopt such limits pursuant to the 1992 Cable Act, its tentative conclusions to base those limits on all activated channels and to apply them only to national programming services affiliated with the system operator are required by the record.

As set forth *supra* at 5-6, must-carry, PEG and leased access channels provide significant sources of programming unaffiliated with the cable operator, thereby contributing to the diversity of viewpoints available to subscribers. The Commission's leased access rules also provide an alternative method of distribution for programmers unable to obtain carriage. In combination, the must-carry, PEG and leased

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[1] As set forth in its initial Comments at 12 n.5, Liberty Media believes that limits on vertical integration raise serious constitutional concerns. At the very least, less restrictive channel occupancy limits will minimize governmental intrusion on the First Amendment rights of cable operators and comply with the Congressional directive to rely on marketplace forces to the greatest extent possible.

access requirements yield a de facto channel occupancy limit by ensuring that between one-third and one-half of all activated channels will be programmed by entities other than the cable operator. Exclusion of these channels from the applicable channel occupancy limits clearly would be contrary to the fundamental purposes of Section 11 of the 1992 Cable Act.

Liberty Media also supports the Commission's tentative conclusion to apply any channel limit only to programming services affiliated with the particular operator of the system in question. Further Notice at ¶182. There is no tenable rationale for extending the channel occupancy limits to programming services affiliated with other cable operators. While Congress was concerned about the "incentive and ability of cable operators to favor their affiliated programming services in carriage decisions," there is no record evidence of any pattern of such favoritism, much less evidence that cable operators would favor a programming service affiliated with another cable operator. Id.

Finally, Liberty Media supports the Commission's tentative conclusion to exclude local and regional programming services from the channel occupancy limits. Id. at ¶219. The record confirms that local and regional news or sports channels provide significant coverage of local events and promote the important Congressional objective of local origination of programming. Id. As the Supreme Court has recognized, live coverage of "outstanding local events [such] as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest" serves the public interest. United States v. Midwest Video Corp., 406 U.S. 649, 668-69 (1972), quoting National Broadcasting Co. v. United States, 319 U.S. 190, 203 (1943) (emphasis added). Consequently, the Commission should define a "local and regional programming service" as "a video programming service which: (a) is marketed and distributed to viewers in a particular community, state or multi-state geographic region rather than nationwide; and (b) originates programming of particular interest to, or sports coverage of teams located in or of particular interest to, that community, state or geographic region."

B. The Channel Occupancy Limits Should Encourage Development And Deployment Of New Technologies.

The Commission seeks to adopt channel occupancy regulations that will "encourage cable operators to continue to invest in the development of new technologies and innovative program services." Further Notice at ¶183. In this context, the Commission expressly solicits comment on TCI's proposal to establish "channel" occupancy limits based on bandwidth rather than channels. Id. Specifically, TCI has proposed that, rather than counting affiliated programming services for channel occupancy limits, the Commission should count the bandwidth occupied by those services. See TCI Comments at 37-39. In this way, cable operators and programmers could utilize digital compression and other technologies to expand their service offerings without occupying additional "channels."[2] Such bandwidth limits would provide strong incentives for investment in new technologies. Liberty Media supports this bandwidth approach because it will promote the development and deployment of digital compression and other new technologies, encourage cable investment in new programming services, and increase the cable system capacity available for new or unaffiliated programming services.

Liberty Media also supports the Commission's proposal to eliminate the channel occupancy limits where a particular cable system either faces effective competition or reaches a certain threshold capacity. Further Notice at ¶¶226, 231. In either case, the cable operator cannot present a bottleneck for programmers seeking distribution facilities and channel occupancy limits are unnecessary.

However, the channel occupancy limits should not apply to capacity -- whether measured in "channels" or bandwidth -- used to distribute non-video and other communications services. Inclusion of non-video services within the channel

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[2] Viacom International Inc. ("Viacom") included a similar proposal in its comments:

> [I]f a system is able to deliver three channels within the spectrum currently used to deliver one channel which is occupied by a commonly-owned program service, the two channels of added capacity should be exempt from any restrictions, regardless of the size of the system.

Viacom Comments at 16 n.21.

occupancy limits is contrary to the Congressional directive to establish 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." 1992 Cable Act, §11(c) (emphasis added). Thus, Congress confined the scope of the channel occupancy limits to video programming, i.e. "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. §522(19). Clearly, non-video information and communications services are outside the scope of the channel occupancy limits.

C. The Commission Should Increase The Attribution Threshold.

The Commission proposes "to apply the broadcast attribution criteria for purposes of applying the channel occupancy limits." Further Notice at ¶197. Although Liberty Media continues to believe that a control standard is more appropriate for defining the scope of the channel occupancy limits (see Liberty Media Comments at 12-18; Reply Comments at 17-21), the Commission, at the very least, should increase the attribution threshold.

At the outset, the Commission acknowledges that it "does not currently have any directly analogous regulations, which measure vertical integration." Further Notice at ¶198. Consequently, the Commission proposes to employ the broadcast attribution standards because those "criteria were designed to identify all interests that could potentially afford influence or control over management or programming decisions." Id. at ¶201.

This Commission rationale simply does not apply to channel occupancy limits. Unlike the issues underlying the broadcast attribution rules, the relevant issue for application of the channel occupancy limits is not who could influence or control the programming decisions of a particular cable system. There is no dispute that the cable operator makes those programming decisions, subject to the must-carry, PEG and leased access requirements described above. Rather, the relevant issue is the point at which a cable operator's ownership interest in a programming service provides sufficient incentive to carry that service rather than a more popular but unaffiliated programming service. There is no evidence that a cable operator would sacrifice subscriber revenue in order to carry a less popular programming service from which it could retain only a small percentage of any profits. An equity interest substantially greater than 5 percent clearly would be required potentially to influence a cable operator's carriage decision in favor of an affiliated but less popular programming service. See Liberty Media Comments at 16-17.[3]

[3] The Commission currently is considering modifications of its broadcast attribution standard which, among other things, would increase the equity threshold for attribution from 5 to 10 percent for voting equity interests and to 20 percent for passive interests. See Notice of Proposed Rulemaking, MM Docket No. 92-51, FCC 92-96 (rel. Apr. 1, 1992). Given the undeniable benefits of cable investment in new programming services, the Commission, at a minimum, should

The Commission also should establish higher equity thresholds for new programming services and services in which more than one cable operator holds a minority interest. Further Notice at ¶202. The record confirms that cable operators often have been the last resort for programmers in search of financing needed to launch new services. Id. at ¶208. As recognized by the Commission, investment in new programming services involves a high degree of risk and "it is common for several MSOs to acquire minority interests in a new programming service in order to spread the risk." Id. at ¶201 n.196.

Application of strict broadcast attribution standards, particularly when combined with the Commission's program access rules, may discourage future cable operator investments. There is little incentive for cable operators to invest in a new programming service which it is unable to carry on its system because of channel occupancy limits, but which must be made available to its competitors pursuant to the program access rules. Likewise, unreasonably low attribution standards may eliminate the ability of programmers and cable operators to spread the risk of investing in new programming services among several minority MSO investors because such investments might preclude carriage on numerous cable systems.

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increase the attribution threshold for the channel occupancy limits to at least 10 percent for voting equity interests.

* * *

In short, the Commission should reject restrictive channel occupancy limits based on unreasonably broad attribution standards that guard against non-existent incentives and potential harms which have not materialized. Instead, the Commission should develop less restrictive vertical limits and narrower attribution standards to encourage continued investment in and development of new programming services and new technologies to the benefit of consumers and programmers alike.

Conclusion

The record in this proceeding demonstrates that the potential harms perceived by Congress from cable consolidation and vertical integration have not occurred. Rather, such consolidation and investment in programming services have resulted in substantial benefits for consumers and programmers. Because other statutory and regulatory provisions already protect against the potential harms envisioned by Congress, the Commission should preserve the demonstrated benefits of cable consolidation and vertical integration by