

a fixed period of time counsels against such an exemption. TWE believes that the more sensible and workable approach would be to exempt services that have demonstrated their popularity among unaffiliated operators. See TWE II at 34-36. In the event that the Commission rejects this proposal, TWE supports an exception for new programming services.

#### H. Other Issues

##### 1. Almost All Commenters Concur with the Commission's Proposal to Not Apply the Channel Occupancy Limits in Areas Where Effective Competition Has Developed.

All commenters, except LG, support the Commission's proposal to not apply channel occupancy limits in communities where effective competition exists. FNPRM ¶ 231; TWE II at 37; TBS II at 7; Viacom II at 9-10; Liberty II at 16; LG II at 12; NCTA II at 24; Discovery II at 6. Like TWE, TBS, NCTA and Viacom agree that the limits should be phased out automatically where effective competition has developed. TWE II at 37; TBS II at 7; NCTA II at 24; Viacom II at 9.

LG argues that, because the definition of effective competition is provided in Section 3 of the 1992 Cable Act governing rate regulation, it should not be applied with regard to channel occupancy limits. Section 11(c), however, mandates that the Commission adopt

reasonable limits, and it also requires the Commission to "rely on the marketplace, to the maximum extent feasible". 1992 Cable Act, § 2(b)2. Accordingly, the Commission should not apply the limits in areas where effective competition has developed.

2. Almost All Commenters Agree That Existing Vertically Integrated Relationships Should Be Grandfathered.

There is universal assent among the commenters, except LG, that the Commission should grandfather all vertically integrated relationships which exceed the channel occupancy limits. FNPRM ¶ 236; TWE II at 37-38; TCI II at 34-36; TBS II at 7-8; MPAA II at 9; Viacom II at 10; Discovery II at 6; LG II at 12-13; NCTA II 20-21. Those commenters who addressed the subject also agreed with TWE that grandfathering should be done as of the effective date of the Commission's channel occupancy rules, not as of December 4, 1992. NCTA II at 21; TCI II at 36.

LG opposes grandfathering existing vertically integrated relationships on the ground that Congress did not specifically provide for it, and it would "freeze" the status quo. LG II at 12-13. As with the elimination of the limits in areas where effective competition exists, however, it is clearly within the Commission's discretion to grandfather existing relationships. In addition, as noted

by the Commission and many commenters, this approach will prevent subscriber confusion and minimize disruption to existing affiliation agreements. FNPRM ¶ 236.

3. The Channel Occupancy Limits Should Be Enforced by the Commission on a Complaint Basis.

Like TWE, the MPAA and NCTA support the Commission's proposal to retain responsibility for enforcement of the channel occupancy limits. FNPRM ¶ 242; TWE II at 38-39; MPAA II at 10-11; NCTA II at 25. TWE continues to believe that enforcement of the limits on a complaint basis would be appropriate. <sup>12/</sup> See TWE II at 38-39; NCTA II at 25-26.

LG and CBA oppose the Commission's proposal to retain enforcement responsibility and suggest that the limits should be enforced by local franchising authorities. LG II at 4-6; CBA II at 1. LG's arguments in favor of enforcement by local franchising authorities highlight the difficulties of this approach. LG asserts that franchising authorities should be able to waive enforcement authority to the Commission if unable to enforce the provisions, or, alternatively, that operators could submit statements to

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<sup>12/</sup> The MPAA suggests that the Commission might require certification of compliance with channel occupancy limits along with annual EEO certification. MPAA II at 10-11. Without any explanation, the MPAA argues that enforcement on a complaint basis "would be inadequate". Id. at 10.

both the local franchising authority and the Commission. LG II at 5-6. These approaches clearly would create inconsistent enforcement and confusion. Accordingly, TWE urges the Commission to retain enforcement responsibility on a complaint basis.

#### Conclusion

TWE urges the Commission to adopt exclusively national subscriber limits in the range of 30% to 40%. The subscriber limits should not apply in areas subject to effective competition. The Commission's attribution standards should focus on management control; at a minimum, 25% ownership should be required for attribution. Enforcement of the subscriber limits should be at the Commission's own initiative, without a system of certification. The Commission should review the subscriber limits every five years.

With regard to channel occupancy limits, the Commission should take account of the full range of possible innovation by applying channel occupancy limits only to the first 54 (or, at most, 75) uncompressed channels of an operator's channel capacity. TWE believes that the Commission lacks authority to regulate pay-per-view offerings and non-video services under the channel occupancy limits and that including them under the limits will

discourage technological innovation. Although TWE continues to believe that attribution criteria for the purposes of channel occupancy limits should be based on actual management control, if the Commission does adopt the broadcast attribution criteria, TWE urges the Commission to adopt an attribution threshold of 25% where multiple MSOs have invested in a program service. Channel occupancy limits should apply only to services that are distributed nationally, not to local or regional services. TWE continues to support an exemption for programming services that have demonstrated their popularity among unaffiliated cable operators. The Commission should not apply the channel occupancy limits in areas where effective competition has developed and should grandfather vertically integrated relationships that exceed the limits. The Commission should retain responsibility for enforcement of

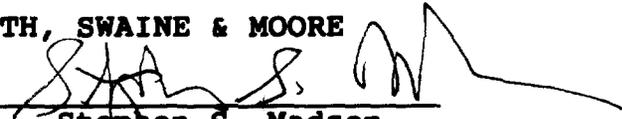
the channel occupancy limits, and enforcement should be done  
on a complaint basis only.

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Respectfully submitted,

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