C. **Vertical Ownership Attribution Standard.**

56. Further Notice. The Further Notice proposed to employ the broadcast attribution criteria for purposes of determining vertical integration in the context of channel occupancy limits. Commenters were asked whether these criteria were appropriate or whether a higher attribution standard would be appropriate to encourage continued MSO investment in cable programming. We also asked commenters to indicate whether a higher equity threshold should be adopted where more than one MSO holds a non-controlling interest in a video programming service.

57. Comments. Commenters addressing this issue propose a variety of vertical integration standards. NCTA and most cable commenters favor an ownership criteria based on control, which they define as either majority voting control or the ability to elect a majority of the board of directors.[76] Discovery argues that if integration is defined as less than control, the regulations should include a behavioral exception which, if satisfied, would exempt affiliated video programming service from attribution.[77]

58. MPAA proposes an attribution threshold of 15% (combined with a lower channel occupancy limit) to implement Section 11. MPAA notes that this standard differs from the attribution criteria they recommend in connection with subscriber limits. However, they believe that such a distinction is warranted by marketplace circumstances. In this regard, MPAA observes that it is common for a large number of cable operators to each take a minority position in a programmer, thus spreading control more widely among operators. According to MPAA, such participation by a number of different MSOs warrants a higher attribution level than is applied in cable system ownership, where one MSO generally controls management and operations decisions, including

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O'Brien/Ward is, of course, at this point unclear.

Slip op. at 13. We believe the specific regulations adopted here would meet the O'Brien/Ward test. See United States v. O'Brien, 391 U.S. 367 (1968) and Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[76] See NCTA Comments at 18-19; Time Warner Comments at 31-32; Discovery Initial Comments at 19; CIC/CC Initial Comments at 38; Liberty Media Comments at 18-19; Viewer's Choice Comments at 5; IFE Initial Comments at 10.

[77] See Discovery Initial Comments at 19-20.

program selection.[78]

59. TCI suggests a vertical integration criteria, pursuant to which ownership interests below 10% would not be attributable; ownership interests above 50% would be fully attributable; and ownership interests between 10% and 50% would be attributable on a prorated basis. TCI contends that this proposal embodies a clear, workable criteria that is superior to proposals favoring _ad hoc_ disputes over the presence or absence of "control."[79]

60. E! Entertainment, ABC, BET, Turner and GTE, on the other hand, support the Commission's proposal to use the Section 73.3555 broadcast attribution standards.[80] GTE argues that the Commission should establish a uniform attribution criteria in this dynamic period of convergence of communications technologies. Turner similarly maintains that the Commission should not apply a more restrictive attribution standard than currently applies to broadcasters.[81]

61. _Discussion_. Section 11(c)(2)(B) of the 1992 Cable Act does not indicate the appropriate criteria for determining vertical ownership attribution. The Senate Report, however, suggests that in determining what is an attributable interest, the Committee intended that the Commission use the attribution rules set forth in Section 73.3555 (Notes) of the Commission's rules or such other criteria as the Commission deems appropriate.[82] We conclude that the broadcast attribution criteria are appropriate for this purpose.

62. In the context of establishing limits on vertical integration in the cable industry we are concerned with identifying interests in cable programming services that are sufficient to afford influence or control over programming decisions. We also seek to identify interests that might potentially provide cable operators with an incentive to favor an affiliated video programming service over an unaffiliated or

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[78] _See_ MPAA Comments at 7.

[79] _See_ TCI Comments at 19-24.

[80] _See_ ABC Comments at 4; Turner Comments at 5-6; and GTE Comments at 3-5; BET Comments at 4-5; E! Entertainment Comments at 4-6. Alternatively, Rainbow Programming proposes a 10% attribution threshold, which it says will make no material difference in a cable operators ability to influence or control a video programmer. _See_ Rainbow Comments at 5.

[81] _See_ Turner Comments at 5.

[82] Senate Report at 80.

competing video programming service. However, we must balance these concerns with the objective of preserving the benefits and efficiencies of vertical integration and encouraging continued MSO investment in new video programming services. The broadcast attribution criteria are appropriate to address these competing concerns. The Section 73.3555 attribution criteria were designed to identify all interests that could potentially afford influence or control over management or programming decisions, while providing exceptions for interests above 5% if there is no realistic possibility of such interests imparting control. Thus, we conclude that the broadcast attribution criteria are strict enough to identify all interests that afford the potential to exert influence or control over management or programming decisions, yet flexible enough to permit continued MSO investment in new video programming services. Moreover, we believe that interests of 5% or greater may be substantial enough to motivate cable to systems to favor an affiliated programmer over a programmer in which the cable system has no attributable interest.

63. We decline to adopt a higher attribution threshold where more than one MSO holds a noncontrolling interest in a video programming service. Although we recognize that common ownership of a programming service by several MSOs may decrease the ability of any one MSO to assert influence or control over programming decisions, we nonetheless continue to believe that such minority interests may be sufficient to provide cable operators with an incentive to favor an affiliated video programming service over an unaffiliated service.

D. Percentage Limitation.

64. Further Notice. In the Further Notice we proposed a 40% limit on the number of channels that could be occupied by affiliated video programmers. Commenters were asked to indicate whether such a limit would be reasonable and would encourage MSOs to continue to invest in new video programming services. We noted that our intention was to establish a channel occupancy limit that would maximize the number of voices available to cable viewers without impairing the ability or incentive of cable operators to invest in new and existing video programming services.

65. Comments. NCTA and most cable commenters indicate that 40% is a minimally acceptable level at which to establish channel occupancy limits. Most cable commenters argue that the channel occupancy limits must be set high enough to preserve the benefits of vertical integration. In this regard, Discovery and Viacom suggest that a channel occupancy limit of 50% would be reasonable. Given the strict attribution standard proposed by the Commission most cable commenters emphasize that it is essential that the Commission adopt a high enough channel

occupancy limit to avoid impeding program investment and distribution. In addition, several commenters endorse the Commission's proposal to allow carriage of additional vertically integrated video programmers provided such video programmers are minority controlled.[83] These commenters agree that such an ownership incentive will increase minority ownership and promote program diversity.

66. TCI supports the proposed 40% limit but continues to advocate that rather than counting channels, the FCC should implement a system based on bandwidth. According to TCI, such an approach would be more precise and adaptable in the forthcoming era of digital compression. Under TCI's recommended approach, channel occupancy limits would be calculated by counting each 6 MHz segment as a single unit and applying limits on the number of units that could be occupied by vertically integrated programming. TCI submits that such an approach will encourage cable operators to continue to invest in the development of new technologies and innovative program services. TCI's proposal is supported by several other cable commenters.[84]

67. MPAA, NATOA and CFA, on the other hand, favor a 20% channel occupancy limit, stating that such a limit would reduce the risk of MSOs favoring affiliated programmers without inhibiting program investment. MPAA asserts that their proposed attribution threshold of 15% combined with a 20% channel occupancy limit better serves Congress' objectives of encouraging MSO investment in new video programming services, while increasing the channel capacity available to unaffiliated video programmers. MPAA suggests that the Commission's proposed 40% limit could result in many instances in no channels being available to unaffiliated programmers.[85]

68. Discussion. We conclude that a 40% limit on the

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[83] See NATOA Comments at 10; BET Comments at 2-4; TCI Comments at 32; Turner Comments at 6; E! Entertainment Comments at 5; NCTA Comments at 22.

[84] See Time Warner Comments at 23-25; Turner Comments at 4; Liberty Media Initial Comments at 15-16.

[85] According to MPAA, it would be possible under the Commission's proposed 40% limit for a substantial number of 36 channel TCI systems to comply with the proposed rule while carrying no unaffiliated programming networks. MPAA adds that a 54 channel TCI system could comply with the proposed rule by "carrying as few as five unaffiliated programming networks." MPAA Comments at 7-8 (emphasis in original).

number of channels[86] that can be occupied by affiliated video programming services is reasonable to serve Congress' competing objectives in requiring such restrictions.[87] We believe that a 40% limit is appropriate to balance the goals of increasing diversity and reducing the incentive and ability of vertically integrated cable operators to favor their affiliated programming, with the benefits and efficiencies associated with vertical integration.[88] Congress and the Commission have both recognized that there are benefits which result from vertical integration. First, MSO investment has produced a wealth of high quality cable programming services. Many of the most popular cable programming services were initiated or sustained with the help of MSO

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[86] We will measure the vertical ownership limits on a per channel basis, using the traditional 6MHz per channel definition. However, given the dynamic state of cable technology, we recognize that it may soon be common for cable operators to provide several channels using a single 6MHz bandwidth segment. Accordingly, as with our other rules we intend to review periodically this definition, and if necessary to make adjustments to ensure that it is consistent with the current state of technology.

[87] In order to calculate the exact number of channels on a vertically integrated cable system that can be devoted to carriage of programming in which the cable operator has an attributable interest parties should round up or down to the nearest decimal point. For example, on a system with 34-36 channels, 14 channels could be occupied by affiliated video programming services and on a system with 54-56 channels, 22 could be devoted to the carriage of affiliated programming services. In addition, where a single channel is shared by affiliated and unaffiliated video programming services, such channel will be counted as an affiliated channel only if the affiliated programming service accounts for 50% or more of the channel's programming time.

[88] We disagree with MPAA's assertion that a 40% limit could result in many instances in no channels being made available to unaffiliated video programmers. First, MPAA's calculation does not take into account the availability of leased access channels to unaffiliated video programmers. Second, MPAA appears to assume that TCI owned systems will drop popular unaffiliated programming services such as ESPN, USA Network and A&E in favor of other less popular affiliated programming services. The record evidence suggests that such conduct is fairly unlikely. See TCI Reply Comments at 13; Time Warner Reply Comments at 14. Finally, MPAA fails to acknowledge that cable systems carrying the maximum number of broadcast must carry and PEG stations are devoting substantial capacity to the carriage of unaffiliated programming.

investment. Second, vertical integration between cable operators and video programming services appears to produce efficiencies in the distribution, marketing, and purchase of programming.[89] Third, vertical integration can reduce programming costs, which in turn may reduce subscriber fees and cable rates. Fourth, vertical integration may in certain circumstances foster investment in more innovative and riskier video programming services.

69. Moreover, Congress directed the Commission not to adopt limitations "which would impair the development of diverse and high quality video programming."[90] In this regard, we note that cable operators are already required to reserve a substantial percentage of their channel capacity for carriage of local broadcast and PEG stations.[91] In addition, cable operators are subject to leased access requirements, pursuant to which they may be required to designate an additional 15% of their activated channel capacity for commercial use by programmers unaffiliated with the cable operator.[92] Significantly, the leased access obligations are parallel in purpose to the channel occupancy requirements, since they also obligate cable operators to provide system access to unaffiliated video programmers. Thus, cable operators' ability to carry affiliated programming is already significantly curtailed by statutorily mandated carriage obligations.

70. We also note that channel occupancy limits are not the only means by which Congress intended to prevent anti-competitive conduct by vertically integrated MSOs. Sections 12 and 19 of the 1992 Cable Act establish specific behavioral restrictions prohibiting discrimination by vertically integrated cable operators and video programming services. As we indicated above, these provisions impose more narrowly tailored behavioral restraints, specifically prohibiting anti-competitive conduct by vertically integrated cable operators and programmers, while channel occupancy limits impose broader structural constraints, which affect the ability of all cable operators to carry programming in which they have an attributable interest. In addition, the must carry, leased access and PEG requirements imposed by other provisions of the Communications Act help to ensure that a diversity of views is available to cable

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[89] See Besen Study (attached to TCI Comments) at 23-24.

[90] 47 U.S.C. § 533 (f)(2)(G).

[91] Cable operators with more than 12 channels may be required to reserve 33% of their activated channel capacity for local broadcast and PEG channels. See 47 U.S.C. §§ 531, 534, 535.

[92] 47 U.S.C. § 532.

subscribers. In light of the foregoing, we believe that the channel occupancy limits need not be unduly restrictive in order to prevent the incentive and the ability of cable operators to favor their affiliated programmers or to promote a diversity of views to cable subscribers.

71. In addition, in order to promote the presentation of a diversity of viewpoints on cable we will allow carriage of vertically integrated video programming services, on two additional channels or up to 45% of a cable system's channel capacity, which ever is greater, provided such additional video programming services are minority-controlled. As we indicated above with respect to horizontal ownership limits, the Commission has long recognized that the public interest is enhanced when cable programming reflects a diversity of viewpoints.[93] We believe that allowing such expanded carriage of minority-controlled video programming services will encourage additional MSO investment in minority-owned programming services, which will in turn promote minority ownership of video programing services and increase the diversity of viewpoints presented to cable subscribers. In this regard, we believe that the diversity benéfits of such increased minority ownership outweigh the access concerns associated with such an increase in integration. We decline, however, to adopt a similar policy for minority oriented-programming. Although we seek to encourage the presentation of a diversity of viewpoints on cable television including those of minorities, we believe that increasing minority ownership of cable systems and video programming services is the most effective and legally sound means of promoting such diversity.[94]

E. Treatment of Pay Channels, Multiplexed Channels and Local and Regional Networks.

72. Further Notice. In the Further Notice we proposed to count all vertically integrated pay-per-view, pay-per-channel and multiplexed services against a system's channel occupancy limits. We proposed, however, to exempt local and regional programming networks from such limits in order to encourage the development of more local cable programming.

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93 See para 28 supra, citing, Policy Statement on Minority Ownership of Cable Television Facilities, 52 RR 2d 1469 (1982).

94 See Metro Broadcasting v. FCC, 110 S Ct. 2997, 3019 and n.36 (1990)(noting substantial practical and constitutional difficulties that would be presented by FCC promotion of broadcast program diversity through direct program regulation rather than through structural means such as ownership).

73. Comments. Cable commenters addressing this issue argue that vertically integrated regional networks, pay-per-view, pay-per-channel, and multiplexed channels should be exempt from the channel occupancy limits.[95] According to these commenters, since pay channels are not used by all subscribers, such channels should not be counted against the cable operator's channel occupancy limit.[96] In addition, Viewer's Choice argues that pay-per-view-networks are not vertically integrated video programmers as contemplated under Section 11 of the 1992 Act. Viewer's Choice indicates that pay-per-view networks select programming from a variety of sources to be offered on an "on demand" basis to subscribers. According to Viewer's Choice, the subscriber is actually the programmer in this case and thus, such pay services should be exempt from the channel occupancy requirements.[97]

74. With respect to multiplexed channels, cable commenters argue that cable operators engage in multiplexing only when they have the additional unused capacity to do so, and thus the existence of multiplexed channels suggests that a system operator is already carrying a full array of programming. Encore adds that multiplexing encompasses more than just time shifting. According to Encore, multiplexing generally refers to a much broader concept of counter programming that affords consumers significant benefits warranting an exception from the channel occupancy limits.[98]

75. Several commenters argue that the channel occupancy limits should not apply to local or regional vertically integrated programming networks.[99] These commenters submit that

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[95] See Viewer's Choice Comments at 6-9; NCTA Initial Comments at 31; Liberty Media Initial Comments at 24; Time Warner Comments at 26-27; IFE Initial Comments at 9.

[96] Time Warner asserts that only a fraction of a system's subscribers receive pay-per-view and pay-per-channel services, but cable operators must nonetheless reserve a channel throughout the system to make such services available to subscribers who desire them. Therefore, Time Warner submits that such services should not count against the overall channel occupancy limit. Time Warner Initial Comments at 43-44. See also NCTA Initial Comments at 22-23; Viewer's Choice Comments at 6-9.

[97] Viewer's Choice Comments at 6-9.

[98] See Encore Comments at 7-8.

[99] See Time Warner Comments at 33-34; Cablevision Systems Initial Comments at 12; Viacom Comments at 8-9; ARC Comments at 2-6; TCI Comments at 33-34; Liberty Media Comments at 14; Turner

there is no evidence demonstrating that cable operators favor affiliated regional programming networks over unaffiliated video programming services. Moreover, commenters favoring an exemption for local and regional cable networks maintain that such networks are developed in order to respond to the needs and tastes of local subscribers and that subjecting such networks to channel occupancy limits would discourage MSOs from investing in the development of such services. NATOA, on the other hand, opposes such an exemption for local or regional video programming services unless such services operate on a nonprofit basis. NATOA argues that there is no legitimate public interest objective to be served by exempting vertically integrated local or regional video programming services and that such an exemption would render the channel occupancy limits ineffective.[100] MPAA also opposes an exception for regional programming arguing that the 1992 Cable Act's mandatory carriage provisions address Congress concerns regarding localism.[101]

76. Discussion. We conclude that vertically integrated pay channels and multiplexed channels should not be exempted from the 40% channel occupancy limits. While we recognize that such channels provide subscribers with a valuable service and increase the diversity of programming available on cable, we see no compelling public interest objective to be served by such an exemption. We also reject the argument advanced by Viewer's Choice that pay-per-view services are not video programmers as contemplated by Section 11 of the 1992 Cable Act. Pay-per-view services are not distinguishable from other programming services for purposes of the ownership rules because they offer a selection of programming from various sources, both affiliated and unaffiliated. This is true of many basic cable programming services. Moreover, the fact that subscribers choose whether or not to view a particular program offered on a pay-per-view basis does not transform the subscriber into the video programmer. Decisions regarding what programming will be offered on a pay-per-view network are generally made by the network's management, as is the case with other video programming services. Accordingly, we believe that such vertically integrated pay services should be counted against the 40% channel occupancy limit.

77. We also disagree with commenters who argue that multiplexed channels should not be counted toward the channel occupancy limits because they provide subscribers with time diversity and counter programming. We recognize that such

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Comments at 7.

100 NATOA Comments at 10.

101 See MPAA Comments at 10.

diversity is beneficial to consumers, but we believe that Congress was specifically concerned with ensuring that a diversity of non-vertically integrated programming sources is available to cable subscribers. We do not believe that this diversity objective would be well served by exempting multiplexed channels from the channel occupancy limits. We do recognize, however, that some of these pay and multiplexed services as they develop are likely to occupy channels and subscriber attention in ways that are different from channels historically distributed on basic cable programming service tiers or even on a pay basis. These differences are likely to be increasingly reflected as cable systems expand beyond their traditional channel capacities. Thus, we believe the discussion below regarding the application of channel occupancy limits to higher capacity systems is an appropriate means of addressing some of the concerns raised here with respect to multiplexed and other less traditional services.

78. We have determined , however, to apply channel occupancy limits only to video programming services distributed to cable systems on a nationwide basis. A programming service need not be distributed in every state to be regarded as a national programming service. A programming service that is distributed to cable systems in numerous states across the country or in a variety of regions may also be considered a national programming service. Programming services distributed only to a particular community or to a discrete region will be exempt from such limits.[102] We consider such an exemption for local and regional programming services to be an important means of encouraging continued MSO investment in the development of local cable programming, which is responsive to the needs and tastes of local audiences and serves Congress' objectives of promoting localism.[103] Moreover, we recognize that because local and regional programming services are usually costly to produce and appeal only to a limited population of subscribers, such an exception may be necessary to encourage MSOs to continue investing in such local programming. Without such an exception commenters argue that MSOs will favor national programming services which can be marketed to larger audiences across the

[102] We decline, however, to follow NATOA's proposal to exempt such services only if they are operated on a non-for-basis. We do not regard such a definition as relevant to the public interest objective of promoting localism.

[103] The 1992 Cable Act states that "A primary objective and benefit of our nation's system of regulation of broadcast television is the local origination of programming." 1992 Cable Act, Section 2(a)(10).

country producing greater subscriber and advertising revenues.[104]

F. Effect of Fiber Optic Cable and Digital Signal Compression.

79. Further Notice. The Further Notice indicated that emerging technologies such as digital signal compression and fiber optic cable would expand channel capacity such that channel occupancy limits would eventually be unnecessary to ensure that cable operators did not favor vertically integrated programmers. Accordingly, we asked commenters whether we should establish a threshold beyond which such channel occupancy limits would not apply. We also questioned whether such a cap should be adopted in this proceeding or at some future date. In this regard, we asked commenters to indicate whether there is an identifiable channel capacity threshold associated with the next generation of cable technology which would provide an appropriate level beyond which channel occupancy limits should no longer apply.

80. Comments. NCTA and several cable commenters propose capping the channel occupancy limits at 54 channels,[105] noting that 64% of subscribers receive between 30 and 53 channels, while only 28% receive 54 or more channels. Time Warner and TCI agree that such expanded channel capacity justifies elimination of the channel occupancy limits. According to Time Warner, digital compression and fiber optic cable will afford cable operators the ability to expand channel capacity beyond their ability to develop new programming. Thus, Time Warner asserts that cable operators will be induced to increase their carriage of unaffiliated video programming services making channel occupancy limits unnecessary. Time Warner contends that 75 channels is the maximum channel capacity available using current cable technologies. According to Time Warner, additional channel capacity beyond 75 channel is possible only through the use of advanced technologies such as fiber optic cable or digital signal compression. Thus, Time Warner suggests that 75 channels is an appropriate threshold beyond which channel occupancy limits should no longer apply.

81. Alternatively, Viacom proposes that to encourage implementation of digital compression, the Commission should not

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[104] See TCI Comments at 33; Liberty Media Comments 14-15; Time Warner Comments at 33; Viacom Comments at 8-9; ARC comments 1-8.

[105] See NCTA Comments at 16-17; Viacom Initial Comments at 15-17; Time Warner Initial Comments at 56-58; E! Entertainment Comments at 3; Liberty Media Comments at 16; Discovery Comments at 5-9.

apply channel occupancy limits to any increased channel capacity that results from the use of compression technology. Under Viacom's suggested approach, a system that is able to deliver three channels using the spectrum ordinarily needed to deliver one channel, would be entitled to exempt the two additional channels from the channel occupancy limits.

82. In contrast, CBA, MPAA and NATOA oppose the establishment of a channel occupancy cap at the present time. MPAA asserts that it is too early to know what effect a 500 channel system will have on the need for such limits and suggests that instead the FCC review the caps every five years and make adjustments accordingly. INTV maintains that any additional channel capacity resulting from new technologies should be made available to independently owned video programming services.

83. Discussion. We continue to believe that expanded channel capacity will reduce the need for channel occupancy limits. As we previously indicated in the *Further Notice*, the expanded channel capacity that will result from fiber optic cable and digital compression technology will help obviate the need for such limits as a means of encouraging cable operators to carry unaffiliated or competing video programming services. Although information on how multichannel video distributors will respond to greatly increased channel capacity is necessarily somewhat speculative, the record indicates that vastly larger cable systems will likely be inclined to deliver targeted "niche" video programming services aimed at correspondingly smaller audience sizes. In addition, pay-per-view and pay-per-channel offerings -- also with more limited audiences -- will increase as channel capacity increases. Also, as channel capacity becomes more abundant and relatively less costly, "multiplexing" is likely to increase and more capacity will be used to increase the convenience of program starting times rather than to distribute separate channels of original programming. Thus, for example, a feature film service ("near-video-on-demand") intended to be competitive with video tape rentals might involve the distribution of films on numerous channels simultaneously with starting times staggered by only a few minutes.

84. Occupancy limits in these circumstances do not parallel occupancy limits for more restricted capacity systems where most services are distributed on discrete channels to a significant portion of a system's subscribership. Accordingly, we believe that occupancy limits can be relaxed, as suggested in the *Further Notice*, once the number of cable channels on a system increases beyond the number distributed using traditional technology. Conventional cable distribution, in the absence of dual cable distribution plant, signal compression, or "fiber to the block,"

enables the distribution of approximately 75 video channels.[106] At the present time, this threshold appears to be a reasonable cut-off for application of the channel occupancy limit. Thus, we will apply the channel occupancy limits only up to 75 channels on a cable system owned by a vertically integrated MSO.[107] Any additional channel capacity made possible through the use of advanced cable technologies will not be subject to the channel occupancy limits at this time. This limitation will be subject to periodic review along with the other provisions of these rules and will be eliminated if developments warrant.

G. Effective Competition.

85. Further Notice. In the Further Notice we observed that once effective competition has been established and a cable operator no longer occupies a program access bottleneck position, channel occupancy limits may no longer be necessary or desirable. Thus, we proposed to phase out channel occupancy limits in communities where effective competition is established. We asked commenters to indicate whether the definition of effective competition for this purpose should include cable systems subscribed to by fewer than 30% of the homes located in the franchise area.

86. Comments. Cable commenters addressing this issue all favored our proposal to phase out channel occupancy restrictions

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[106] Although on a 550 MHz cable system up to 80 channels may technically be offered, cable operators frequently use some channels to provide audio services and system monitoring and control services, thus approximately 75 channels are generally available to provide video programing service. Accordingly, we conclude that a 75 channel threshold is reasonable for this purpose. See Report to Congress Regarding Comparisons Between Cable Systems and Consumer Electronics Equipment ET Docket No. 93-7, Adopted October 5, 1993, Released October 5, 1993 at 26.

[107] The channel occupancy limits need not necessarily apply to the first 75 channels. For example, on a cable system with 75 channels no more than 30 channels (40% of 75) can be devoted to the carriage of affiliated video programming and thus, no less than 45 channels (60% of 75) must be occupied by unaffiliated video programming services. On a system with 100 channels at least 45 channels would still be required to be devoted to the carriage of unaffiliated programming services, however, these 45 channels could be any of the system's 100 channels.

in communities where effective competition has developed.[108] Where effective competition exists, these commenters assert that non-vertically integrated video programmers clearly have alternative outlets for programming. In addition, these commenters indicate that there is no incentive for cable operators to favor their affiliated video programming services over unaffiliated or competing video programming services in a competitive marketplace. According to one cable commenter, maintaining such limits where effective competition is established might hinder competition, by enabling a multichannel video program distributor to carry programming owned by a cable operator that the cable operator would not be permitted to carry.

87. MPAA and NATOA, on the other hand, oppose eliminating channel occupancy limits in communities where effective competition develops. MPAA observes that a competing multichannel distributor may also be vertically integrated and removing channel caps in these instances would result in foreclosure of nonaffiliated programmers from either outlet. Both MPAA and NATOA contend that the effective competition standard relates only to rate regulation and is not relevant to the ability of a vertically integrated cable operator to preclude a video programmer from obtaining access to subscribers.

88. Discussion. We conclude that we should not eliminate channel occupancy limits in communities where effective competition exists. Although it is argued that the development of effective competition will preclude cable operators from exercising undue power in these situations, the effective competition standard was not adopted for this specific purpose and it is not clear that the presence of effective competition for any cable system addresses all of the relevant concerns that Congress expressed in enacting Section 11 of the Act. For example, if a programming service is excluded from carriage on a competitive system for reasons related to vertical integration, that service will continue to be disadvantaged, and the diversity and competition objectives of this portion of the Cable Act will be frustrated. Thus, at this time, we are not prepared to say that the presence of "effective competition" is a reasonable basis for removing the channel occupancy caps.

89. Congress has, however, indicated that a primary objective of the Act was to "rely on the marketplace to the maximum extent feasible, to promote the availability to the public of a diversity of views and information" and that the legislation was intended to protect consumer interests in the

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[108] See NCTA Comments at 24; Liberty Media Comments at 16; Time Warner Comments at 37; TCI Initial Comments at 39; Viacom Initial Comments at 17-18; Turner Comments at 7; Discovery Comments at 5-7.

receipt of cable service "where cable television systems are not subject to effective competition."[109] Thus, as with a number of other aspects of these rules, further analysis as to whether the restrictions might be phased out where effective competition develops will be appropriate as we gain more experience with the rules.

H. Grandfathering Carriage of Vertically Integrated Programmers.

90. Further Notice. In the Further Notice, we proposed to grandfather any existing vertical relationships which exceed the channel occupancy limits we ultimately adopt and asked commenters to address this proposal.

91. Comments. Most cable commenters addressing this issue support the Commission's proposal to grandfather existing vertical relationships in order to minimize disruption to established industry arrangements and to prevent subscriber confusion.[110] Viacom observes that deletion of vertically integrated video programming services is unwarranted and would disrupt subscriber service. Moreover, Viacom submits that program deletion would interfere with existing financial arrangements between programmers, operators and advertisers which rely on certain penetration levels and continued carriage of video programming services.

92. Liberty Media argues that the Commission should adopt a flexible approach in grandfathering existing vertical relationships which exceed the new channel occupancy limits. According to Liberty Media, cable operators with grandfathered programming should not be prevented from developing or investing in additional video programming services. Liberty Media adds that in order to avoid penalizing cable operators who already have invested in new video programming services, the Commission should establish special channel occupancy limits for grandfathered systems at levels two or three channels above existing carriage levels.

93. Discussion. We believe that the public interest would be disserved by requiring cable operators to delete vertically integrated video programming services in order to comply with the channel occupancy caps. Accordingly, we will grandfather all vertically integrated video programming services carried as of December 4, 1992 (the effective date of the 1992 Cable Act),

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[109] 1992 Cable Act, Section 2(b).

[110] See NCTA Comments at 21; MPAA Comments at 8-9; Discovery Comments at 6; Turner Comments at 7; Time Warner Comments at 38; Viacom Comments at 9-11; E! Entertainment Initial Comments at 12; Liberty Media Initial Comments at 28-29.

which exceed the channel occupancy limits we adopt herein. We believe that this proposal will minimize the disruption to existing programming relationships and will prevent subscriber confusion, which could result from divestiture or program deletion. We note, however, that once additional capacity becomes available on a grandfathered system, the cable operator shall be prohibited from expanding its carriage of vertically integrated video programming services until such system is in full compliance with the channel occupancy limits.

94. We recognize that grandfathering existing vertical programming relationships to some extent may protect established services and favor the largest and most vertically integrated cable operators. However, we believe that such considerations are outweighed by the need to prevent subscriber confusion and minimize the disruption to existing carriage agreements. Moreover, given the trend toward increased channel capacity as a result of improved cable technologies, it appears that no useful purpose would be served by requiring cable operators to drop existing services. In any event, such an approach appears to be consistent with Congress' intent that the FCC "take particular account of the market structure, ownership patterns, and other relationships in the cable television industry" in establishing such limits.[111]

I. Enforcement.

95. Further Notice. In the Further Notice we observed that the 1992 Cable Act and its legislative history were silent on the issue of enforcement of the channel occupancy limits. We proposed to enforce channel occupancy limits through a process of certification whereby cable operators would certify annually to the Commission that their cable systems are in compliance with the channel occupancy limits.

96. Comments. NATOA and CBA advocate local franchise authority enforcement of the channel occupancy limits. NATOA asserts that local enforcement would be most efficient since local authorities are more familiar with their local cable operator and are better able to monitor the local programming line up.[112] CBA agrees that enforcement of the channel occupancy caps should be performed by local franchising authorities.[113] According to CBA, strict enforcement of the channel occupancy limits is essential to induce cable operators to be more responsive to the needs of their local communities and less

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111 47 U.S.C. § 533(f)(2)(C).

112 See NATOA Comments at 4-5.

113 See CBA Comments at 2.

concerned with the advancement of their own programming investments. CBA indicates that cable operators often refuse carriage to local LPTV stations, claiming an unavailability of channel capacity, yet such cable operators continually increase carriage of vertically integrated video programming services.

97. NCTA, Viacom and Time Warner all oppose local enforcement of the channel occupancy limits.[114] NCTA argues that local authorities do not have the resources or the expertise to determine the ownership structure of various video programming services being offered. NCTA and Time Warner suggest that the FCC should enforce the channel occupancy limits on a complaint only basis. Viacom proposes requiring cable operators to certify compliance with channel occupancy limits to the FCC as part of their annual reporting requirement in connection with rate regulation. Viacom submits that placing the certification burden on the local authorities would be unduly burdensome and would result in inconsistent applications of the attribution rules.

98. Discussion. While we proposed in the *Further Notice* to rely on a process of certification to monitor compliance with the channel occupancy limits, we have determined that a preferable and less burdensome approach is to require cable operators to maintain records regarding the nature and extent of their attributable interests in all video programming services as well as information regarding their carriage of such vertically integrated video programming services on cable systems in which they also have an attributable interest. Such information should be retained for a period of at least three years in the cable operator's public file.

99. In this regard, we welcome the assistance of local franchise authorities in monitoring compliance with the channel occupancy limits in their franchise area. Where a franchise authority has questions as to whether a local cable operator is in violation of the channel occupancy limits, such franchise authority may request to inspect the cable operator's records at reasonable times and during regular business hours. After such inspection, franchise authorities believing that a violation exists should file a complaint with the Commission. Other parties seeking to report potential violations of the channel occupancy limits may also contact the local franchise authority or report the matter directly to the Commission. If the Commission ultimately finds a cable operator to be in violation of its channel occupancy rules, the Commission may impose appropriate sanctions, including cease and desist orders and forfeitures.

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[114] *See* NCTA Initial Comments at 35; Viacom Initial Comments at 18-19; Time Warner Initial Comments at 56-60.

V. LIMITS ON PARTICIPATION IN PROGRAM PRODUCTION

100. Notice. In the Notice we asked commenters to indicate whether there it was necessary or appropriate to adopt additional restrictions on the degree to which multichannel distributors may participate in the creation or production of video programming, given the structural and behavioral restrictions contained in the 1992 Cable Act which are similarly designed to prevent anti-competitive conduct by vertically integrated cable systems and video programming services.

101. Comments. Most commenters addressing the issue of establishing limits on multichannel distributor participation in the creation and production of video programming opposed establishing such limits at this time. Commenters agreed with the Commission's tentative conclusion in the Notice that the objectives of any such restrictions are fully addressed by other provisions of the Act.[115]

102. Discussion. Section 11 of the 1992 Cable Act requires the Commission to consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video programming distributors ("multichannel distributors") may engage in the creation or production of video programming.[116] Congress included this provision in response to the same concerns regarding vertical and horizontal integration discussed above. Thus, in considering whether such limits are necessary or appropriate, we must also consider the degree to which these concerns are already addressed by other provisions of the 1992 Cable Act.

103. As we stated previously in the Notice, the 1992 Act mandates that the Commission establish certain structural limits on the development of horizontal and vertical integration in the cable industry. The subscriber limits and channel occupancy limits that we adopt herein are intended to promote diversity and to encourage competitive dealings between cable programming services and cable operators and between cable programming services and competing video distributors. Channel occupancy limits, in particular, restrict the ability and the incentive for

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[115] See NCTA Initial Comments at 36-37; Viacom Initial Comments at 19-21; Time Warner Initial Comments at 60-62; TCI Initial Comments at 58; Liberty Media Initial Comments at 9-11. The National Private Cable Association, INTV and Liberty Cable indicated that some limits may be necessary. These commenters, however, did not indicate the rationale for such additional restrictions.

[116] 47 U.S.C. § 533 (c)(2)(C).

cable operators to favor programming services in which they have an attributable interest. Such structural limits also limit the ability of cable operators to impede the entry of new programming services.

104. In addition to the structural limits addressed in this proceeding, the 1992 Cable Act establishes certain behavioral restrictions which prohibit anti-competitive conduct by cable operators in the acquisition of programming. Section 12 for example, prohibits cable operators from requiring either exclusive rights or a financial interest in programming services as a condition of carriage. Moreover, Section 12 prohibits cable operators from discriminating against unaffiliated programmers in the selection, terms and conditions of carriage.

105. Section 19 provides additional protection against anti-competitive conduct by vertically integrated cable operators. Section 19 of the 1992 Act prohibits cable operators and programming vendors that are vertically integrated with cable operators from engaging in "unfair" or "deceptive" practices that would hinder competition in cable service and programming or inhibit delivery of programming to consumers. The regulations we adopted pursuant to Section 19 establish effective safeguards to prevent a cable operator with an attributable interest in a programming vendor from discriminating against other multichannel distributors in the price, terms or conditions of sale of such programming or from unreasonably refusing to sell programming to a another multichannel distributor.

106. In view of the structural and behavioral restrictions already required under the 1992 Act, we do not believe that additional restrictions on the ability of multichannel distributors to engage in the creation or production of video programming are warranted at the present time. We conclude that at the present time the objectives of such a restriction are fully addressed by the other provisions of Section 11, Section 12, and Section 19 of the 1992 Cable Act.

VI. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis.

107. The Commission's final regulatory flexibility analysis for the Second Report and Order and the Commission's initial regulatory flexibility analysis for the Further Notice are set forth in Appendix C.

B. Paperwork Reduction Act Statement

108. The decision in this proceeding has been analyzed with respect to the Paperwork Reduction Act of 1980, and has been

found to impose new and modified requirements or burdens on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

C. **Ordering Clauses**.

109. Accordingly, IT IS ORDERED that pursuant to the authority contained Sections 2(a), 4(i) and (j) and 303 of the Communications Act of 1934, as amended, and the Cable Television Protection and Competition Act of 1992, Pub. L. No. 102-385, Part 76 of the Commission's Rules, 47 C.F.R. Part 76, Is AMENDED as set forth in Appendix D below, and will become effective January 10, 1994, subject to approval by the Office of Management and Budget. However, the effective date of the horizontal ownership limits contained in Section 76.503 of the Commission's rules IS STAYED pending final judicial resolution of the District Court decision in Daniels Cablevision v. United States, No. 92-2292 (D.D.C. released September 16, 1993) holding such rules unconstitutional.

E. **Additional Information**.

110. For additional information regarding this proceeding, contact Jacqueline Chorney, Mass Media Bureau, (202) 632-6990.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

List of Commenters Responding to the
Notice of Proposed Rule Making

Initial Comments
Affiliated Regional Communications, Ltd. ("ARC")
Annenberg School for Communications/University of Southern California
(David Waterman)
The Association of Independent Television Stations, Inc. ("INTV")
BellSouth Telecommunications, Inc. ("BellSouth")
Cablevision Industries Corporation/Comcast Corporation ("CIC/CC")
Cablevision Systems Corporation ("Cablevision Systems")
Cablevision of Texas III, L.P. ("Cablevision of Texas")
Cities of Inverness, Crystal River, et.al. (Joint Florida Cities")
Coalition of Small System Operators ("Small System Coalition")
Cole, Raywid & Braverman ("CR&B")
Community Broadcasters Association ("CBA")
Consumer Federation of America ("CFA")
Continental Cablevision, Inc. ("Continental")
Corporate Partners
Discovery Communications, Inc. ("Discovery")
E! Entertainment Television, Inc. ("E! Entertainment")
GTE
Intermedia Partners
International Family Entertainment ("IFE")
Liberty Cable Company, Inc. ("Liberty Cable")
Liberty Media Corporation ("Liberty Media")
The Motion Picture Association of America ("MPAA")
The National Association of Telecommunication Officers & Advisors, The National League of Cities, The United States Conference of Mayors, and the National Association of Counties (collectively "NATOA")
The National Cable Television Association, Inc. ("NCTA")
The National Private Cable Association, Maxtel Associates Ltd. ("NPCA")
The National Telephone Cooperative Association
Nationwide Communications, Inc. ("NCI")
The New York State Commission on Cable Television ("N.Y. Cable Commission")
Sandler Capital Management ("Sandler")
New Jersey Board of Regulatory Commissioners ("New Jersey Cable Board")
Tele-Communications, Inc. ("TCI")
Three Rural Telephone/Cable Companies
Time Warner Entertainment Company, L.P. ("Time Warner")
Transworld Telecommunications, Inc. ("TTI")
Tribune Regional Programming, Inc. ("TRB")
Turner Broadcasting System, Inc. ("Turner")
Viacom International, Inc. ("Viacom")

Reply Comments
ARC
Bell Atlantic Communications
Cablevision of Texas
Coalition of Small System Operators
Cole, Raywid & Braverman
Discovery
GTE
Liberty Media Corporation
MPAA
NATOA
NCTA
The National Telephone Cooperative Association
Nationwide Communications, Inc.
Oklahoma Western Telephone Company
Satellite Broadcasting Association
TCI
Time Warner
The United States Telephone Association
Viacom

APPENDIX B

List of Commenters Responding to the Further Notice of Proposed Rule Making

Comments
Affiliated Regional Communications, Ltd. ("ARC")
Black Entertainment Television ("BET")
Capital Cities/ ABC, Inc. ("ABC")
Community Broadcasters Association ("CBA")
Discovery Communications, Inc. ("Discovery")
E! Entertainment Television, Inc. ("E! Entertainment")
Encore Media Corporation ("Encore")
GTE Services Corporation ("GTE")
Liberty Media Corporation ("Liberty Media")
Pay-Per-View Network, Inc. ("Viewer's Choice")
The Motion Picture Association of America ("MPAA")
The National Association of Telecommunication Officers & Advisors, The National League of Cities, The United States Conference of Mayors, and the National Association of Counties (collectively "NATOA")
Rainbow Programming Holdings, Inc. ("Rainbow Programming")
Satellite Broadcasting Association
The National Cable Television Association, Inc. ("NCTA")
Tele-Communications, Inc. ("TCI")
Time Warner Entertainment Company, L.P. ("Time Warner")
Turner Broadcasting System, Inc. ("Turner")
Viacom International, Inc. ("Viacom")

Reply Comments
ARC
Bell Atlantic Communications
Community Broadcasters Association ("CBA")
Consumer Federation of America ("CFA")
Discovery
E! Entertainment Television, Inc. ("E! Entertainment")
GTE
Liberty Media
MPAA
NATOA
NCTA
Rainbow Programming
Starsight Telecast, Inc. ("Starcast")
TCI
Time Warner
Turner
Viacom
Viewer's Choice

APPENDIX C

Report and Order -- Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

1. **Need and purpose for this action:** This action is taken to implement the provisions of the Cable Television Consumer Protection and Competition Act of 1992 relating to vertical and horizontal ownership limits.

2. **Summary of issues raised by comments in response to the Initial Regulatory Flexibility Analysis:** No comments were received in response to the request for comments to the Initial Regulatory Flexibility Analysis.

3. **Significant alternatives considered and rejected:** The Commission considered several proposals relating to implementation and enforcement of the vertical and horizontal ownership limits. We analyzed the record in light of our statutory directives and established regulations which, to the extent possible, minimize the burdens on the cable systems and programming services subject to the vertical and horizontal ownership limits.

4. **Federal Rules which overlap, duplicate or conflict with these rules.** None.

Appendix D
Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552, as amended 106 Stat. 1460.

2. Part 76 is amended by adding Section 76.503 to read as follows:

§ 76.503 National Subscriber Limits

* * * * *

(a) Except as set forth in paragraph (b) of this section no person or entity shall be permitted to reach more than 30% of all homes passed nationwide through cable systems owned by such person or entity or in which such person or entity holds an attributable interest.

(b) Ownership of cable systems reaching up to 35% of all homes passed nationwide shall be permitted provided the additional cable systems, beyond 30% of homes passed nationwide, are minority-controlled.

(c) Prior to acquiring additional cable systems any person or entity holding an attributable interest in cable systems reaching 20%, or more, of homes passed nationwide must certify to the Commission that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition.

Note 1: For purposes of this Section:

(a) "Minority-Controlled" means more than 50% owned by one or more members of a minority group.

(b) "Minority" means Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander.

(c) "Attributable Interest" shall be defined by reference to the criteria set forth in the Notes to § 76.501.

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