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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	)	

LIBERTY MEDIA CORPORATION'S
<u>OPPOSITION TO PETITION FOR RECONSIDERATION</u>

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SUMMARY

The Center for Media Education and Consumer Federation of America ("CME/CFA") requests that the Commission impose unprecedented structural restrictions upon the cable industry, without regard to their effect on cable operators, programmers and consumers. In advocating draconian ownership and channel occupancy limits, CME/CFA ignores the evidence developed through four rounds of comments in this proceeding, the effects of various regulations adopted in dozens of earlier rulemaking proceedings to implement the 1992 Cable Act, and the clear intent of Congress.

CME/CFA offers nothing to support its onerous regulatory proposals. Instead, CME/CFA resorts to an unfounded attack on the Commission's motives in establishing a 30 percent horizontal ownership limit and claims that two "recent developments" warrant imposition of drastically lower limits. However, neither of those developments -- a Federal Trade Commission consent agreement potentially requiring Liberty to divest its interest in QVC if QVC takes over Paramount and a complaint filed by Viacom International against QVC, Tele-Communications, Inc. and Liberty in connection with Viacom's attempted take-over of Paramount -- warrants reconsideration of the Commission's horizontal ownership limits. Finally, CME/CFA's proposal to count all "customers served by a telephone company that is affiliated with a cable company" toward the ownership limit is beyond the scope of the proceeding authorized under the 1992 Cable Act.

Likewise, CME/CFA attempts to support its unreasonably low channel occupancy limit by ignoring the Commission's must-carry, PEG and leased access regulations, which ensure that substantial numbers of cable channels will be occupied by programmers unaffiliated with the cable operator and over whom the cable operator can assert no editorial control. CME/CFA offers nothing but speculation to support its claim that its proposed channel occupancy limits will neither stifle investment in new programming nor disrupt existing program services. Contrary to the clear intent of Congress, CME/CFA ignores substantial evidence of the public interest benefits provided by local and regional programming services in its attempt to have those services included in the channel occupancy limits.

The record in this proceeding overwhelmingly demonstrates that the structural limits proposed by CME/CFA are unreasonable, unnecessary, and imprudent. Accordingly, the Commission should summarily dismiss the CME/CFA petition.

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OPPOSITION TO PETITION FOR RECONSIDERATION

Liberty Media Corporation ("Liberty Media") hereby opposes the Petition for Reconsideration filed on December 15, 1993 ("Petition") by the Center for Media Education and the Consumer Federation of America ("CME/CFA") in this proceeding. In seeking to impose unnecessarily restrictive structural limits on the cable industry, CME/CFA ignores the overwhelming evidence in this proceeding, the deterrent effect of numerous other regulations implementing the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the clear intent of Congress. Because there is no sound basis for the regulatory constraints which it advocates, the CME/CFA Petition should be summarily rejected.

Preliminary Statement

After considering the extensive record developed through four rounds of comments in this proceeding -- as well as the effects of various regulations adopted by the Commission in dozens of earlier rulemaking proceedings to implement other provisions of the 1992 Cable Act -- the Commission released its Second Report and Order on October 22, 1993, establishing horizontal ownership and channel occupancy limits for cable operators. See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, ____ FCC Rcd. ____, 73 R.R.2d 1401 (1993) ("Second Report and Order"). The regulations adopted by the Commission impose significant structural constraints upon the cable industry: (1) cable operators may hold minimal attributable interests in no more than 30 percent of the homes passed by cable systems nationwide (35 percent if the additional systems are minority controlled); and (2) cable operators may devote no more than 40 percent of the first 75 activated channels on any of their systems to national programming services in which they hold an attributable interest (45 percent if the additional programming services are minority controlled). Second Report and Order at ¶¶3-4.

Although numerous commenters, including Liberty, had advocated limits different from those ultimately established by the Commission, not one cable operator, programmer, franchising authority or cable subscriber has sought reconsideration of the Second Report and Order. Nevertheless, CME/CFA, as a purported representative of unidentified consumers, urges the Commission to reconsider its decision and to impose unprecedented structural limits on the cable industry. The ownership limits proposed by CME/CFA are contrary to the intent of Congress and far exceed the scope of the Commission's proposed rulemaking. The channel occupancy limits proposed by CME/CFA would cause widespread disruption of existing cable service and would deter investment by cable operators in new programming services. CME/CFA offers no evidence that such drastic measures are either necessary or desirable.

I. There Is No Rational Basis For A Horizontal Ownership Limit Of Less Than 30 Percent Of Cable Homes Passed.

CME/CFA contends that the horizontal ownership limits adopted by the Commission "are far too high." Petition at 2.[1] Claiming that drastic reductions in existing levels of ownership concentration are required to ensure "that no single MSO or group of MSOs can determine what programming will be available to consumers," CME/CFA urges the Commission to adopt horizontal ownership limits "in the range of 10-20%" of homes

[1] The provisions of the 1992 Cable Act requiring the Commission to adopt horizontal ownership limits have been found unconstitutional. Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 10 (D.D.C. 1993), appeal docketed, No. 93-5290 (D.C. Cir.). Consequently, the Commission has stayed the effectiveness of its horizontal ownership regulations pending appellate resolution of the constitutional issues. Second Report and Order at ¶3.

passed nationwide.[2] Petition at 4. Apparently recognizing that there is no reasonable basis for such restrictive ownership limits, CME/CFA resorts to speculation and factual distortion to support its regulatory proposals.

A. The Ownership Limits Sought By CME/CFA Are Inconsistent With Congressional Intent, Unsupported By The Record, And Contrary To The Public Interest.

CME/CFA attacks the existing ownership regulations by claiming that the sole motivation for the adoption of a 30 percent ownership limit was "the Commission's desire not to force TCI to divest any of its systems." Petition at 5. Specifically, CME/CFA contends that:

> The only reason the Commission offers to justify avoiding divestiture is that "Congress did not intend necessarily to require the divestiture of any existing interests." Id. at ¶27, citing S. Rep. at 34.

Id.[3] Consequently, CME/CFA attempts to justify lower ownership limits by arguing that "the Senate Report clearly does

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[2] CME/CFA would count telephone subscribers toward this limit in cases where "a telephone company...is affiliated with a cable company." Petition at 12.

[3] The portion of the Senate Report cited by the Commission states that:

> [T]he legislation directs the FCC to place reasonable limits on the size of MSOs (by the number of subscribers). The FCC should balance the concerns expressed about concentration with the efficiencies gained by greater integration. The legislation does not imply that any existing company must be divested and gives the FCC flexibility to determine what limits are reasonable and in the public interest.

Cable Television Consumer Protection Act of 1991, S. Rep. No. 92, 102d Cong., 1st Sess. 34 (1991) ("Senate Report").

not prohibit the FCC from ordering divestiture" and that the Commission's interpretation of congressional intent "is not a sound reason on which to base a policy judgment" in any event. Petition at 5-6.

However, CME/CFA's arguments ignore the fact that the Commission expressly rejected lower limits which would have required divestiture -- not simply because of its interpretation of the legislative history of Section 11 -- but rather because there was no evidence to support such drastic measures:

> [W]e determined that <u>in the absence of definitive evidence</u> that existing levels of ownership are sufficient to impede the entry of new video programmers or have an adverse affect on diversity, existing arrangements should not be disrupted. <u>Based on our review and consideration of the record</u>, we are persuaded that such divestiture is unnecessary.

<u>Second Report & Order</u> at ¶27 (emphasis added).

Consistent with the Congressional intent reflected in the <u>Senate Report</u>, the Commission examined the evidence presented in four sets of comments submitted in the proceeding and determined that the 30 percent limit "strikes the proper balance" between the "two competing concerns raised by Congress." <u>Id.</u> at ¶25. Specifically, the Commission concluded that the 30 percent ownership limit would "enable cable operators to avail themselves of the benefits and efficiencies of horizontal concentration and may provide an incentive for MSO investment in upgraded technology and infrastructure," while at the same time preventing "cable operators from creating barriers to the entry of new video programmers." <u>Id.</u> at ¶27.

The Commission's conclusion is fully supported by the record. Numerous commenters recited the benefits to consumers and programmers of multiple cable system ownership. See, e.g., Liberty Reply Comments, filed May 12, 1993, at 7-11 (summarizing administrative and operating efficiencies, new program development, and other benefits identified by commenting parties resulting from multiple cable system ownership). At the same time, not one programmer -- whether failed or successful, proposed or well-established -- claimed in comments submitted to the Commission that any cable operator has exercised horizontal market power, and no commenter introduced any empirical evidence of the exercise of such market power. Absent any record evidence that existing levels of ownership concentration had adversely affected programmers, the Commission appropriately determined that ownership limits which would freeze or reduce existing ownership levels were unjustifiable. CME/CFA has provided nothing to warrant reconsideration of that determination.

Moreover, the Commission expressly considered the effects of other Commission regulations intended to address the concerns raised by Congress in evaluating the appropriate ownership limits. The Commission concluded that the 30 percent ownership limit was particularly appropriate "when coupled with the behavioral restrictions contained in Sections 12 and 19 of the 1992 Cable Act." Second Report and Order at ¶26. The Commission further noted that the must-carry provisions of Sections 4 and 5 of the 1992 Cable Act, along with channel occupancy limits and other regulatory restraints, further supported adoption of the 30 percent ownership limit. Id. The Commission properly concluded that, because the "cumulative effect" of these regulations was sufficient to protect against the exertion of "undue power that could prevent the success of new video services," more restrictive horizontal ownership limits were unnecessary and might impede efforts by cable operators "to expand their system ownership and avail themselves of any efficiencies and other benefits which might be gained through increased ownership." Id.

In contrast, CME/CFA simply pretends that the other applicable regulations considered by the Commission do not exist. For example, it is inconceivable that CME/CFA could genuinely argue that "cable operators control the content of the programming on every channel, as opposed to broadcasters, which control the content on just one channel." Petition at 3 n.3 (emphasis in original). The fact that cable operators "must-carry" certain broadcast signals, which may account for one-third of all activated channels, clearly precludes them from controlling the content of the programming on those channels. Of course, the Commission's PEG and leased access requirements further undermine CME/CFA's claims.

Thus, unlike CME/CFA, the Commission dutifully considered the record evidence, balanced the competing interests identified by Congress, and weighed the effects of its existing regulations in attempting to establish appropriate horizontal ownership limits for the cable industry. It is wholly disingenuous for CME/CFA to suggest that the "only" reason for the Commission's decision was its desire to avoid "a confrontation with one big company, TCI." Petition at 4-5.

B. The "Recent Developments" Cited By CME/CFA Do Not Justify Lower Horizontal Limits.

As set forth above, the record in this proceeding provides no support for the restrictive ownership limits sought by CME/CFA. Consequently, CME/CFA attempts to demonstrate the need for such limits by relying on "two recent developments," which purportedly "show that TCI, with ownership levels below the FCC limits, presently possesses sufficient market power to impede the flow of video programming to consumers." Petition at 7, 11. However, neither of the "developments" cited by CME/CFA supports its proposed ownership limits.

CME/CFA first claims that the Federal Trade Commission's ("FTC") proposed consent agreement -- which would require Liberty to divest its interest in QVC if QVC is successful in its effort to take over Paramount -- somehow demonstrates that lower ownership limits are necessary because TCI "already has market power" as a result of "the large number of subscribers to which it controls access." Petition at 7-8. However, the FTC's proposed consent agreement provides absolutely no support for CME/CFA's horizontal ownership proposal. The Agreement Containing Consent Order, upon which CME/CFA relies, expressly recites that "[t]his agreement is for settlement purposes only and does not constitute an admission by

TCI or [Liberty] that the law has been violated...." 58 Fed. Reg. 63167, 63168 (1993).

In any event, the testimony cited in the CME/CFA Petition at 8 makes clear that the FTC's consent agreement was intended to address certain vertical concerns arising from the proposed QVC-Paramount transaction, not horizontal ownership issues:

> Since the alleged competitive problems stem from the vertical link between TCI/LMC and QVC, the FTC's consent order addresses them by severing that link.

Statement of Mary Lou Steptoe before the Senate Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary 5-6 (Nov. 18, 1993). Thus, the FTC's consent order is irrelevant to CME/CFA's proposed horizontal ownership limit.

CME/CFA also attempts to justify more restrictive horizontal ownership limits by citing allegations contained in the antitrust action brought by Viacom International Inc. ("Viacom") against TCI, Liberty, QVC and others. Petition at 8-11. Specifically, CME/CFA notes that Viacom "has made similar allegations of TCI's use of its control over subscribers to interfere with the flow of programming to consumers." Id. at 8-9. Based on those allegations, CME/CFA urges the Commission to reconsider and drastically reduce its horizontal ownership limits because "[i]f TCI can wield its monopoly power to disadvantage such well-established services as

Showtime and The Movie Channel, it certainly has the power to preclude the launch of new programming." Id. at 9.[4]

Aside from the fact that CME/CFA would have the Commission formulate structural regulations affecting the entire cable industry based on unproven allegations made by a competitor in a lawsuit apparently filed to gain leverage in a takeover battle, the allegations cited by CME/CFA are contradicted by the evidence presented in this proceeding and do not support CME/CFA's proposed horizontal ownership limits in any event. CME/CFA claims that TCI has the power to "make or break" cable programming services because:

> In the case of a nationwide advertiser supported basic cable programming service, such as Viacom's MTV and Nickelodeon, the 'critical mass' of subscribers required to succeed is roughly 40 million of the current 57 million available subscribers.

Petition at 9-10, quoting Testimony of Sumner M. Redstone, before the Senate Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary 4 (Oct. 27, 1993).[5] The record plainly demonstrates that substantial

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[4] CME/CFA quotes at length from the Viacom complaint and the Congressional testimony of Viacom's chairman, Sumner M. Redstone. It should be noted that Viacom itself did not seek reconsideration of the Commission's ownership or channel occupancy limits -- despite the fact that the deadline for such petitions occurred months after Mr. Redstone gave his testimony and Viacom filed its complaint.

[5] The evidence in this proceeding clearly contradicts that unsupported claim. No evidence has been provided regarding the costs, advertiser revenues, or subscriber revenues of MTV and Nickelodeon enabling evaluation of the claim that 40 million subscribers are needed for those services to survive.

numbers of existing national basic cable services have survived and prospered with far fewer than 40 million subscribers. See Liberty Comments, filed Feb. 9, 1993, at 35 n.15 (as of September 1992 there were at least 39 national "basic" cable programming services with fewer than 33 million subscribers); see also Comments of Time Warner Entertainment Company, L.P., filed Feb. 9, 1993, at 27-29 (several well known national basic cable programming services have operated for five to ten years with penetration levels below 40 percent of cable subscribers); Comments of Tele-Communications, Inc., filed Feb. 9, 1993, at 24-25 (listing no fewer than 15 national basic cable programming services which have existed for at least three years with fewer than 30 million subscribers). More recent information shows that the majority of existing national basic cable programming services serve fewer than 40 million subscribers. See CableVision, Dec. 6, 1993, at 106 (46 of the 68 listed national basic cable networks had fewer than 40 million subscribers).

Indeed, the very estimates upon which CME/CFA relies do not support the restrictive ownership limits which it seeks. If a single cable operator serving 30 percent of the "current 57 million available subscribers" refused to carry a particular programming service, "roughly 40 million" cable subscribers unaffiliated with that cable operator would remain available to the new programmer. In addition, more than three million HSD, MMDS, SMATV and other distribution system subscribers are available. Thus, even if the unrealistic subscriber requirements cited by CME/CFA were used, a cable operator serving 30 percent of all subscribers[6] could not unilaterally "make or break" a new programming service.

C. CME/CFA's Proposal To Include Homes Passed By Telephone Lines In The Ownership Limits Is Contrary To The Statute.

Undaunted by the absence of any support for its proposal to limit cable ownership to 10-20 percent of homes passed, CME/CFA goes far beyond the scope of this proceeding by suggesting that its proposed limits include all "customers served by a telephone company that is affiliated with a cable company." Petition at 12. In support of its recommendation, CME/CFA claims that "[w]hen MSOs and telephone companies merge, the potential for direct competition in their overlapping areas is removed completely" and that customers of the telephone company will have "a strong 'potential' to become cable subscribers." Id. at 12-13. In addition to ignoring existing Commission regulations[7] and failing to pro-

[6] Of course, the Commission has limited horizontal ownership to 30 percent of all homes passed by cable. Second Report and Order at ¶3. As a result, the actual percentage of total cable subscribers served by any one cable operator will vary depending on the penetration rate among the homes passed by its systems.

[7] CME/CFA's claims appear to be contrary to Commission Rules prohibiting a telephone company from acquiring a cable system within its telephone service area to provide video dialtone service. See 47 C.F.R. §63.54(d)(3). However, the continued applicability of the Commission's rules implementing the telco/cable cross ownership limitations of 47 U.S.C. 533(b) is uncertain. See Chesapeake and Potomac Tel. Co. of Va. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), appeal docketed, No. 93-2340 (4th Cir.)

vide any support whatsoever for its claims, CME/CFA proposes restrictions far beyond the scope of the ownership regulations authorized by the statute.

Section 11 of the 1992 Cable Act directed the Commission to conduct a proceeding "to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest." 47 U.S.C. §533(f)(1)(a) (emphasis added). The statute conferred no authority upon the Commission to place limits on telephone customers, a fact implicitly acknowledged by the Commission in its Notice of Proposed Rulemaking and Notice of Inquiry and Further Notice of Proposed Rulemaking in this proceeding. Neither notice made any mention of the potential application of horizontal ownership limits to telephone customers under any circumstance. Consequently, extension of the ownership limits to include telephone customers would be contrary to the applicable provisions of the 1992 Cable Act and would violate the Administrative Procedure Act. See National Black Media Coalition v. F.C.C., 791 F.2d 1016, 1022-23 (2d Cir. 1986) (although a final rule need not be an "exact replica of the rule proposed in the Notice," the Commission's Notice must be sufficient "to give the public advance notice of the scope of its proceedings").

II. The Channel Occupancy Limits Proposed By CME/CFA Are Contrary To The Public Interest.

Consistent with its unprincipled efforts to impose on the cable industry the most restrictive structural regulations possible without regard to their effect on programmers or cable consumers, CME/CFA asks the Commission to reconsider its channel occupancy regulations and:

> adopt the more reasonable channel occupancy limit of 20% suggested in the Senate Report; subtract PEG, broadcast, and leased access channels when calculating system capacity; count affiliated local and regional networks toward the limit; remove the 75 channel capacity threshold beyond which channel occupancy limits do not apply; and decline to grandfather existing vertical relationships.

Petition at 14. Again, CME/CFA simply ignores the overwhelming record evidence that such restrictive limits would deter investment in new cable services, disrupt existing cable service, and adversely affect the diversity of programming available to viewers. CME/CFA also ignores the deterrent effect of other Commission regulations designed to address the Congressional concerns about potential discrimination by cable operators in favor of their affiliated programming services.

A. The Existing Channel Occupancy Limits And Other Commission Regulations Ensure Access For Unaffiliated Programmers.

CME/CFA contends that the existing channel occupancy limits allow "large MSOs with investments in several programmers [to] control both the means of communication and the message communicated to large members of Americans" because they allow those MSOs "to carry little or no unaffiliated programming on their systems." Petition at 14-15. In the face of must-carry, leased access and PEG requirements -- which may obligate a cable operator to carry programming over which it has no editorial control on nearly half of its activated channels -- CME/CFA's claim again borders on the disingenuous. It also simply ignores the regulations adopted by the Commission under Section 12 of the 1992 Cable Act which are:

> designed to prevent a multichannel video programming distributor from engaging 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.

See 47 U.S.C. §536(a)(3).

CME/CFA's argument that the existing channel occupancy limits do not provide sufficient access for unaffiliated programmers already was considered and rejected by the Commission when first offered by the Motion Picture Association of America ("MPAA"). See Second Report and Order at ¶68 n.88 (MPAA failed to consider the effect of must-carry, leased access and PEG requirements, as well as the popularity of certain unaffiliated programming services). CME/CFA attacks the Commission's rationale by claiming that the must-carry, leased access and PEG provisions relied upon by the Commission were intended primarily to serve other legislative objectives. Petition at 16-18. That these provisions also serve other objectives does not detract from their effectiveness in ensuring that cable subscribers receive programming and information from sources unaffiliated with the cable operator. Thus, there is no reason to subtract must-carry, PEG and leased access channels from the total number of activated channels to which the channel occupancy limits apply.

Likewise, there is no basis for CME/CFA's attempt to eliminate the exclusion of local and regional services from the channel occupancy limits. CME/CFA contends that these services should be counted toward the channel occupancy limits because "most local and regional networks are owned by large MSOs, and as such are part of the trend of vertical integration Congress meant to address with the Cable Act." Petition at 18 n.10. However, CME/CFA ignores the fact that one of the explicit objectives of the 1992 Cable Act was to promote the "substantial government interest" in ensuring the continued "local origination of programming." 1992 Cable Act, §2(a)(10).

The Commission exempted local and regional services from the channel occupancy limits because those services provide "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." Second Report and Order at ¶78. It is ridiculous to suggest that local news or sports programming provided by a cable service owned wholly or partially by an MSO is of lesser value to viewers than similar local programming provided by a broadcast station owned by a national network or group owner. Because local and regional programming services clearly promote public interest objectives consistently identified by Congress and the Commission, the Commission acted reasonably and properly in excluding those services from the channel occupancy limits.

Finally, CME/CFA argues that more restrictive channel occupancy limits (i.e. 20 percent of all activated channels other than must-carry, leased access, and PEG channels) will not adversely affect the development of new programming services because "there are many MSOs that could invest in new programming without coming close to that limit, and there are a great number of potential investors who are not affiliated with MSOs." Petition at 19. Again, CME/CFA simply ignores the record evidence.

For example, CME/CFA claims that services like CNN and BET "became successful prior to their affiliation with any particular cable operator." Petition at 19. As such, these services should be expected to have little or no trouble attracting investment from sources other than cable operators. Nevertheless, these and other programming services credit their very existence to timely investments by cable operators when no one else was willing to make a similar investment. See, e.g., Media Ownership: Diversity and Concentration: Hearings before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, 101st

Cong., 1st Sess. 221 (1989) (Statement of Robert L. Johnson, President and founder of BET) (BET "would not exist without the support of the cable operators... [which has] done more to create minority programming and diversity in television than all FCC regulations and broadcasting outreach programs combined"); see also Comments of Turner Broadcasting System, Inc., filed Feb. 9, 1993, at 12 (cable operators took "a major risk, one that others would not undertake at comparable terms" in providing long-term equity to TBS); Comments of Discovery Communications, Inc. ("Discovery"), filed Feb. 9, 1993, at 2, 13-14 (Discovery made over 400 presentations to potential investors in launching the Discovery channel, but "survived only because cable operators were willing to make an investment in it when no one else would"). Thus, contrary to CME/CFA's speculation, the Commission has not "overestimated the beneficial effects of vertical integration" (Petition at 19) and cable operators remain the most likely source of investment in risky new programming services.

The channel occupancy limits proposed by CME/CFA clearly would stifle investment in new programming services and disrupt existing program schedules enjoyed by consumers. Using the 36 channel system postulated by CME/CFA (Petition at 15 n.9) and taking into account the leased access requirements of Section 612(b) of the Communications Act (47 U.S.C. §532(b)), a cable operator would be permitted to carry only three channels of affiliated programming on such a system.

As a result, subscribers would be denied access to existing programming services which they enjoy simply because their cable operator has invested in more than 3 popular programming services.

B. CME/CFA Provides No Justification For Reconsideration Of The Commission's Decisions To Apply Channel Occupancy Limits Only To The First 75 Channels And To Grandfather Existing Carriage.

CME/CFA asks the Commission to apply the channel occupancy limits to all channel capacity regardless of the number of activated channels. CME/CFA also seeks to reverse the Commission's decision to grandfather existing carriage of affiliated programming where such carriage may exceed the new channel occupancy limits. Petition at 20-22. Again, CME/CFA offers no support for either proposal.

CME/CFA contends that the channel occupancy limits should apply "regardless of how many channels a cable operator offers to subscribers." Petition at 20. CME/CFA speculates that without such limits "expanded channel capacity will simply mean more opportunities for MSOs to offer affiliated programming to the detriment of unaffiliated programming." Petition at 21. As a result "all of the newly available channels will be filled with services affiliated with the MSO." Id. CME/CFA offers absolutely no support for its speculation.

The discrimination which CME/CFA envisions appears to be prohibited by Section 12(a)(3) of the 1992 Cable Act

(47 U.S.C. §536(a)(3)) and is unlikely in any event. As the Commission has noted, cable operators faced with "dramatically expanded capacity will require programming from many different sources in order to program so many additional channels." Notice of Proposed Rulemaking and Notice of Inquiry, 8 FCC Rcd. 210 (1992), at ¶53. Consequently, the Commission correctly determined that the channel occupancy limits "can be relaxed...once the number of cable channels on a system increases beyond the number distributed using traditional technology." Second Report and Order at ¶84.

By establishing this limit, the Commission also has promoted the Congressional objective of "ensur[ing] that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems." 1992 Cable Act, §2(b)(3). The Commission established the 75 channel cut-off because it represented the maximum channel capacity available through "conventional cable distribution, in the absence of dual cable distribution plant, signal compression or 'fiber to the block'." Second Report and Order at ¶84 and n.106. Thus, by applying the channel occupancy limits only to the first 75 channels provided by a cable operator, the Commission offers cable operators an incentive to deploy new technologies and improve service to the public.

Finally, CME/CFA argues that by grandfathering existing carriage of affiliated programming services which exceed the channel occupancy limits, the Commission "frustrates the development of unaffiliated programming." Petition at 22. Again, CME/CFA ignores reality as well as relevant Commission regulations. The Commission clearly stated that a grandfathered system must devote all "additional capacity [that] becomes available" to unaffiliated programming until such time as the system achieves compliance with the channel occupancy rules. Second Report and Order at ¶93. Thus, rather than "frustrating development of new unaffiliated programming," the Commission's decision to grandfather existing carriage of affiliated programming services effectively requires the grandfathered cable operator to discriminate against affiliated programmers in future carriage decisions until the system complies with the channel occupancy limits. To do otherwise would only cause further disruption in cable service to viewers.

Conclusion

The CME/CFA Petition is an unprincipled attempt to impose upon the cable industry draconian structural limits without regard to their effect on cable operators, programmers or subscribers. The extensive record developed by the Commission in this proceeding amply demonstrates that the regulatory restrictions proposed by CME/CFA are unreasonable, unnecessary and imprudent, and CME/CFA offers nothing new to warrant reconsideration of the regulations adopted by the Commission.