

sustaining their success had it not been for cable operator investment (see, e.g., Comments of Turner Broadcasting System, Inc., filed February 9, 1993, at 12 (at a time when TBS's "independence was very much at stake," cable operators were willing to provide long-term equity under terms others were not); Opposition of Black Entertainment Television, Inc. to Comments of Viacom International, Inc., filed February 22, 1994, at 2 ("[C]able investment has been crucial to establishing BET as a viable and valuable programming service.")). Likewise, CME's assertion that there has been no successful launch of an unaffiliated programmer since vertical integration has taken hold was disputed by TBS, citing the recent successes of ESPN2, FLIX and the SciFi Channel.

Similarly, there is no evidence in the record to substantiate CME's claim that the 40% limit will deter independent investors from investing in video programming, or that independent investors are currently deterred from investing in cable programming by the Commission's channel occupancy limits.

Finally, the Commission disagrees with CME's assertion that the Senate Report "suggested" a 20% channel occupancy limit. The Senate Report stated: "For example, the FCC may conclude that each MSO should control no more than 20 percent of the channels on any cable system * * *." Thus, the Report used the 20% figure for illustrative purposes only, while clearly acknowledging that the Commission was free to choose a different limit. This interpretation is supported by the actual wording of the statute, which simply requires the Commission to establish "reasonable" channel occupancy limits.

The Commission also denies CME's petition to reconsider the treatment of broadcast, PEG and leased access channels. CME correctly notes that the channel occupancy limits are intended to keep cable operators from filling every available channel with their own programming. But from this premise, CME draws the conclusion that channel occupancy limits must therefore be intended to give "independent commercial programmers a chance to get on the wire." The statute, however, does not distinguish between "independent" unaffiliated programmers and other types of unaffiliated programmers. Section 11 simply ensures that subscribers will have access to some kind of unaffiliated programming on a prescribed number of channels. CME does not dispute that broadcast, PEG and leased access channels are "unaffiliated" with cable

operators, or that the 1992 Cable Act requires cable operators to reserve channel space for such unaffiliated programming. Thus, the Commission reaffirms its holding in the Second Report and Order that it would be unreasonable to subtract such channels before calculating the system's channel capacity, since they provide the type of diverse, unaffiliated programming contemplated by the 1992 Cable Act. Further, as the Commission noted in the Second Report and Order, it would be unfair to penalize those cable operators who carried the widest array of broadcast, PEG and leased access channels by decreasing the number of channels available for affiliated programming.

Moreover, there is no evidence in the record that "independent" commercial programmers (i.e., those with no cable ownership interests at all) are unable to obtain carriage because of the Commission's treatment of broadcast, PEG and leased access channels. To the contrary, in the Commission's sampling of 25 TCI and Time Warner cable systems described above, the Commission found that all of the systems carried some "independent" unaffiliated programmers, with most systems carrying between 7 and 11 such channels.

In addition, although the Senate Report's sample calculation excluded broadcast and access channels in calculating channel capacity, CME's reliance on it as an expression of Congressional intent is misplaced. As the Commission stated in the Second Report and Order:

The Senate Report language (* * *) appears to be included merely as an example to illustrate how the Commission may decide to calculate channel occupancy limits and therefore does not prohibit the Commission from adopting an alternative approach if it finds such an approach to be reasonable to promote the legislative objectives. In any event, this language is not included in the statute itself.

Finally, the Commission does not believe that it is weakening Congress' statutory scheme by considering the impact of other provisions of the 1992 Cable Act in establishing channel occupancy limits. Section 11 expressly gives the Commission broad discretion to fashion "reasonable" channel occupancy limits. In the Commission's view, establishing "reasonable" limits requires it to consider all factors bearing on the dangers or benefits of vertical integration. Thus, for instance, the Commission believes that not only should it take into account the impact of broadcast, PEG and leased access channels, but also the impact of sections

12 and 19 in deterring the type of discriminatory conduct that may be caused by vertical integration. Only by considering the whole of Congress' scheme can the Commission determine the level of vertical structural limits that are "reasonable."

The Commission also denies CME's petition to reconsider the exception for local and regional programming. CME's approach overlooks Congress' direction that the Commission consider the benefits as well as the dangers of vertical integration in establishing "reasonable" channel occupancy limits. As the Commission stated in the Second Report and Order, the exception for local and regional networks was "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.) CME does not challenge the value of local and regional programming, or the Commission's conclusion that given the cost and limited appeal of such programming, an exception may be necessary to encourage continued MSO investment. The Commission continues to believe that consideration of these benefits of vertical integration more accurately reflects Congressional intent, and fully justifies the exception.

On reconsideration, the Commission also declines CME's invitation to eliminate the 75-channel cap. There is no evidence in the record to support CME's claim that "there is a strong likelihood that all of the newly available channels will be filled by services affiliated with the MSO." Indeed, the Commission notes that in its informal survey of 25 TCI and Time Warner cable systems, none of the systems were approaching the current 40% channel occupancy limit for affiliated programming. However, even if there were some basis for CME's prediction, the Commission still believes that the vast expansion of channel capacity may obviate the need for a rigid occupancy limit. As the Commission noted in the Second Report and Order, although information on how multichannel video distributors will use the additional capacity "is necessarily somewhat speculative," the record indicates that the capacity will likely be used to deliver targeted "niche" video programming services aimed at correspondingly smaller audience sizes, such as pay-per-view and "multiplexed" channels. (Second Report and Order at ¶¶ 83-84.) Occupancy limits in these