

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, the occupancy limits can be relaxed.

In sum, the Commission continues to believe that the introduction of advanced technologies such as signal compression and fiber optics will reduce the need for structural occupancy limits in order to ensure programming diversity and access for unaffiliated programmers. Nevertheless, as the Commission noted in the Second Report and Order, the 75-channel cap will be subject to periodic review and will be eliminated if developments warrant.

The Commission also denies CME's request to reconsider its decision to grandfather all vertically integrated programming services carried as of December 4, 1992 (the effective date of the 1992 Cable Act). The Commission still believes, as it held in the Second Report and Order, that the public interest would be disserved by requiring cable operators to delete vertically integrated programming services to comply with the channel occupancy caps. The Commission continues to believe that grandfathering existing arrangements will limit consumer confusion and the disruption of existing programming relationships, and is consistent with Congress' direction that our channel occupancy limits "take particular account of the market structure, ownership patterns, and other relationships of the cable television industry." (Communications Act, section 613(f)(2)(C).)

The Commission also rejects CME's contention that the decision to grandfather existing vertical arrangements "has rendered impotent" the intent of Congress to limit excessive vertical integration. First, the Commission reiterates that Congress directed it to establish "reasonable" channel occupancy limits based on competing interests; if Congress wished to require the divestiture of existing channels it could have done so. More importantly, the Commission did not grandfather non-compliance in perpetuity. Rather, the Second Report and Order provided that when a grandfathered cable system adds channel capacity, it cannot add an affiliated programming service until its system is in full compliance with the Commission's channel occupancy rules. Thus, the difference is more one of timing than of ultimate objectives. While CME suggests immediate divestiture of existing services to bring

systems into compliance, the Commission's approach is to grandfather existing services and remedy non-compliance prospectively. The Commission continues to believe that its approach better reflects the various interests at stake, and thus better reflects Congress' intent.

Bell Atlantic filed a Petition for Limited Reconsideration requesting that the Commission reconsider its decision to apply the channel occupancy limits to cable systems that face actual head-to-head competition. On reconsideration, the Commission declines to modify its decision to enforce channel occupancy limits in systems which face actual head-to-head competition. With respect to Bell Atlantic's argument that channel occupancy limits are even less necessary in markets where competition exists and one of the competitors is a video dialtone service, the Commission cannot find, at this time, that video dialtone will completely eliminate the problems caused by vertical integration. Under video dialtone, a telephone company must provide sufficient capacity to serve multiple video programmers, and must expand capacity as demand increases to the extent technically feasible and economically reasonable. At this point, there are only eight commercially licensed video dialtone services in the country. None of these systems is yet operational; until that time, it is unclear whether a video dialtone system will fully address the concerns raised by channel occupancy limits. In addition, the practical effect of several recent court cases is that certain telephone companies may now provide their own programming to subscribers in their service areas. Thus, the Commission does not believe that video dialtone in its current state can provide sufficient justification to reconsider the decision to enforce channel occupancy limits in systems which face actual head-to-head competition.

The remaining arguments raised by Bell Atlantic's Petition have already been considered and rejected in the Second Report and Order. In the Second Report and Order, the Commission concluded that it should not eliminate channel occupancy limits in communities where effective competition exists because the Commission found that the effective competition standard was not adopted for this specific purpose and because it is not clear that the presence of effective competition for any cable system will address all of the relevant concerns that Congress expressed in enacting section 11 of the 1992 Cable Act. For example, the Commission noted that if a

competing multichannel distributor is also vertically integrated, without channel occupancy limits, unaffiliated programming services may continue to be denied access from either outlet, thus frustrating the diversity and competition objectives of the 1992 Act.

Finally, the Commission also agrees that the statutory exemption from regulation for cable systems subject to effective competition is very limited: Congress explicitly stated in the statute that, in systems which faced effective competition, rate regulation would not be necessary. Thus, it is reasonable to assume that had Congress intended for all cable regulations to be eliminated where systems became subject to actual head-to-head competition, this statutory exemption would have been drafted much more broadly. Nowhere in either the language of section 11 or its legislative history does it state that the presence of actual head-to-head competition will render the channel occupancy limits unnecessary.

The Commission therefore concludes that there is insufficient evidence in the record before it to warrant elimination or modification of the channel occupancy limits in systems that face actual head-to-head competition. However, as the Commission indicated in the Second Report and Order, it remains aware that Congress has indicated that a primary objective of the 1992 Act was to rely on the marketplace to the maximum extent possible, and that the legislation was intended to protect consumer interests in the receipt of cable service where cable television systems are not subject to effective competition. Thus, as competition develops and the Commission gains more experience with the rules, the Commission will further analyze its rules and the industry as a whole to see whether vertical ownership limits should be phased out.

Administrative Matters

Regulatory Flexibility Act Analysis

Pursuant to sections 601-602 of the Regulatory Flexibility Act, Public Law 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981), the Commission's final analysis is as follows:

Need and Purpose for Action: This action is being taken to address petitions for reconsideration of the channel occupancy rules adopted by the Commission to implement section 11(c) of the 1992 Cable Act.

Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: There were no comments received in