1. The authority citation for part 233 is revised to read as follows:

Authority: 42 U.S.C. 301, 602, 602 (note), 606, 607, 1202, 1302, 1352, and 1382 (note); Pub. L. 94–114, 89 Stat. 579; Pub. L. 99–603, 100 Stat. 3359; Pub. L. 97–458, 96 Stat. 2513; Pub. L. 98–64, 97 Stat. 365; Pub. L. 99–514, 100 Stat. 2916; Pub. L. 100–241, 101 Stat. 1812.

2. Section 233.20 is amended by removing and reserving paragraph (a)(2)(vii) and revising paragraph (a)(2)(vi) to read as follows:

§ 233.20 Need and amount of assistance.

(a) * *

(2) * * *

(vi) If the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals, (A) specify the persons whose needs will be included in the individual's need, and (B) provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient.

(vii) [Reserved]

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[FR Doc. 93–27963 Filed 11–12–93; 8:45 am]

BILLING CODE 4184–01–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket No. 92–264, FCC 93–456]

Broadcast Services; Cable Television Act

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission implements section 11(c)(2) of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) by prescribing national subscriber limits and limits on the number of channels that can be occupied on a cable system by a video programmer in which the cable operator has an attributable interest. The Commission declines at this time to impose limits on the degree to which multichannel video programming distributors may engage in the creation or production of video programming as authorized by section 11(c)(2)(C) of the 1992 Act. This action was taken in compliance with the 1992 Cable Act.

EFFECTIVE DATE: Section 76.504 will become effective January 10, 1994. Section 76.503 is stayed pending final judicial resolution of the District Court decision in *Daniels Cablevision* v. *United States*. Notice will be given in the **Federal Register** when an effective date is established for § 76.503.

FOR FURTHER INFORMATION CONTACT: Jacqueline Chorney, Mass Media Bureau, (202) 632–6990.

SUPPLEMENTARY INFORMATION: The public reporting burden for this collection of information (§ 76.503) is estimated to average 1 hour per response. The public recordkeeping burden for § 76.504 is estimated to average 15 hours per year per recordkeeper. This includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of the Managing Director, AMD–PIRS, Records Management Division, Washington, DC 20554, and to the Office of Management and Budget, Paperwork Reduction Project (3060–XXXX), Washington, DC 20503.

This is a synopsis of the Second Report and Order (Second Report) in MM Docket No. 92–264, FCC 93–456, adopted September 23, 1993, and released October 22, 1993. The complete text of this Second Report is available for inspection and copying during normal business hours in the FCC Reference Center (room 239), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Service, at (202) 857–3800, 2100 M Street, NW., suite 140, Washington, DC 20037.

Synopsis of the Second Report and Order

1. In this Second Report, the Commission implements section 11(c)(2) of the 1992 Cable Act by prescribing national subscriber limits and limits on the number of channels that can be occupied on a cable system by a video programmer in which the cable operator has an attributable interest ("channel occupancy limits"). The Commission declines at this time to impose limits on the degree to which multichannel video programming distributors may engage in the creation or production of video programming as authorized by section 11(c)(2)(C) of the 1992 Act.

2. The Notice of Proposed Rule Making and Notice of Inquiry (NPRM/NOI) initiating this proceeding may be found at 58 FR 03523 (January 11, 1993), and sought comment generally on the objectives and scope of section 11(c)(2) of the 1992 Cable Act and more specifically on various issues regarding the level at which subscriber limits and channel occupancy limits would be reasonable and the appropriate implementation of such limits. In addition, the Commission questioned whether it was necessary or appropriate to adopt limits on the degree to which multichannel video programming distributors ("multichannel distributors") should be permitted to participate in the creation or production of video programming. The Commission subsequently issued a Report and Order and Further Notice of Proposed Rule Making (R&O/FNPRM) 58 FR 42013, August 6, 1993 which sought further comment on specific proposals regarding the adoption and implementation of subscriber limits and channel occupancy limits.

3. Briefly, this Report and Order contains the following determinations. The Commission establishes a 30 percent limit on the number of homes passed nationwide that any one entity can reach through cable systems in which such entity has an attributable interest. Horizontal ownership will be determined for this purpose based on the same criteria used by the Commission in the broadcast context. In addition, to promote a diversity of views the Commission will permit ownership of additional cable systems, up to 35 percent of homes passed nationwide, provided such systems are minority-controlled. However, in view of the recent federal district court decision holding that the Commission's statutory authority to adopt horizontal ownership limits is unconstitutional, and to avoid potential confusion and uncertainty during the period of judicial review the Commission is staying the effective date of the horizontal ownership rules until final judicial resolution of the District Court's decision. (See *Daniels Cablevision* v. *United States*, No. 92–2292 (D.D.C. released September 16, 1993). The vertical ownership limits adopted pursuant to section 11, which were upheld by the Court are not stayed and will become effective as set forth below.

4. With respect to vertical ownership limits, the Commission adopts a 40 percent limit on the number of channels that can be occupied on a vertically integrated cable system by video programmers in which the cable operator has an attributable interest. In order to promote a diversity of views the Commission will allow carriage of

vertically integrated programming services on two additional channels, or up to 45 percent of a system's channel capacity, whichever is greater, provided such video programming services are minority-controlled. Vertical attribution is defined for this purpose by reference to the Commission's broadcast attribution criteria. The channel occupancy limits will apply only up to 75 channels, and channel capacity beyond 75 channels will not be subject to vertical ownership restrictions at the present time.

5. The Commission further concludes that in view of the structural and behavioral restrictions already required under the 1992 Act, additional restrictions on the ability of multichannel distributors to engage in the creation or production of video programming are unwarranted. The Commission believes that at the present time the objectives of such a restriction are fully addressed by the vertical and horizontal ownership limits required by section 11, as well as by the carriage agreement and program access provisions contained in section 12, and section 19 of the 1992 Cable Act.

6. Recognizing the conflicting advantages and disadvantages of vertical integration and horizontal concentration, Congress directed the Commission to consider and balance the following public interest objectives in establishing the ownership limits mandated by section 11: (A) To ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer; (B) to ensure that cable operators do not favor affiliated video programmers in determining carriage and do not unreasonably restrict the flow of video programming of affiliated video programmers to other video distributors; (C) to take account of the market structure, ownership patterns, and other relationships of the cable industry, including the market power of the local franchise, joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests; (D) to take into account any efficiencies and other benefits that might be gained through increased ownership or control; (E) to make rules and regulations that reflect the dynamic nature of the communications marketplace; (F) to impose no limitations that prevent cable operators from serving previously unserved rural areas; and (G) to impose no limitations that will impair the development of diverse and high quality programming.

7. The Commission first considers subscriber limits. Section 11 of the 1992 Cable Act requires that the Commission prescribe 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. Regarding the applicable market for such limits, the R&O/FNPRM proposed to adopt exclusively national subscriber limits and asked commenters to indicate whether national subscriber limits would suffice to implement the objectives of the 1992 Cable Act. With respect to regional limits, the Commission tentatively concluded that the benefits of regional concentration outweigh the potential anticompetitive harm that such concentration may have on the local advertising and programming marketplace.

8. The Report and Order, while differing with those commenters who assert that the Commission is without authority to adopt regional subscriber limits, the Commission declines to adopt such limits at this time. Based on the record in this proceeding and on our interpretation of the 1992 Cable Act, the Commission believes that Congress was primarily concerned with national concentration in the cable industry. Moreover, Congress' objectives in requiring horizontal ownership limits—to prevent the "concentration of the media in the hands of a few" and to limit the ability of MSOs to exercise undue market power in the program acquisition market—can best be served by the adoption of national subscriber limits. The Commission believes that issues of regional concentration would be better addressed by other provisions of the 1992 Act designed to promote the introduction of competition to established cable franchises.

9. In addition, the Commission finds no basis in the record for imposing regional limits that could reduce investment in the development of regional programming, upgraded cable infrastructure and improved customer service. The Commission concludes that the potential benefits and efficiencies of regional concentration outweigh any anti-competitive affects in the local programming or advertising marketplace. In the absence of record evidence suggesting that any cable operator possesses undue power in the local programming or advertising market, the Commission finds it unnecessary to adopt regional limits at this time.

10. Regarding measurement and percentage limitation, the R&O/FNPRM sought comment on its proposal to establish subscriber limits as a share of homes passed. The R&O/FNPRM further proposed to adopt a 25 percent limit on the number of homes passed by cable systems owned by any one entity, although it continued to seek comment on a limit in the range of 20 percent to 35 percent of homes passed. The R&O/FNPRM also asked commenters to indicate whether it would be appropriate in calculating compliance with the subscriber limits to subtract the number of homes passed by cable systems where effective competition—as defined in the 1992 Cable Act—is established. Finally, commenters were asked to address the Commission's proposal to allow ownership of additional cable systems, beyond the specified limit, provided such systems are minority-controlled.

11. In adopting ownership limits the Commission seeks to balance two competing concerns raised by Congress: on the one hand, the possibility that large horizontally integrated MSOs might have the ability to preclude the launch of new video programming services and on the other hand, the benefits and efficiencies that result from greater horizontal concentration. Based on our consideration of these statutory factors and on the preponderance of the data provided in the record, the Commission concludes that a horizontal ownership limit prohibiting any one entity from having an attributable interest in cable systems that in the aggregate reach more than 30 percent of cable homes passed nationwide strikes the proper balance. A 30 percent horizontal ownership limit is generally appropriate to prevent the nation's largest MSOs from gaining enhanced leverage from increased horizontal concentration. Nonetheless, it also ensures that the majority of MSOs continue to expand and benefit from the economies of scale necessary to encourage investment in new video programming services and the deployment of advanced cable technologies.

12. The Commission believes that a 30 percent limit is reasonable to prevent the types of anti-competitive conduct which concerned Congress, particularly when coupled with the behavioral restrictions contained in sections 12 and 19 of the 1992 Cable Act. Moreover, sections 4 and 5 require cable operators to carry the signals of local commercial and non-commercial broadcast stations. And section 612 of the Communications Act requires cable systems to make a specified percentage of channels available to unaffiliated programmers. The cumulative effect of these regulations coupled with a horizontal

ownership limit of 30 percent should protect against any one cable system exerting undue power that could prevent the success of new video programming services or "unfairly impede the flow of video programming to the consumer." A 30 percent limit combined with the above mentioned provisions will be appropriate to address the diversity aims which underlie the statutory horizontal ownership provisions. At the same time such a limit will allow the majority of cable operators to expand their system ownership and avail themselves of any efficiencies and other benefits which might be gained through increased ownership or control of cable systems.

13. While the R&O/FNPRM proposed a 25 percent horizontal ownership limit, the Commission considered a number of factors in concluding that a 30 percent limit was reasonable, including indications in the legislative history that Congress did not intend necessarily to require the divestiture of any existing interests.[1] Thus, the Commission determined that in the absence of definitive evidence 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. The Commission, based on a review of the record, finds that such divestiture is unnecessary.

14. As proposed in the R&O/FNPRM, in order to encourage a diversity of viewpoints the Commission will allow ownership of additional cable systems reaching up to 35 percent of cable homes passed, provided such additional cable systems are minority-controlled. The Commission is convinced that the minority ownership incentive adopted in this Report and Order in connection with the horizontal ownership limits will be an important means of furthering the goal of increasing minority ownership and participation in the cable industry, and thus ensuring the inclusion of minority views in programming. The Commission believes that the increased diversity that this additional minority ownership will encourage outweighs the marginal impact on competition that could result from the increased concentration. Notably, the Commission provides a similar incentive in the broadcast context to increase the diversity of viewpoints available to the public.

15. The Commission declines to calculate compliance with the national subscriber limits by subtracting the number of homes passed by cable systems in areas where effective competition is established. The statutory provisions and the implementing rules adopted focus on ensuring that system operators are constrained in terms of the total share of the market they may occupy in order that no single operator exerts an undue influence, particularly at the national level, on the diversity of programming services available through cable television. The presence of competition in particular markets ameliorates some of the concerns involved and provides members of the public in those markets with the opportunity, through the competitor they select, to influence directly the services offered in those markets. The presence of effective competition in any given system or group of systems does not, however, directly respond to the concern with the exercise of undue control by a single entity at the national level.

16. The R&O/FNPRM next proposed to adopt the broadcast attribution standard to implement horizontal ownership limits. The Commission now finds that the broadcast attribution criteria contained in § 73.3555 of the Commission's rules are appropriate to implement the horizontal ownership limits. (For the sake of convenience, the actual rules now being adopted reference the standards set forth in the notes to § 76.501 of the rules. These are derived from and are not substantively different from those generally referred to as the broadcast attribution rules, i.e., § 73.3555.) Pursuant to these criteria, all voting stock interests of 5 percent or more are attributable. Non-voting stock interests (including most "preferred" stock classes) are not attributable. There are several exceptions to the presumption of attribution created by the 5 percent benchmark. Most notably there is a single majority shareholder exception, which provides that minority interests will not be attributed where there is a single 51 percent shareholder. In addition, the interests of "insulated" limited partners are not attributed.

17. The R&O/FNPRM asked commenters to address how compliance with the subscriber limits should be monitored and enforced. The Commission concludes that, in order to enforce most efficiently and effectively the horizontal ownership limits, a system of certification should be instituted. Although public information is available from various sources regarding the number of homes passed by the largest cable operators, such sources generally apply different attribution criteria than the Commission has decided to employ. Therefore, the Commission will require entities holding attributable interests in cable systems reaching 20 percent or more of homes passed nationwide to certify to the Commission, prior to the acquisition of any additional cable systems, that such acquisition will not result in a violation of the horizontal ownership limits adopted herein.[2] Where a transaction will result in a cable operator exceeding the limit, the cable operator must seek either a permanent or temporary waiver from the Commission, which might also include a commitment to divest a sufficient number of systems so as to come into compliance with these ownership limits after the acquisition is completed. The Commission will consider waiver requests only in limited circumstances where an acquisition temporarily places a cable operator over the permissible number of subscribers or where an MSO seeks to expand service into an otherwise unserved rural area.

18. Finally, in view of the fact that the cable television industry is so dynamic and fluid, the Commission believes that periodic review of the ownership limits is necessary. As proposed in the R&O/FNPRM, the Commission plans to review the subscriber limits every five years to determine whether such limits are reasonable under the prevailing market conditions and whether such limits continue to serve the objectives for which they were adopted.

19. The Commission secondly considers issues concerning channel occupancy limits. Section 11 of the 1992 Cable Act also requires the Commission to establish reasonable limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an attributable interest. As with the establishment of horizontal ownership limits, the Commission seeks to establish channel occupancy limits which strike the proper balance between

[1] We note in this regard that the largest existing MSO, TCI, using the attribution standards adopted herein, has an interest in cable systems passing approximately 23.8 million homes or 27 percent of homes passed nationwide. *See* TCI submission dated September 22, 1993. This number is larger than the number used for corporate and other reporting requirements because, *inter alia*, it includes systems in which an "attributable interest" is held rather than systems that are treated as "consolidated" for certain corporate and other reporting purposes. Compare, Television Digest, June 7, 1993, p. 4 (TCI and consolidated subsidiaries in which the ownership interest is greater than 50 percent as of December 31, 1992, pass 17.7 million homes).

[2] The Commission contemplates that the MSO whose aggregate attributable interests in cable systems equals or exceeds 20 percent of homes passed nationwide will be responsible for filing the requisite certification. Thus, if a system in which TCI holds an attributable interest acquires an additional cable system, TCI will be the party responsible for certifying to the Commission that the transaction will not result in a violation of FCC rules.

competing statutory objectives: To ensure that vertically integrated cable operators do not favor affiliated video programmers, or unfairly impede the flow of video programming to cable subscribers, on the one hand and, on the other, to encourage MSOs to continue to invest in the development of diverse and high quality video programming services.

20. In that regard, the Commission first reviews the issue of application of channel occupancy limits. The R&O/FNPRM indicated that the statutory language and legislative history were unclear regarding how Congress intended such channel occupancy limits to be applied. In particular, the Commission questioned whether Congress intended such limits to apply only to video programmers affiliated with the operator of the particular cable system in question or whether such limits were intended to apply to carriage of all cable affiliated video programming on all cable systems. The Commission also questioned whether in calculating a system's channel capacity we should subtract the number of broadcast, PEG and leased access channels.

21. Given the ambiguity, the R&O/FNPRM proposed to apply such limits only to video programmers affiliated with the particular cable operator. The R&O/FNPRM also proposed to include all activated channels including broadcast, PEG and leased access channels in calculating system capacity.

22. The Commission agrees with the majority of commenters on this issue, who assert that the most logical interpretation of the statutory language is to apply such limits only to video programmers that are vertically integrated with the particular cable operator in question. The Commission believes that this represents the most reasoned approach given Congress' stated objective of encouraging a diversity of voices and preventing unaffiliated programmers from being denied carriage on vertically integrated cable systems. In the absence of significant empirical evidence of existing discriminatory practices, we see no useful purpose in limiting the ability of cable operators to carry programming affiliated with a rival MSO. Such a restriction would be unduly burdensome on MSO investment in cable programming and would be contrary to the purpose of the statute. Moreover, we seek to adopt reasonable carriage limits that will balance both the benefits and concerns associated with vertical integration.

23. With respect to calculating channel capacity, the Commission concludes that all activated channels should be taken into account. The Commission notes that cable operators are obligated by the 1992 Cable Act to carry local broadcast and noncommercial educational channels, and are required to reserve channel capacity for lease to unaffiliated programmers. Consequently, it would be unreasonable to use such channels to reduce the base of channels available for carriage of vertically integrated programming. The Commission disagrees with NATOA's argument that the legislative history requires that the Commission subtract all broadcast, PEG and leased access channels prior to application of the channel occupancy limits. The Senate Report language relied upon by NATOA is included in an example meant to illustrate how the Commission may decide to calculate channel occupancy limits and does not appear to 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.

24. Finally, the Commission addresses the arguments advanced by some commenters that the channel occupancy provisions of the 1992 Act violate the First Amendment. At the outset, it should be noted that the Commission has an obligation to execute and enforce the provisions of section 11 enacted by Congress and therefore is not free to declare an act of Congress unconstitutional. Nevertheless, the Commission believes that the statute is constitutional. The Commission notes that Congress, in enacting the cable access provisions under the Cable Communications Policy Act of 1984, Public Law 98–549, and the cable must carry obligations under the 1992 Cable Act, carefully considered the First Amendment rights of cable operators and others and concluded that these provisions were constitutionally permissible as consistent with and in furtherance of the goals of the First Amendment. The Commission believes that the channel occupancy limits provided in Section 11 are generally analogous to the cable access and must carry provisions and, similarly, do not believe that these limits infringe the First Amendment rights of cable operators or others. Moreover, the federal district court in *Daniels Cablevision, Inc.* v. *United States*, which struck down the subscriber limit authority in section 11, upheld other provisions of the 1992 Cable Act in dispute, including the section 11 channel occupancy limits, as "facially compatible with the First Amendment."

25. The Commission secondly considers the issue of a vertical ownership attribution standard. The R&O/FNPRM 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 encoaurge continued MSO investment in cable programming. Commenters were also asked 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.

26. In the context of establishing limits on vertical integration in the cable industry the Commission is concerned with identifying interests in cable programming services that are sufficient to afford influence or control over programming decisions. The Commission also seeks to identify interests that might potentially provide cable operators with an incentive to favor an affiliated video programming service over an unaffiliated or competing video programming service. However, these concerns must be balanced with the objective of preserving the benefits and efficiencies of vertical integration and encouraging continued MSO investment in new video programming services. The Commission concludes 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, the Commission believes that interests of 5 percent 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.

27. The Commission declines to adopt a higher attribution threshold where more than one MSO holds a noncontrolling interest in a video programming service. Although the Commission recognizes 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, the Commission nonetheless continues 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.

28. On the issue of percentage limitation, the R&O/FNPRM proposed a 40 percent 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. The Commission noted its intention 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.

29. The Commission determines that a 40 percent limit on the number of channels [3] that can be occupied by affiliated video programming services is reasonable to serve Congress' competing objectives in requiring such restrictions.[4] The Commission believes that a 40 percent 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. Moreover, Congress directed the Commission not to adopt limitations "which would impair the development of diverse and high quality video programming." In this regard, the Commission notes that cable operators' ability to carry affiliated programming is already significantly curtailed by statutorily mandated carriage obligations.

30. The Commission also notes 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. 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 subscribers. In light of the foregoing, the Commission believes 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.

31. In addition, in order to promote the presentation of a diversity of viewpoints on cable the Commission will allow carriage of vertically integrated video programming services, on two additional channels or up to 45 percent of a cable system's channel capacity, whichever is greater, provided such additional video programming services are minority-controlled. The Commission believes 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 programming services and increase the diversity of viewpoints presented to cable subscribers. In this regard, the Commission believes that the diversity benefits of such increased minority ownership outweigh the access concerns associated with such an increase in integration. The Commission declines, however, to adopt a similar policy for minority-oriented programming.

32. The R&O/FNPRM next proposed to count all vertically integrated pay-per-view, pay-per-channel and multiplexed services against a system's channel occupancy limits. The Commission further proposed, however, to exempt local and regional programming networks from such limits in order to encourage the development of more local cable programming.

33. The Commission concludes that vertically integrated pay channels and multiplexed channels should not be exempted from the 40 percent channel occupancy limits. Although such channels provide subscribers with a valuable service and increase the diversity of programming available on cable, the Commission sees no compelling public interest objective to be served by such an exemption. The Commission also rejects 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. Accordingly, the Commission finds that such vertically integrated pay services should be counted against the 40 percent channel occupancy limit.

34. The Commission also disagrees with those who argue that multiplexed channels should not be counted toward the channel occupancy limits because they provide subscribers with time diversity and counter programming. The Commission does 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, 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.

35. The Commission determines, however, that the channel occupancy limits should apply 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. Without such an exception commenters argue that MSOs will favor national programming services which can be marketed to larger audiences across the country producing greater subscriber and advertising revenues.

36. The R&O/FNPRM next considered the effect of fiber optic cable and digital signal compression. The Commission 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

[3] 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.

[4] 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 the 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 percent or more of the channel's programming time.

to ensure that cable operators did not favor vertically integrated programmers. Accordingly, comments were invited on whether the Commission should establish a threshold beyond which such channel occupancy limits would not apply. The Commission also questioned whether such a cap should be adopted in this proceeding or at some future date. In this regard, commenters were asked 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.

37. The Commission continues to believe that expanded channel capacity will reduce the need for channel occupancy limits. As indicated in the R&O/FNPRM, 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 as necessarily somewhat speculative, the record indicates that vastly large 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.

38. 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, the Commission believes that occupancy limits can be relaxed 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. At the present time, this threshold appears to be a reasonable cut-off for application of the channel occupancy limit. Thus the Commission will apply the channel occupancy limits only up to 75 channels on a cable system owned by a vertically integrated MSO.[5] 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 may be eliminated if developments warrant.

39. The R&O/FNPRM considered effective competition, observing 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, the Commission proposed to phase out channel occupancy limits in communities where effective competition is established. Commenters were asked to indicate whether the definition of effective competition for this purpose should include cable systems subscribed to by fewer than 30 percent of the homes located in the franchise area.

40. The Commission concludes that channel occupancy limits should not be eliminated 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. Thus, at this time, the Commission is not prepared to say that the presence of "effective competition" is a reasonable basis for removing the channel occupancy caps. However, 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 the Commission gains more experience with the rules.

41. The R&O/FNPRM next proposed to grandfather any existing vertical relationships which exceed the channel occupancy limits ultimately adopted and asked commenters to address this proposal. The Commission now determines 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, the Commission will grandfather all vertically integrated video programming services carried as of December 4, 1992 (the effective date of the 1992 Cable Act), which exceed the channel occupancy limits adopted herein. The Commission notes, 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.

42. R&O/FNPRM observed that the 1992 Cable Act and its legislative history were silent on the issue of enforcement of the channel occupancy limits and 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. However, the Commission now determines 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.

43. In this regard, The Commission welcomes 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

[5] 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 percent of 75) can be devoted to the carriage of affiliated video programming and thus no less than 45 channels (60 percent 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.

operator to be in violation of its channel occupancy rules, the Commission may impose appropriate sanctions, including cease and desist orders and forfeitures.

44. Third and finally, the Commission considered issues relating to limits on participation in program production. In that regard, the NPRM/NOI asked commenters to indicate whether 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.

45. In view of the structural and behavioral restrictions already required under the 1992 Act, the Commission does 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. The Commission concludes 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.

Administrative matters

Final Regulatory Flexibility Analysis

46. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605, it is certified that this decision will have an impact on small cable systems. As detailed in the full text of the Second Report and Order, the Commission has attempted, wherever possible within the statutory constraints, to establish regulations which, to the extent possible, minimize the burdens on the cable systems and programming services subject to the vertical and horizontal ownership limits. The full text of the Commission's final regulatory flexibility analysis may be found in appendix C of the Second Report and Order

Ordering Clauses

47. 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. 102–385, part 76 of the Commission's rules, 47 CFR part 76, is amended as set forth below, and will become January 10, 1994, subject to approval by the Office of Management and Budget. However, the effective date of the horizontal ownership limits contained in § 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 the statutory authority for such rules unconstitutional.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission
LaVera F. Marshall,
Acting Secretary.

Amendatory Text

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. Section 76.503 is added to subpart J 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 percent 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 percent of all homes passed nationwide shall be permitted provided the additional cable systems, beyond 30 percent of homes passed nationwide, are cable systems, beyond 30 percent 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 percent, 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.

(d) *Minority-controlled* means more than 50 percent owned by one or more members of a minority group.

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

(f) *Attributable interest* shall be defined by reference to the criteria set forth in the Notes to § 76.501.

3. Section 76.504 is added to Subpart J to read as follows:

§ 76.504 Limits on carriage of vertically integrated programming.

(a) Except as otherwise provided in this section no cable operator shall devote more than 40 percent of its activated channels to the carriage of national video programming services owned by the cable operator or in which the cable operator has an attributable interest.

(b) The channel occupancy limits set forth in paragraph (a) of this section shall apply only to channel capacity up to 75 channels.

(c) A cable operator may devote two additional channels or up to 45 percent of its channel capacity, whichever is greater, to the carriage of video programming services owned by the cable operator or in which the cable operator has an attributable interest provided such video programming services are minority-controlled.

(d) Cable operators carrying video programming services owned by the cable operator or in which the cable operator holds an attributable interest in excess of limits set forth in paragraph (a) of this section as of December 4, 1992, shall not be precluded by the restrictions in this section.

(e) Cable operators are required to maintain records in their public file for a period of three years 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. These records must be made available to local franchise authorities, the Commission, or members of the public on reasonable notice and during regular business hours.

(f) *Minority-controlled* means more than 50 percent owned by one or more members of a minority group.

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

(h) *Attributable interest* shall be defined by reference to the criteria set forth in the Notes to § 76.501.

[FR Doc. 93–27630 Filed 11–12–93; 8:45 am]
BILLING CODE 6712–01–M

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47 CFR Part 76

[MM Docket No. 92–266; FCC No. 93–494]

Cable Television Act of 1992

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission has adopted an Order extending the freeze of regulated cable service revenues from November 15, 1993 until February 15, 1994. This Order will establish an additional opportunity for local franchising authorities and subscribers to participate in assuring the reasonableness of cable service rates prior to expiration of the freeze.

EFFECTIVE DATE: November 15, 1993.

FOR FURTHER INFORMATION CONTACT: Lawrence A. Walke, (202) 416–0847.

SUPPLEMENTARY INFORMATION: The text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street NW., Washington, DC 20554, and may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street NW., Washington, DC 20037.

Order

Adopted: November 10, 1993.

Released: November 10, 1993.

By the Commission: Chairman Quello issuing a separate statement; Commissioner Duggan issuing a separate statement; Commissioner Barrett dissenting.

I. Introduction

1. In this Order, on our own motion, we reconsider the expiration date of the freeze of regulated cable service revenues, and extend the expiration date of the freeze from November 15, 1993 until February 15, 1994.

II. Background

2. In the Rate Order, 58 FR 29736 (May 21, 1993), we established a comprehensive regulatory framework providing for rate regulation of the basic service tier by local franchising authorities and of cable programming services tiers by the Commission as required under the Cable Act of 1992. We established June 21, 1993 as the effective date of our rate regulations. At the same time, we were concerned that during the period between adoption of our rules and the earliest practical opportunity for local franchising authorities to establish regulation of the basic service tier, and for consumers to file complaints with the Commission concerning rates for cable programming services tiers, cable operators could raise rates, effectively undermining the statutory goal that rates for cable services remain reasonable. In particular, we were concerned that cable operators could raise rates to potentially unreasonable levels, as determined under the rate regulations ultimately adopted. We determined that a freeze of regulated cable service revenues until August 3, 1992 would provide a reasonable opportunity for local franchise authorities to become certified to regulate the basic service tier and for consumers to invoke by complaint the Commission's regulatory oversight over cable programming services tiers. Accordingly, we established a freeze until that date of revenues for cable services subject to regulation under the Cable Act of 1992.

3. Subsequently, the Commission reexamined the feasibility of implementing rate regulation by June 21, 1993 in view of the significant additional responsibilities imposed on the Commission by the Cable Act of 1992 and a severe funding shortfall faced by the Commission at that time. We extended the effective date of cable rate regulation from June 21, 1993 until October 1, 1993, and the freeze until November 15, 1993 in order to provide local franchising authorities and consumers a continued opportunity to exercise their rights under the Cable Act of 1992 and our regulations in light of the new effective date of cable rate regulation. We later determined that an earlier implementation of cable rate regulation was feasible because of a supplemental appropriation provided to the Commission and moved the effective date of rate regulation from October 1, 1993 to September 1, 1993. We did not alter the date for expiration of the freeze because we were concerned that local franchising authorities may have established implementation plans based on an effective date of October 1, 1993. Our regulations establishing rate regulation of cable service became effective September 1, 1993.

III. Discussion

4. Under the Cable Act of 1992 and our implementing regulatory framework, cable operators are generally free to raise rates for the basic service tier in the absence of local certification and for cable programming service tiers in the absence of subscriber complaints invoking the regulatory oversight of the Commission. As of November 3, 1993, the Commission has received 3425 applications for certification from local franchising authorities covering approximately 5050 communities served by cable, and no more than approximately 836 properly completed subscriber complaints. These figures represent only a small percentage of the nearly 33,000 communities that are potentially eligible to regulate the basic service tier, and an even smaller percentage of the country's 58 million cable subscribers.

5. In light of the relatively few applications for certification and subscriber complaints received to date, we are concerned that the expiration of the freeze on November 15, 1993 could undermine the statutory purpose that rates for regulated cable service be reasonable by permitting rates to rise before rate regulation has begun in earnest. We believe that the purposes of the statute will best be fulfilled if we establish an additional opportunity for local franchising authorities and subscribers to participate in assuring the reasonableness of cable service rates prior to expiration of the freeze. We believe that an extension of the freeze until February 15, 1994 will ensure that we have afforded local franchising authorities a sufficient period in which to seek Commission certification to regulate basic cable service rates, and in which cable subscribers may exercise their rights to invoke Commission oversight of cable programming services. Accordingly, we will reconsider, on our own motion, the decision in the *Deferral Order*, 58 FR 33560 (June 18, 1993), that the freeze should expire November 15, 1993, and extend the expiration date of the freeze until February 15, 1994. When the basic tier becomes subject to regulation, a cable operator may generally raise rates only after approval by local franchising authorities. Where local governments already have initiated rate regulation of the basic service tier, we are not concerned that rates for the tier could rise to unreasonable levels after November 15, 1993. Accordingly, after the effective date of this *Order*, the freeze will not apply to a basic service tier that has become subject to regulation by a local franchising authority or the Commission. In the *Rate Freeze Order*, 58 FR 17530 (April 5, 1993), we determined that it was necessary to freeze rates for the cable programming service tier in order to prevent cable operators from evading the freeze of the basic tier by moving programming from the basic to the cable programming service tier. In situations where the basic tier is already subject to regulation, it is not necessary to continue the freeze in effect for the cable programming service tier in order to prevent an evasion of rate regulation of the basic tier. Accordingly, where the basic tier has become subject to regulation, the freeze will expire on that date for both tiers. In such situations, we note that subscribers and local franchising authorities may file complaints to make the cable

programming service tier subject to regulation and establish refund liability for cable programming service rates as of the date of the complaint. Where only the cable programming service tier is subject to regulation, we do not believe that the cable operator's capacity to evade the freeze of the basic tier by shifting programming to the higher tier is significantly diminished. Accordingly, where only the cable programming service tier is subject to regulation, the freeze will continue in effect for both tiers.

6. At the same time, we recognize that by this *Order* the freeze will have been in place for over ten months. We emphasize that we will entertain petitions for relief where the operator can show that the freeze is causing severe economic hardship or threatens the viability of continued provision of cable service.

7. As indicated, our comprehensive regulatory framework governing cable service rates became effective September 1, 1993. Under that framework, operators are currently scheduled to respond on November 15, 1993 to initial notices of regulation of the basic service tier that occurred prior to October 15, 1993, and to complaints filed with the Commission prior to October 15, 1993 concerning rates for cable programming services tiers. This schedule will permit local authorities and the Commission to bring to consumers the benefits of rate regulation. In particular, local authorities and the Commission can begin reviewing promptly on November 15, 1993 FCC Forms 393 where operators have elected to use the benchmark approach for setting initial rates. Under our comprehensive regulatory framework, a benchmark and price cap approach serves as the primary method of setting rates for regulated cable services. We are currently reviewing on reconsideration whether further changes to the benchmark scheme are warranted. As we stated in our first reconsideration order, we will provide for appropriate transition mechanisms should any changes be adopted. Moreover, in the *Rate Order*, we established that cost-of-service showings would be reviewed on a case-by-case basis under established standards of cost-of-service regulation traditionally applied to public utilities. Although we are in the process of developing and adopting uniform cost-of-service standards, such standards are not an essential part of our rate regulation scheme. Application of traditional cost-of-service principles on a case-by-case basis will give cable operators ample opportunity to justify their rates based on costs and ensure that their constitutional rights are not violated. In this regard, we note that the U.S. Court of Appeals for the D.C. Circuit rejected a request by several operators that our rate rules be stayed until we adopted final cost-of-service rules. *Intermedia Partners* v. *FCC*, No. 93–1491 (D.C. Cir. August 31, 1993). Thus, under the current schedule and regulatory framework, local authorities and the Commission can begin reviewing as early as November 15, 1993 cost-of-service showings and assess in individual cases the costs that may be recovered in rates for regulated cable services. These local and federal regulatory actions will enable operators and consumers to receive assurance in the near future that rates are in compliance with our requirements where rates are within permitted levels, and to enjoy the benefits of rate adjustments and refunds where rates exceed permitted levels. Our current regulatory framework and implementation schedule, therefore, will permit local authorities and the Commission to began without further delay the regulatory processes that will assure that cable service rates are reasonable as required under the Cable Act of 1992. Moreover, implementation of the rate regulation provision of the 1992 Cable Act will inevitably be a learning process for the Commission, local authorities, and the industry that will require revision and refinement over time. Accordingly, we believe it imperative that the process be commenced so that we can gain experience with the process and so that the benefits of the Act will be received by subscribers.

8. We find good cause under the Administrative Procedure Act to make this freeze effective with less than 30 days advance publication in the **Federal Register**. As explained, an extension of the freeze from November 15, 1993 until February 15, 1994 is necessary in order to afford local franchising authorities a sufficient period in which to seek Commission certification to regulate basic cable service rates, and in which cable subscribers may exercise their rights to invoke Commission oversight of cable programming services. We will make this *Order* and implementing rule changes effective upon publication in the **Federal Register** in order to prevent an expiration of the freeze that would otherwise occur under 30 days advance publication in the **Federal Register**.

IV. Ordering Clauses

9. Accordingly, *It is Ordered*, pursuant to sections 4(i) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 543, that the freeze of cable service rates established in *Order*, 8 FCC Rcd 2921, 58 FR 17530 (April 5, 1993), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993), *extended*, FCC 93–304, 58 FR 33560 (June 18, 1993), *Is Extended* UNTIL February 15, 1994.

10. *It is Further Ordered*, That section 76.1090 of the Commission's rules, 47 C.F.R. Section 76.1090, *Is Amended* as set forth below.

11. *It is Further Ordered*, That this *Order* Is Effective On November 15, 1993.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Part 76 of chapter I of title 47 of the Code of Federal Regulations is amended 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. Section 76.1090 is amended by revising paragraph (a), and adding new paragraph (c) to read as follows:

§ 76.1090 Temporary Freeze of Cable Rates.

(a) The average monthly subscriber bill for services provided by cable operators subject to regulation under section 623 of the Communications Act shall not increase above the average monthly subscriber bill determined under rates in effect on April 5, 1993, until February 15, 1994.

* * * * *

(c) The freeze imposed by paragraph (a) of this section will not apply where a basic tier service has become subject to regulation by a local franchising authority or the Commission.

[FR Doc. 93–28068 Filed 11–12–93; 8:45 am]

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