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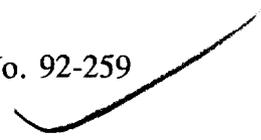
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Cable Television)
Consumer Protection and Competition)
Act of 1992)
)
Broadcast Signal Carriage Issues)

MM Docket No. 92-259



To The Commission:

INITIAL COMMENTS OF TURNER BROADCASTING SYSTEM, INC.

Turner Broadcasting System, Inc ("TBS") hereby files its comments in the above-captioned proceeding. TBS is a diversified company whose business segments include entertainment, news, syndication and licensing, sports, and real estate operations. Among its business segments particularly relevant to the instant proceeding are its five cable program networks, Cable News Network ("CNN"), Headline News, TBS Superstation, Turner Network Television ("TNT"), and The Cartoon Network. While TBS will not comment at this time on the specific matters raised in the Notice, it does wish to register two overriding points with respect to this proceeding.

1. Must Carry

As the Commission is aware, TBS, among others, have challenged the constitutionality of Sections 4 and 5 of the Cable Act of 1992. See Turner Broadcasting

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System, Inc. v. FCC, Civ. Act. No. 92-2247 (D.D.C. filed Oct. 5, 1992). We submit as Exhibit A to these Comments the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction in the Turner litigation so that it will be part of the record in this proceeding.

We recognize that the Commission cannot itself declare Sections 4 and 5 unconstitutional. See Johnson v. Robinson, 415 U.S. 361, 368 (1974). However, the Commission is obligated to adhere to the obligations of the First Amendment while administering the Communications Act, see Meredith Corp. v. FCC, 809 F.2d 863, 872-874 (D.C. Cir. 1987); see also FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978), and we therefore submit that in attempting to implement Sections 4 and 5, the Commission is obligated to do everything possible to limit the intrusion upon the First Amendment rights of cable program networks and cable operators. In doing so, TBS specifically reserves, and does not waive, its constitutional rights, and these Comments are filed without prejudice to TBS's constitutional challenges.

2. Retransmission Consent

In its pending lawsuit, TBS also claims that the retransmission consent provisions in Section 6 of the 1992 Cable Act are not severable from the commercial must carry provisions in Section 4, and that once the must carry provisions are found unconstitutional, Section 6

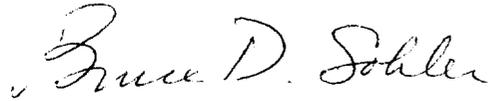
must fall also. We perceive in the instant Notice some inclination upon the Commission's part to utilize this proceeding in an attempt to buttress the argument for severability, and we expect that certain broadcast interests will be pressing the Commission in this regard. We would suggest that proceeding in such a manner would be both inappropriate and unsound policy.

TBS believes that were retransmission consent implemented alone, the beneficiaries would only be the already strongest and most popular broadcast stations. We would respectfully suggest that the Commission consider whether from a policy perspective, the introduction of retransmission consent into the current mass media marketplace is an approach that the Commission would choose if it acted independently.

Ultimately, the question of whether Section 6 is severable will be decided, as it should, on the basis of Congress' intent. See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987) (test is whether retransmission consent if must carry falls "is legislation that Congress would not have enacted."). The Commission has nothing to contribute to that question, and as a matter of policy should leave to Congress the determination of what

changes, if any, to the existing scheme (whether retransmission consent or compulsory license reform) are appropriate without must carry.

Respectfully submitted,



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D12653.1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

TURNER BROADCASTING SYSTEM, INC., et. al.)	
)	
Plaintiffs)	
)	
v.)	
)	
FEDERAL COMMUNICATIONS COMMISSION,)	Civil Action No. 92-2247
)	(Three-Judge Court)
and)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendants)	

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

TURNER BROADCASTING SYSTEM, INC., et. al.)	
)	
Plaintiffs)	
)	
v.)	
)	
FEDERAL COMMUNICATIONS COMMISSION,)	Civil Action No. 92-2247
)	(Three-Judge Court)
and)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendants)	

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

PRELIMINARY STATEMENT

Twice before, the United States Court of Appeals for the District of Columbia Circuit has struck down government imposed rules compelling cable systems to accept and retransmit the programming of broadcast stations as fundamentally at odds with the First Amendment. At issue in those decisions were "must carry" regulations promulgated by the Federal Communications Commission ("FCC") which, the courts held, impermissibly promoted the speech of one category of speakers -- broadcasters -- at the expense of the constitutionally-protected speech of another category of speakers -- cable program networks -- in an unapologetically protectionist effort to insulate broadcasters from competition from the cable industry. The FCC's must carry rules were also held to violate the First Amendment rights of cable operators by infringing upon their editorial discretion to select the programming to offer their subscribers. In addition, the courts found that the challenged rules ignored the preferences of viewers, whose First Amendment interests the Supreme Court has identified as "paramount."

In a third attempt at skewing the video marketplace to their economic advantage, the broadcast industry has succeeded in persuading Congress to impose new must carry requirements. While the vehicle may be different, its destination is the same: The statutory requirements, set forth in Sections 4, 5, and 6 of the Cable Television Consumer Protection and Competition Act of 1992, substantially intrude in the First Amendment marketplace of ideas and are constitutionally no different than the previously invalidated FCC regulations. Over the Executive Branch's constitutional objections, Congress has adopted a sweeping legislative scheme that protects each and every local broadcaster while threatening the continued expansion of diverse and innovative video programming provided by cable program networks. Because, however, the First Amendment simply does not permit the government to favor a class of speakers in derogation of the rights of competing speakers and the public, the new must carry provisions cannot stand. Further, because Congress granted each commercial broadcaster an ability to choose between must carry rights in Section 4 and "retransmission consent" rights in Section 6, Section 6 cannot be severed from Section 4 and must also fall.

Since the constitutional infirmities are clear, and the harm to cable program networks substantial and irreparable, a preliminary injunction should be entered enjoining any effect or implementation of the Act's must carry and retransmission consent requirements.

STATEMENT OF THE CASE

A. Background

Since its origination in the late 1940s, cable television has evolved to become a full-fledged electronic media outlet providing the public with a wealth of video programming choices. That evolution is attributable to a confluence of technological and market forces. The advent of satellite-based cable program distribution and increased cable system channel capacity has enabled

cable systems to offer programming that appeals to mass markets as well as audiences with particular interests. Moreover, the demise of the FCC's must carry rules -- together with the FCC's decision to drop similar protectionist measures -- ended the government's artificial distortion of the video marketplace and has permitted nonbroadcast speakers to flourish. As a result of these developments, approximately 80 national, regional, and local cable programming services now provide a diverse mix of news, entertainment, public affairs, sports, financial, religious, minority-oriented, and children's programming.^{1/} Plaintiffs in this case are companies that operate 16 of those cable program networks.

For cable networks like CNN, USA Network, Arts & Entertainment Network, and The Family Channel to reach their viewing audience, they must obtain access to a channel on a cable system. A cable system distributes cable programming by receiving or originating signals from diverse sources and then transmitting those signals over coaxial and fiber optic cables to its subscribers. Cable operators select programming to present to their subscribers from various services, including local broadcast station signals, signals of distant broadcast television stations, locally-originated cable programming, and cable network programming.

Because cable program networks are distributed almost exclusively through cable systems, they reach only the approximately 60 percent of television homes that subscribe to cable.^{2/} Moreover, while cable system channel capacity has increased during the last decade, many cable systems have reached or are close to reaching the limit of their channel capacity. For this reason, it is extremely difficult for new cable networks, such as The Cartoon Network, Court TV, and The Sci-Fi Channel to obtain cable system carriage. McGuirk Affidavit ¶¶ 24-27.

^{1/} Affidavit of Terence F. McGuirk, Executive Vice President of Turner Broadcasting System, Inc. ¶ 11 [hereinafter "McGuirk Affidavit"].

^{2/} Broadcasting & Cable Market Place 1992 at xxiii (R.R. Bowker New Providence, NJ).

Mandatory carriage of broadcast stations compounds this situation by forcing cable networks to compete for fewer channels.

Broadcast television stations, by contrast, possess multiple means of transmitting their signals to their audiences. Broadcast stations are licensed by the FCC free-of-charge to utilize specified portions of the radio-magnetic spectrum to transmit their signals over-the-air to the 98 percent of American homes that own television sets.^{3/} Broadcast stations are also able to transmit their programming over-the-air to cable systems for subsequent retransmission to cable subscribers. Thus, even absent carriage on a cable system, a broadcast station can transmit its signal over-the-air to virtually every home within its licensed community.

B. Previous Must Carry Requirements

The FCC first adopted must carry rules in 1966 at a time when it viewed cable television as a service strictly ancillary to broadcasting.^{4/} There were no cable program networks in existence when the first must carry rules were promulgated.

In the 1970s, the FCC repromulgated and fine-tuned the must carry rules to protect the broadcast industry, although during this period its view of cable television began to change. By the end of the decade, the FCC had finally come to recognize cable television as a legitimate, independent vehicle for the provision of video services to the public.^{5/} Based on this recognition, the FCC removed related regulatory requirements that limited the number and type

^{3/} See id.

^{4/} Second Report and Order in Docket 14895, 2 F.C.C.2d 725 (1966); First Report and Order in Docket 14895, 38 F.C.C. 683 (1965) ("First Report and Order").

^{5/} Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 645-46 (1979).

of distant television signals that a cable system could retransmit.^{6/} Yet, the must carry requirements remained.

Under these must carry rules, cable system operators were compelled to transmit, upon request and without compensation, each and every over-the-air broadcast signal that was considered local by the FCC. The rules required a cable system to carry the signals of all commercial television stations within 35 miles of the community served by the system, other stations within the same television "market" as designated by the FCC, and all stations "significantly" viewed in the community." See 47 C.F.R. §§ 76.5 et seq. (1984).

C. The Quincy and Century Decisions

In 1985, the D.C. Circuit invalidated the FCC's must carry rules as violative of the First Amendment. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986). While expressing serious doubts about subjecting the rules to anything less than the most exacting First Amendment scrutiny, the court held that the rules were invalid even if considered merely an "incidental" burden on, as opposed to government regulation of, speech.

The Quincy court recognized that the very purpose of the rules was to bolster the fortunes of local broadcasters while restricting the ability of cable program networks to reach their intended audiences. By government fiat, broadcasters were guaranteed the right to convey their messages over cable systems while cable programmers were force to compete for a proportionately diminished number of cable system channels. The court rejected the FCC's assertion that the rules furthered the government's purported interest in the preservation of free, over-the-air broadcasting, finding the Commission failed to substantiate that any serious threat to

^{6/} Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663, 744-46 & 768-69 (1980).

local broadcasting even existed. Furthermore, in view of the government's asserted interest, the rules were remarkably overinclusive. In short, they served the constitutionally impermissible purpose of protecting broadcasters, as opposed to broadcasting.^{7/}

Subsequently, and despite First Amendment concerns, the FCC promulgated new, "scaled back" must carry rules in 1986. These rules limited the number of broadcast stations a cable system was required to carry, established a minimum viewership standard for stations to be eligible for carriage, permitted cable systems to refuse carriage of more than one broadcast station affiliated with the same commercial broadcast network, limited the number of noncommercial stations a cable system was required to carry, and were to remain in effect for a period of only five years and then eliminated entirely.

In promulgating these rules, the FCC expressly abandoned any claim that must carry rules were required to protect local broadcasting.^{8/} Further, the FCC recognized that must carry rules were fundamentally anti-consumer:

[W]e believe that it would not serve the interests of video consumers to maintain policies that favor any group of program service providers to the exclusion of other competing service providers, especially where such policies may hinder consumers'

^{7/} The court noted that the rules indiscriminately protected "each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator," and contained no requirement that stations actually provide locally-originated programming to qualify for carriage. 768 F.2d at 1460.

^{8/} In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C. Rcd. 864, 879-80 (November 28, 1986) [hereinafter "Report and Order"]. See also In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 2 F.C.C. Rcd. 3593, 3599-3600 (May 1, 1987) [hereinafter "Memorandum Opinion and Order on Reconsideration"].

access to those competing program services.^{9/}

Despite their more limited scope and duration, the FCC's revised rules were quickly struck down as violative of the First Amendment. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988). Since Century, the FCC has considered and resisted persistent broadcast industry appeals for the promulgation of new must carry rules.^{10/}

FCC factfinding since Century has demonstrated that most local broadcast stations are being carried by cable systems, and that virtually all cable systems are carrying at least one local affiliate of each network.^{11/} Invited to establish the justification for reimposition of must carry regulations,^{12/} broadcasters have offered nothing more than anecdotal evidence of isolated decisions by cable systems to discontinue carrying minimally viewed broadcast stations. The lack of any evidence demonstrating a threat to local broadcasting, as opposed to certain individual broadcasters, validates FCC Chairman Sikes' recognition that "the stations needing must carry the

^{9/} Report and Order, 1 F.C.C. Rcd. at 880. See also Memorandum Opinion and Order on Reconsideration, 2 F.C.C. Rcd. at 3600. Despite broadcast industry claims that cable carriage was essential to its ability to offer programming in competition with cable, the FCC recognized that cable subscribers possessed an inexpensive means of receiving both cable and over-the-air programming -- an input-selector or "A/B" switch. The five-year duration of the rules was considered to be the maximum period necessary to permit cable subscribers to become familiar with and install the switch if they so desired.

^{10/} Although the FCC initiated a rulemaking proceeding in July 1991, it declined even to propose new must carry requirements, instead requesting comment on "whether, in today's video marketplace, must carry rules are needed." In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, 6 F.C.C. Rcd. 4545, 4566, at ¶ 111 (1991) ("Must Carry Second Further Notice of Proposed Rulemaking").

^{11/} Staff Report, Policy and Rules Division of the Mass Media Bureau, Cable System Broadcast Signal Carriage Report, Sept. 1, 1988, at 11, 13.

^{12/} Must Carry Second Further Notice of Proposed Rulemaking, 6 F.C.C. Rcd. at 4566, ¶ 111.

most are the ones that are watched the least."^{13/}

The elimination of protectionist regulatory intervention into the video marketplace has permitted the diversity offered by cable program networks to flourish. The absence of such rules has permitted cable operators to exercise editorial discretion in choosing program offerings that their subscribers want, and has led to the introduction of new program networks, expanded carriage of existing cable program networks as well as new locally-originated cable programming. At the same time, the capacity of cable program networks to create and offer original news, entertainment and other informational has grown dramatically. Basic cable program networks spent \$340 million for programming in 1984; in 1991, that investment in programming had increased to \$1.5 billion.^{14/}

D. The Cable Television Consumer Protection and Competition Act of 1992

Confronted with the courts' prior rejection of mandatory cable carriage as violative of the First Amendment, and the FCC's continuing refusal to impose must carry rules a third time, the broadcast industry turned to the only avenue left -- Congress. The broadcast industry convinced Congress to include new must carry requirements in its 1992 cable legislation and to broaden their rights substantially by also granting each commercial broadcaster the option to be paid or to withhold the station from cable altogether.^{15/}

The detailed must carry provisions in the 1992 Cable Act are in many respects even more expansive than the rules invalidated in Century. The Act requires each cable system with more than 300 subscribers and 12 or fewer channels to carry the signals of all non-duplicative

^{13/} Id. at 4576 (Separate Statement of FCC Chairman Alfred C. Sikes).

^{14/} H.R. Rep. No. 628, 102d Cong., 2d Sess. 31 (1992) (hereinafter "H.R. Rep. No. 628").

^{15/} See The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (1992) ("1992 Cable Act" or "Act").