



**NEW YORK STATE COMMISSION
ON CABLE TELEVISION**

CORNING TOWER BLDG., EMPIRE STATE PLAZA
ALBANY, NEW YORK 12223
(518) 474-4992
(518) 486-5727 FAX

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February 8, 1993

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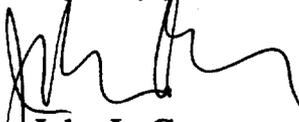
Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 92-264

Dear Ms. Searcy:

I am enclosing herewith an original and nine copies of comments submitted by the New York State Commission on Cable Television in the above-referenced proceeding.

Very truly yours,


John L. Grow
Counsel

Encs.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections 11 and 13)
of the Cable Television Consumer)
Protection and Competition Act of 1992)
Horizontal and Vertical Ownership)
Limits, Cross-Ownership Limitations)
and Anti-trafficking Provisions)

MM Docket No. 92-264

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COMMISSION ON CABLE TELEVISION**

New York State Commission
on Cable Television
Corning Tower Bldg.
Empire State Plaza
Albany, New York 12223
(518) 474-4992

Dated: Albany, New York
February 8, 1993

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MM Docket No. 92-264

**COMMENTS OF THE NEW YORK STATE
COMMISSION ON CABLE TELEVISION**

1. The New York State Commission on Cable Television ("NYSCCT") respectfully submits initial comments in response to the Notice of Proposed Rulemaking and Notice of Inquiry ("NPRM") released in this docket December 28, 1992. NYSCCT is an independent Commission with broad authority to promote and oversee the development of the cable television industry in the State of New York. NYSCCT is expressly authorized by Section 815(6) of the Executive Law of the State of New York to represent the interests of the people of the State before the Federal Communications Commission ("Commission").

2. The comments herein will focus on the issues raised in the NPRM relative to the anti-trafficking provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Cable Act"). The Cable Act of 1992 adds a new Section 617 to the Communications Act entitled "Sales of Cable System." Subsection (a) of the new statute provides as follows:

"[e]xcept as provided in this section, no cable operator may sell or otherwise transfer ownership in a cable system within a 36 month period following either the acquisition or initial construction of such system by such operator."

Section 617 also provides certain exceptions from ~~the~~ three year holding requirement (subsection (c)) and special language relative to transfers of multiple systems (subsection (b)). Section 617(d) empowers the Commission to waive the three year holding requirement for certain transfers "consistent with the public interest" and "to permit appropriate transfers in the cases of default, foreclosure, or other financial distress," provided, however, that if such a transfer is also subject to the approval of a franchising authority, the franchising authority must also approve it. Subsection (e), which is applicable only to proposed transfers of interests or systems which have been held for a minimum of 36 months, limits the time a franchising authority must act to disapprove a jurisdictional transfer.

3. At the outset, we note that many cable television franchise agreements and some state laws, see e.g., New York State Executive Law, Section 822, require the prior approval of transactions affecting the ownership or control of a cable television franchise, cable system or cable operator. It is our best judgment based upon the provisions of individual franchise agreements in the State of New York that the jurisdiction conferred in cable television franchise agreements nationwide will vary substantially. In any event, where a proposed transfer is subject to the approval of the franchising authority, the new statute will impact the existence and exercise of such jurisdiction in only two ways.

4. First, if the proposed transfer is subject to the three year holding period, the transfer cannot be consummated unless the Commission as well as the franchising

authority approves it.¹ Second, if a proposed transfer is not subject to the three year requirement, the franchising authority may not unilaterally delay any action on a completed application for approval beyond 120 days or the transfer will be deemed approved. Where a proposed transfer is not subject to the approval of the franchising authority, the only effect of Section 617 is to preclude transfers within the three year holding period unless the Commission issues a waiver.

5. In paragraph 8 of the NPRM, the Commission considers the issues related to the "jurisdiction and enforcement" of the anti-trafficking rules. The Commission proposes that franchising authorities have primary responsibility to monitor and enforce the new statute. Specifically, the Commission proposes that the transferor certify to the franchising authority (1) that the proposed transfer satisfies the three year holding period or (2) that it is exempt therefrom pursuant to Section 617(b). The Commission also proposes that such certification be provided even if the transfer is not subject to local approval. We agree with these proposals. We would urge the Commission to ensure that the statement of certification contain sufficient facts relative to all transfers during the past three years to enable the franchising authority to make an informed and expeditious judgment as to whether the proposed transfer is consistent with the anti-trafficking provisions. This is particularly important if the franchising authority is not required to approve the proposed

¹ It is noted that where a transferor seeks the approval for a transfer subject to Section 617(a), the standard of review applicable to the franchising authority (as set forth in the franchise or applicable state or local law) would necessarily be expanded to include the policy underlying the new statute and such franchising authority could reach a judgment on that policy as applied to the particular facts and circumstances of the proposed transaction different from the Commission.

transfer. The Commission should also require that such certification be provided a reasonable period of time prior to the closing date of the proposed transaction. We suggest that sixty days would be an appropriate notice period. In addition, where a franchising authority challenges the certification, we would not object to review by the Commission in order that an expeditious and relatively inexpensive determination be made consistent with the interests both of the cable franchisee and the franchising authority. (Infra., para. 14)

6. In paragraphs 9 through 20 of the NPRM, the Commission addresses issues relative to the nature and types of transactions that should be included within the anti-trafficking provisions. In this regard, the Commission asks parties to consider whether a transfer of ownership in a cable system should be defined by reference to the transfer of control standards applicable to broadcast stations pursuant to Section 310(d). We generally agree with the Commission that the types of transfers subject to the three year holding period are those which would result in an outright sale or assignment of a franchise or cable system to a separate independent entity or a transfer which changes control including actual working control. In this regard, it does appear that inter-company transfers and the transfers of non-controlling ownership interests are "unlikely to be engaged in for purposes of profiteering or to affect cable rates or service." (NPRM, para. 12) At the same time, the Commission asks whether its standards applicable to broadcast transfers will provide "sufficient guidance" to franchising authorities and states that "it may be preferable to establish a fixed transfer of ownership threshold for purposes of applying the anti-trafficking rule." (NPRM, para. 12) In this regard, we suggest that the Commission establish as an alternative standard a threshold of 20% or 25% of ownership whereby any proposed transfer

which involves a sale or assignment of such an interest in the franchisee would presumptively be subject to the three year holding requirement. We also suggest that any transfer of a control that increases the level of ownership and control by one entity to 80% be considered subject to the three year holding period.

7. In paragraph 15 of the NPRM, the Commission discusses the types of transfers that are exempt from the anti-trafficking restriction as described in Section 617(b) of the 1992 Cable Act. Section 617(b) provides as follows:

"(c) Exceptions. - Subsection (a) shall not apply to -

(1) any transfer of ownership interest in any cable system which is not subject to Federal income tax liability;

(2) any sale required by operation of any law or any act of any Federal agency, any State or political subdivision thereof, or any franchising authority; or

(3) any sale, assignment, or transfer, to one or more purchasers, assignees, or transferees controlled by, controlling, or under common control with, the seller, assignor, or transferor."

Exceptions that may be recognized under Section 617(c)(1) for "tax-free" transfers should include safeguards to ensure that they are consistent with the intent of Congress to prevent profiteering and any adverse effect on cable rates and services. (House Report, p. 119) We agree with the Commission that any transfer described in subsection (c)(2), as well as a transfer pursuant to the rights of a secured creditor of the cable operator, should be outside the three year holding period. To find otherwise might permit the three year period to benefit the cable operator, a result which cannot be reconciled with Congressional intent underlying the section.

8. Section 617(c)(3) exempts "any sale, assignment, or transfer, to one or more purchasers, assignees, or transferees controlled by, controlling, or under common control with, the seller, assignor, or transferor." As the Commission notes, the legislative history suggests that this provision "was intended to apply to pro forma transfers as defined in Section 73.3540(f) of our rules." (NPRM, para. 17) Although certain inter-company transfers have a nominal effect on a cable system or franchisee, it is our experience that such transfers may also have the effect of modifying existing security interests or otherwise increasing the financial burden on the cable system. A proposed transfer which will increase the amount of debt payable by the franchisee, or the terms thereof, could adversely impact rates depending, of course, on the precise standards to be promulgated by the Commission in MM Docket No. 92-266. Thus, the mere identity of the parties and the similarity of interests before and after transfer should not necessarily be dispositive of whether the three year holding period is applicable.

9. The Commission proposes to require that a transferor alleging exempt status pursuant to Section 617(b) provide certification to the franchising authority similar to certification required to establish exemption from the transfer of ownership standard. Here, we simply reiterate that the form of certification must include sufficiently detailed information to enable the franchising authority readily and expeditiously to form a judgment as to whether the position asserted by the cable operator conforms with the Commission rules.

10. In paragraph 14 of the NPRM, the Commission requests comment on the dates to be used for determining the three year holding period. In the case of a new

franchise, we suggest that the commencement date be the date the cable operator actually commences construction of the cable system as distinct, for example, from the date the franchise may require the commencement of construction or the date the cable operator first undertakes steps preliminary to actual construction. We further suggest that where the construction period set forth in a franchise extends beyond three years that the cable operator must show that it has proceeded with construction in accordance with the time table contained in the franchise and has fulfilled its obligation therewith in order to be free of the anti-trafficking ban.

11. Where a franchise or system, or interest therein, has been acquired by purchase, we believe that the date for determining commencement of the three year period should be the date of vesting of the purchaser's interest in the system or entity. The same event should be used for determining when the three year holding period has been satisfied. This is not to suggest, however, that a cable operator may not seek transfer approval until the three year period has expired. It has been the experience of NYSCCT that the proposed closing date of a substantial transfer is many months after the final execution of the purchase and sale agreement. Thus, a cable operator could file an application for approval of a proposed transfer before the three years has elapsed provided the closing will not occur until after the period has run.

12. Also, in paragraph 14 of the NPRM, the Commission asks generally how the date for determining the three year holding period should apply to the transfer of a multiple systems operator ("MSO"). The sale by an MSO of a single system should not be treated any differently than the sale of a stand alone system. Where an MSO proposes to

sell all its systems, including systems acquired more, as well as less than, three years ago some degree of flexibility is warranted. (The same issue is raised by the sale of a substantial interest in an MSO where the MSO has acquired certain holdings within the three year period even if there has been no transfer of an interest in the ownership of the MSO within three years.) In other words, the rule need not require that each and every system independently meet the three year test. Perhaps a fair measure of whether or not the MSO is engaging in profiteering or prohibited trafficking is the number of subscribers to systems which have been held more than three years compared to the number of subscribers in systems which have been held less than three years. A subscriber test is a reasonable one inasmuch as the purchase price (or adjustments thereto) of cable system transfers is often stated in terms of a per-subscriber amount. We suggest that where a certain percentage, e.g., 80%, of the subscribers are served by systems which have been owned for at least three years that the transaction be eligible for local review and approval independent of Section 617(a).

13. In paragraph 13 of the NPRM, the Commission requests comments concerning the procedures for resolving complaints about the applicability of the anti-trafficking rules. While NYSCCT generally favors the resolution of issues at the state and local level, a controversy concerning whether a particular transfer constitutes a transfer of ownership for purposes of the three year ban may warrant resolution by the Commission for at least three reasons. First, whenever a proposed transfer is within the scope of Section 617(a) and a cable operator nonetheless seeks to pursue the same, the Commission will be required to determine the request for waivers. Second, where a cable operator contends by

reason of the nature of a proposed transfer that it is not subject to the three year requirement and a franchising authority without jurisdiction over the proposed transfer disputes that contention, a determination by the Commission would benefit all parties by reducing the potential burden and expense of litigation in court. Also, as noted in the NPRM, the resolution of such disputes by the Commission would tend to promote uniformity in the application of the rules.

14. In paragraph 20 of the NPRM, the Commission asks whether a conditional waiver of the three year holding period may be issued prior to any action or approval by a franchising authority consistent with the intent of Section 617(b). We have no objection to issuance of prior, conditional waivers provided, however, that the Commission must make it clear that such actions would not in any way effect the jurisdiction or discretion of a franchising authority over the same transfer. It is particularly important that such a waiver not be understood to shift or otherwise effect the burden of proof applicable to franchising authority review of the proposed transfer.

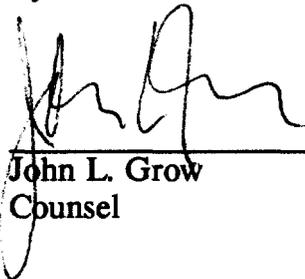
15. In paragraphs 21 through 23 of the NPRM, the Commission addresses Section 617(e) relative to the 120 day period for action on transfer applications by franchising authorities as well as the implied directive that the Commission promulgate regulations specifying minimum information to be provided in such applications. The important points here are that such information as may be identified in Commission rules is not exclusive of information which may be required by the franchising authority itself and that the 120 day period for reviewing the proposed transfer does not commence until the transferor satisfies the information requests of the franchising authority. Accordingly, it is

not essential that the Commission regulations contain an exhaustive description of all information that might reasonably be required in the context of any particular application. Rather, it would appear sufficient that the rules generally provide that a transferor's request for approval contain all material facts relative to the proposed transaction including a full description of the persons acquiring the franchise or system or interest therein. Now that the Congress has codified the long-standing concern of franchising authorities over the financial, technical and legal qualifications of a proposed franchise applicant (see Section 621(a)(4)(c)), the Commission could justify the inclusion of additional financial, technical or legal information in its rules. On the other hand, the Commission must necessarily recognize that given the variety of transfers that are subject to the jurisdiction of franchising authorities, no single, even comprehensive, set of information requirements could encompass all the information necessary for most transfers.

Respectfully submitted,

NEW YORK STATE COMMISSION
ON CABLE TELEVISION

By:



John L. Grow
Counsel

Dated: Albany, New York
February 8, 1993