A. The Anti-Trafficking Rules Should Be Applied Prospectively.

At the outset, the three-year holding requirement of Section 617(a) should not apply to systems acquired before enactment of the 1992 Cable Act. Obviously, restrictions on the transferability of systems affect the price that a reasonable purchaser will pay for those systems. See, e.g., Elimination of Broadcast Three-Year Rule, 52 R.R.2d at 1084 (Department of Justice concluding that "the value of a license is deflated in the eyes of prospective purchasers who realize that they will not be able to sell that license for three years"). No holding requirement existed prior to enactment of the 1992 Cable Act, and purchasers had no reason to believe that their right to sell a particular system would be restricted in any way. Consequently, it would be unreasonable to impose retroactively a three-year holding requirement on purchasers who acquired systems at prices arrived at in the absence of such a requirement, particularly where rate and customer service regulations will be in place to protect against the evils alleged to arise from premature system transfers.

B. Anti-Trafficking Restrictions Should Apply Only To Transfers Of Controlling Interests.

Liberty supports the Commission's tentative conclusion to limit the application of the three-year holding requirement to transfers of controlling interests in cable systems. Notice at ¶11. The Commission's interpretation of Section 617(a) is consistent with the express terms of the statute, its restrictions on the transfer of ownership interests in broadcast licenses, and the perceived problems which the statute is intended to address.

Section 617(a) applies only where a "cable operator" sells or otherwise transfers "ownership in a cable system" within three years of "the acquisition or initial construction of such system by such operator." By definition, the three-year holding requirement applies only when the transferor: (1) is "responsible for...the management and operation" of the system; or (2) "provides cable services" over the system <u>and</u> "owns a significant interest in such cable system." <u>See</u> Section 602(5)(A) and (B). Thus, the statute itself contemplates that only those interests significant enough to affect management and control of the services provided over the system should be subject to the three-year holding requirement. Moreover, by expressly exempting transactions in which the seller and buyer are commonly controlled, Congress necessarily has permitted the transfer of non-controlling interests within the applicable three-year period. <u>See</u> Section 617(c)(3).

This interpretation of Section 617(a) also is consistent with the Commission's prior and current rules restricting the transfer of ownership interests in broadcast licensees or permittees. Before it was eliminated in 1982, the Commission's broadcast anti-trafficking rule required any application for assignment of license or transfer of control filed prior to completion of a three-year holding period to be designated for hearing, subject to certain exceptions. See Elimination of Broadcast Three-Year Rule, 52 R.R.2d at 1082. However, pro forma assignments and transfers of less-than-controlling interests were exempt from the three-year rule. Clay Broadcasters, Inc., 21 R.R.2d 442, 446 (1972). Consequently, the rule applied only when "third-party" designees or transferees received a controlling interest in the license or the licensee. Id. The existing restrictions on transfers of construction permits also apply only to transfers of controlling interests. Notice at ¶10.

Finally, the control threshold also is justified by the Congressional objectives purportedly underlying Section 617. As the Commission has acknowledged, the transfer of an ownership interest in a cable system is unlikely to have an adverse effect on rates or customer service unless the interest being transferred is sufficient to control management and operational decisions. Notice at ¶12. Consequently, use of the five percent broadcast attribution standard -- or some other less-than-controlling "percentage of ownership" -- to determine the applicability of the three-year holding requirement (Notice at ¶12) is inconsistent with the spirit as well as the letter of Section 617(a).

C. Non-Taxable, Pro Forma, And Government Required Transfers Should Be Excepted.

Section 617(c) states that the three-year holding requirement of Section 617(a) does not apply to any transfer of ownership interest which: (1) is "not subject to Federal income tax liability;" (2) is required by "operation of any law or any act" of the federal, state or local government "or any franchising authority;" and (3) transfers ownership between a buyer and a seller under common control. The Commission seeks comment on the appropriate scope of these exceptions. Notice at ¶¶15-18.

Liberty supports the Commission's tentative conclusion to exempt all "tax-free" transactions, including like-kind exchanges and reorganizations under Sections 1031 and 368 of the Internal Revenue Code, as well as Commission-issued tax certificates in acquisitions by minorities. Although the Commission correctly states that such transactions defer rather than eliminate tax liability (Notice at ¶15), they substantially diminish the likelihood of "profiteering" and may promote efficiencies. For example, a like-kind exchange between two MSOs may result in efficiencies where each MSO is acquiring a system located near other systems which it already operates. The deferral of tax liability pursuant to such an exchange would be of little or no value to the parties if they then immediately sold the systems involved because they would incur immediate tax liability in the subsequent transaction. Because such exchanges have built-in protections against "profiteering" and offer the possibility of increased efficiencies, they should not be discouraged through application of the three-year rule.

The Commission also questions whether "payment of cash or other taxable consideration to equalize the value of assets in like system exchanges" should defeat the exception, subjecting the transaction to the three-year holding requirement. Notice at ¶15. Although the Commission should not permit parties to use the cash "boot" in such transactions to circumvent the anti-profiteering purpose of the statute, efficiency-enhancing transactions should not be restricted merely because the value of the assets exchanged differs, requiring a cash adjustment.[17] Consequently, the Commission should exclude from the three-year rule all transactions which qualify as non-taxable events under applicable Internal Revenue Service regulations.

For example, the Commission should look through the transaction by which Liberty was formed to the original dates of system acquisition or construction by TCI. Pursuant to an

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[17] The inclusion of a cash "boot" does not eliminate the tax benefits of a "like kind" exchange under the Internal Revenue Code. See 26 U.S.C. §1031(b).

exchange offer to TCI shareholders, certain assets were spun off to Liberty which had been an indirect wholly-owned subsidiary of TCI.[18] Clearly, this non-taxable transaction was not the kind of "profiteering" sale targeted by Congress and qualifies under several of the exceptions tentatively recognized by the Commission.

Liberty also supports the Commission's interpretation of Section 617(c)(3) "as not requiring a new three-year holding period to commence following each transfer to an affiliated entity." Notice at ¶17. Instead, the starting date for the appropriate holding period "should relate back to the original date such system was constructed or acquired by the affiliated transferor." Id. Finally, the Commission should not require a three-year holding period for each system in multiple system transactions. For example, the anti-trafficking rules should not be applied to prohibit a multiple system transfer where only a few of the systems have not been held by the seller for three years.

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[18] During February of 1991, Liberty, then a newly-formed Delaware corporation, distributed to stockholders of TCI rights to exchange shares of TCI common stock for shares of Liberty common stock at a specified exchange rate. On March 28, 1991, the exchange offer was completed; various subsidiaries of TCI contributed their interests in certain cable television programming businesses and cable television systems to Liberty; and Liberty issued to such TCI subsidiaries shares of several different classes and series of Liberty's preferred stock. As a result of the exchange offer, Liberty's stock was then held by former TCI stockholders who had exercised their exchange rights.

D. The Commission Should Be Responsible For Enforcing Its Anti-Trafficking Rules.

In the absence of any statutory guidance on the subject, the Commission expresses its belief that "the local franchising authority should have primary responsibility to monitor and enforce the anti-trafficking rule." Notice at ¶8. The Commission proposes to require cable operators seeking to transfer an interest in a cable system to certify to the local franchising authority that proposed transfer does not violate Section 617(a). Id. Likewise, the Commission proposes that complaints concerning alleged violations of Section 617 "should be resolved at the local level." Id. at ¶13. Finally, the Commission seeks comment on the appropriate method of calculating the three-year period. Id. at ¶14.

Although disputes over compliance with the transfer provisions of a particular franchise agreement may be an appropriate subject for resolution at the local level, Liberty respectfully submits that disputes over the application of the three-year holding requirement of Section 617 should be resolved by the Commission "to ensure consistency in the interpretation of the rule." Notice at ¶13. If the cable operator provides the appropriate certification and a dispute arises with respect to the proper calculation of the three-year rule or the application of an exception to that rule, the Commission should resolve that dispute through the special relief procedures of Section 76.7 of the rules. Resolution of these issues at the local level is bound to lead to inconsistent interpretations of the statute and conflicting obligations for multiple system operators.

Moreover, the statute expressly grants the Commission authority to waive the three-year holding requirement consistent with the public interest.[19] This authority -- which should be broadly exercised consistent with the Commission's public interest findings concerning the corresponding three-year holding requirement for broadcast licenses -- further supports Commission resolution of disputes over Section 617. A cable operator should not be required to litigate disputes with the franchising authority over the application of Section 617 in local courts while at the same time pursuing a waiver request before the Commission. The Commission should consider waiver requests as part of the dispute resolution process pursuant to Section 76.7 of the rules.

E. The Commission Should Drastically Limit The Information Required In Transfer Requests.

Section 617(e) states that in cases where a particular franchise agreement "requires franchising authority approval of a sale or transfer," and the cable operator is

[19] Although Section 617(d) states that the Commission "shall" use its waiver authority "to permit appropriate transfers in the cases of default, foreclosure, or other financial distress," that section in no way purports to limit the circumstances under which the Commission "may" exercise that authority.

in compliance with the 36-month holding period, the franchising authority must act on the cable operator's request for approval of sale or transfer within 120 days if the request "is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority." Under those circumstances, the franchising authority's failure to act within 120 days is deemed to constitute approval of the proposed sale.

Although Section 617 does not specifically require the Commission to adopt regulations governing the information to be provided to the franchise authority, the legislative history indicates that the 120-day limit does not apply "to request for approval of a cable sale or transfer...submitted prior to adoption of the FCC regulations, given that such requests, by definition, could not include the information required to activate the 120-day limit." House Report at 121. The legislative history refers to a wide variety of information purportedly "required" by the franchising authority "to begin an evaluation of a request for approval of a sale or transfer." House Report at 120. However, the Commission correctly "question[s] whether such extensive information is necessary" and seeks comment on appropriate "informational requirements." Notice at ¶23.

The Commission should limit the information required to be provided to the franchising authority to only that information necessary to ensure compliance with the terms of the franchise agreement and the anti-trafficking, horizontal concentration and vertical integration provisions of the 1992 Cable Act. Where the cable operator certifies to compliance with these provisions of the Act and provides whatever information is required under the franchise agreement concerning the legal, financial and technical qualifications of the proposed transferee, the 120-day period should begin running.

Detailed analysis of the transaction's effect on rates and services and review of specific transfer agreements are unnecessary and serve only to delay the process. Comprehensive regulation of basic rates and services at the local level, and other rates and services at the federal level, preclude the need for exhaustive analysis of the transactions' effects on rates and services. Regardless of the agreement between the seller and buyer, the buyer's performance will be governed by the franchise agreement. Although the Commission should permit the franchising authority to request additional information, such requests should not stay the 120-day limit absent the cable operator's consent or a substantial showing of good cause by the franchising authority.

Conclusion

In this proceeding the Commission considers rules directed at potential -- not actual -- harm arising from horizontal consolidation and vertical integration which have yielded substantial public interest benefits, including diverse and innovative programming. Such potential harms already are addressed by numerous behavioral protections imposed by the 1992 Cable Act and run counter to the normal marketplace incentives of cable operators and affiliated programmers. The Commission should avoid unnecessary and overly restrictive rules that will sacrifice real benefits to the detriment of viewers, cable operators and programmers alike.

Respectfully submitted,

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