that local franchising authorities can most efficiently monitor compliance with the anti-trafficking restrictions, thereby assuring that the transfer of a cable system will not unduly be delayed. A certificate filed with a franchising authority should carry with it a presumption that the cable operator is in compliance with the statute or is exempt under one of its provisions.[19/] As discussed below, the Joint Parties believe that the Commission's special relief procedures would be an appropriate vehicle by which a franchising authority could test whether such a certificate was bona fide. In order to insure that the statute and the Commission's implementing regulations are interpreted consistently, the Commission should retain jurisdiction over all disputes relating to the anti-trafficking rules.

Operators seeking to transfer ownership of a cable system prior to the expiration of the three-year holding period should only be required to provide the franchising authority with a certificate citing the appropriate provision in the Commission's regulations which supports the exemption.

19/ NPRM at ¶ 8.

II. The Commission Should Entertain Waiver Applications When Necessary to Serve the Public Interest.

Corporate believes that the Commission has broad, unqualified, waiver powers under Section 617(d), not limited to cases of default, foreclosure or other financial distress. As the statute says, "[t]he Commission may, consistent with the public interest, waive the requirement of subsection (a). . . ." The only limitation on the Commission's waiver authority is that, if franchise authority approval is required by the franchise agreement, the Commission cannot waive the three-year restriction unless the franchise authority has approved the transfer.[20/] In addition to its general waiver authority, the Commission also has the power to "use its authority . . . to permit appropriate transfers in the cases of default, foreclosure, or other financial distress."

Section 617(d)'s references to "public interest" determinations and "appropriate" transfers indicate Congress' willingness to let its expert agency act pursuant to general waiver powers. In contrast, the references to "default, foreclosure, or other financial distress" merely indicate circumstances in which Congress has pre-determined that waivers are always consistent with the public interest. Congress would only have granted the Commission specific,

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20/ Section 617(d).

rather than a general waiver power, had it intended to limit the right to grant a waiver to cases of default, foreclosure, or financial distress.

Corporate submits that the Commission should consider waivers of the three-year holding rule on a case-by-case basis. There are, however, certain situations in which a waiver would clearly be in the public interest.

The Commission should be particularly receptive to waivers involving the acquisition of contiguous systems. Such an acquisition would enable an operator to achieve economies of scale which would lead to enhanced service for both sets of subscribers. The public interest would also clearly be served when a buyer is willing to invest quickly and significantly to improve cable services when such investment does not involve unreasonably raising rates. Section 617 should not be used to discourage investors willing to make substantial improvements to a system without imposing unreasonable rate increases on subscribers.[21/]

The specific exception for "any sale required by law" in Section 617(c)(1) exempts from the holding period those transfers into bankruptcy or receivership which are covered generally by Section 73.3541 of the Commission's broadcast

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21/ Exercise of the Commission's waiver authority should also take into consideration the fact that unreasonable rate increases, if they do occur, can be eliminated pursuant to Section 623 of the 1992 Cable Act.

rules on involuntary pro forma assignments and transfers. Under the broadcast rules and policies, however, a sale from a receiver or trustee to a third party for the benefit of creditors, or the acquisition for sale or subsequent sale to a third party by the creditor itself, constitutes a "substantial" change in control that normally requires a "long form" application. There is no reason at all, however, to subject these transactions to the holding period in Section 617. Sales out of bankruptcy or receivership and sales to, by or for the benefit of creditors present no prospect of "profiteering." Moving a cable system out of the hands of trustees or creditors, who would likely have no system operation experience, and into the hands of a normal operator should only benefit subscribers. Unless creditors are certain that they will be able to divest themselves of cable properties acquired pursuant to foreclosure or similar legal process, they will be reluctant to lend funds to the cable industry.

While other waiver decisions regarding financial distress should be made on a case-by-case basis, the unavailability of capital sufficient to maintain an adequate level of cable television service should be a good cause for waiver,[22/] if accompanied by the demonstrated ability of the transferee to invest in the cable plant. In addition, a

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22/ NPRM at ¶ 19.

waiver applicant that demonstrates the transfer of a system will not lead to increased prices or a diminution in service warrants the granting of a waiver. Moreover, the approval of a franchising authority should be presumptive evidence that this waiver condition has been satisfied.[23/]

Corporate also supports the concept of a "contingent" waiver, issued by the Commission, which would be conditional on securing the franchising authority's approval of the transfer, when required. A cable operator should have the discretion to first submit a waiver petition to the franchising authority and then to the Commission, vice versa, or, where appropriate, to the franchising authority and the Commission simultaneously. If the Commission approves the petition before the franchising authority, it may grant it on a contingent basis.

23/ Congress specifically exempted from the holding period "any sale required by . . . any act of . . . any franchising authority," acknowledging implicitly that the purpose of the holding period is not to tie the hands of local franchising authorities. Franchising authorities are likely to be in the best position to assess whether a "substantial" change of control sought within the three-year holding period would have any adverse impact on cable rates or services. Thus, where a franchising authority supports a proposed "substantial" change of control within the three-year holding period, the Commission should be provided with a strong presumption in favor of a grant of the waiver.

CONCLUSION

For all of the foregoing reasons, the Commission should adopt rules and policies in accordance with the proposals contained in these comments.

Respectfully submitted,

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