DOCKET FILE COPY ORIGINAL

RECEIVED

FEB - 9 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

To: The Commission

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Of Counsel:

Robert S. Lemle
Senior Vice President
and General Counsel
Cablevision Systems Corp.
One Media Crossways
Woodbury, NY 11797

Howard J. Symons
Gregory A. Lewis
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Its Attorneys

No. of Copies rec'd 0+9
List A B C D E

February 9, 1992

TABLE OF CONTENTS

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

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

To: The Commission

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Introduction and Summary

Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rule Making ("Notice")[1/] in the above-captioned proceeding.

The provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or "Act")[2/] at issue in this proceeding establish narrow statutory mandates intended to prevent anticompetitive conduct without impeding the proper functioning of the video programming distribution market. Neither the Act, its underlying legislative history, nor public policy support imposition of regional subscriber limits. Regional consolidation of cable systems, like the regional

---

[1/] *In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-264, FCC-92-542 (rel. Dec. 28, 1992).

[2/] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

consolidation of non-wireline cellular carriers, offers economies of scale and scope essential to the origination of new and innovative programming and the deployment of an advanced telecommunications infrastructure.

Assuming the constitutionality of the channel occupancy limitations, those limitations should apply only under circumstances that pose a danger of anticompetitive harm. With respect to a given cable operator, for instance, the channel occupancy limits should apply only to programming in which that operator holds an attributable interest. The Commission should also establish attribution rules that exempt a cable operator's ownership in new or developing programming services, so that operators can continue to use their systems as incubators for such programming.

To facilitate efficient and timely review of cable system transfers, the 120-day review period should commence upon a request for transfer approval, notwithstanding subsequent requests for information by a franchising authority. The Commission should clarify that agreements related to a transfer need not be in final form, so long as the relevant terms and conditions are specified. The statutory exemption for inter-company transfers should apply to a cable operator's acquisition of a financing entity's majority ownership interest in a system (or the operator's sale of a majority interest to a financing entity), so long as the cable operator has exercised and continues to exercise management control over the system. To ensure uniform enforcement of the anti-trafficking and transfer rules, the Commission (rather than, *e.g.*, state courts) should hear appeals from franchise authority decisions concerning the adequacy of the operator's response to an information request and the applicability of the statutory exemptions to a particular transaction.

Finally, the cable/SMATV cross-ownership limitation should apply only to the offering of SMATV service "separate and apart from" cable service. Thus, a cable operator should be permitted to acquire SMATV facilities in order to extend its cable service within its franchise area.

I. The Establishment of Regional Subscriber Limits Would Undermine Program Diversity and Retard the Deployment of an Advanced Telecommunications Infrastructure

Section 11 of the 1992 Cable Act requires the Commission to "prescribe . . . reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person."[3/] The Commission now seeks comment on whether regional subscriber limits are "necessary or appropriate" to "implement the objectives of the 1992 Cable Act."[4/] For the reasons discussed below, Cablevision strongly opposes the adoption of regional subscriber limits.

The establishment of subscriber limits mandated by the statute was a response to concerns over "the issue of national

[3/]Pub. L. No. 102-385, 106 Stat. 1460, 1487 (adding Section 613(f)(1)(A) to the Communications Act of 1934).

[4/]Notice at ¶ 35.

concentration in the cable industry,"[5] which, Congress concluded, posed a danger of undue concentration in the video programming creation and acquisition market.[6] That market is essentially national in nature.[7] Regional concentration does not confer upon an operator the ability to "extract unreasonable concessions from program suppliers" as a condition of carriage,[8] or otherwise impede competition in the market for video programming services. Restricting regional concentration will, in fact, deprive cable operators of the economies of scale and scope that make possible innovative regional programming, enhanced customer service capabilities, and the deployment of advanced technology.

A. Cable Systems With Regional Scope Can and Do Offer Innovative Programming that Would Otherwise be Unavailable

The increasing regionalization of cable operations has provided operators with the incentive and the opportunity to produce locally- and regionally-oriented programming that simply did not exist before. With the exception of certain local

---

[5]/See S. Rep. 92, 102d Cong., 2d Sess. 32-33 (1992) ("Senate Report") (emphasis added).

[6]/Id. at 32.

[7]/ESPN, TNT, HBO, and other programming services generally offer sports programming pursuant to national distribution agreements negotiated with national professional and collegiate sports leagues and associations. Cable news and public affairs services, such as CNN and the Financial News Network, are likewise aimed at national (and international) audiences.

[8]/See Notice at ¶ 35, quoting Report in MM Docket No. 89-600, 5 FCC Rcd. 4962, 5003 (1990) ("1990 Cable Report").

sporting events, programmers concerned with spreading the costs of production and distribution among the largest possible base of subscribers have ignored regional markets. For cable operators, by contrast, the aggregation of a regional subscriber base provides a platform for the creation of regional programming. Such programming offers subscribers news and information about their local area that would otherwise be unavailable. Unlike a programmer, moreover, an operator is likely to offer regional programming, even if it is unprofitable or only marginally profitable, because it helps establish an operator's identity and attracts subscribers.

With more than 570,000 subscribers on Long Island, Cablevision has long been a leader in producing regional programming for an area of the country that, notwithstanding its proximity to the nation's major media center, was without locally-oriented television since the beginning of broadcast television. Cablevision's News 12 is an award-winning news and public affairs channel that, in recent years, has offered coverage of events ranging from local town meetings to the Avianca plane crash. News 12 would not have been possible without access to all of Long Island. Cablevision has invested substantial resources in News 12 since its inception. An operator with only a fractional share of the Long Island subscriber base would not have had the incentive or the resources to begin and maintain a service aimed at a region-wide audience.

Cablevision has also begun a second regional service, Long Island One, which provides coverage of local sports events, job information, public service announcements, and other services responsive to the interests of Long Island subscribers. Coverage of municipal government proceedings of Island-wide interest will also be included in this service. Without the ability to maintain and expand its subscriber base, however, Cablevision would be unable to commit the resources necessary to produce such specialized programming.

To impose a regional subscriber limit would simply deprive subscribers of programming that is particularly responsive to their needs, and undermine the ability of cable operators to achieve the long-held goal of "narrowcasting." Given the economies of scale and scope essential to the creation of programming, no competing multichannel video distributor is likely to duplicate those services. The Commission's rules should therefore permit cable systems to expand regionally so that operators have the continued ability and incentives to create diverse and high quality regional programming.[9]

B. Regional Consolidation Enables an Operator to Enhance the Quality of its Service and its Ability to Deploy Advanced Technologies

Regional consolidation also permits a cable operator to maximize the return on its non-programming costs because the

---

[9] See 47 U.S.C. § 533(f)(2)(D), (G) (directing the Commission to "account for any efficiencies and other benefits" associated with increased concentration and to "not impose limitations which would impair the development of diverse and high quality video programming").

expense of serving additional, adjacent franchise areas is incremental. Regional consolidation permits a cable operator to provide service with fewer headends and to utilize marketing strategies and personnel for multiple markets, thereby reaping the significant cost savings and efficiencies.[10/] For instance, Cablevision's expansion throughout Cleveland, Ohio has generated similar economies of scale permitting improved customer service.

For instance, regional consolidation has permitted Cablevision to establish a centralized operations center to handle customer service, installation, and access programming production. With this facility, Cablevision can monitor network operations, respond to service questions and problems, dispatch technicians, and perform general system maintenance far more efficiently than it could if it were prevented from operating regionally.

Regional consolidation has also given Cablevision the base necessary to justify the expense of deploying fiber optics and other advanced facilities to improve the quality of its cable service and the capabilities of its system infrastructure. The deployment of advanced technology on a region-wide basis has also generated economies of scope that enable Cablevision to utilize

---

[10/] Cf. In re Application of Bill Welch, 3 FCC Rcd. 6502, 6504 n.33 (1988); In re Application of Madison Cellular Telephone Company, 2 FCC Rcd. 5397, 5397 (1987) (Common Carrier Bureau) (noting with approval similar efficiencies from regionalized cellular operations).

its cable infrastructure to offer voice and data telecommunications services.

In part because of the economies made possible by its regionalized operations, Cablevision has become an industry leader in the deployment of broadband telecommunications technology. In the past three years, for instance, Cablevision has spent more than $100 million upgrading its cable facilities on Long Island. Fiber optic cable now constitutes more than ten percent of Cablevision's trunking facilities there. The use of fiber optic technology permits the consolidation of headends, increased channel capacity, improved picture quality, enhanced reliability, and the delivery of service on a more cost effective basis. In addition, the installation of fiber optics will provide the capacity to implement advanced technologies such as digital compression and high definition television.[11]

Regional consolidation will become even more significant in the future, as cable systems compete directly with the telephone companies in the provision of telecommunications services and, potentially, in the provision of cable service. Indeed, as the Commission recognized in the context of cellular telephone

---

[11] Cablevision is also gradually replacing its "tree and branch" architecture with a new fiber optics-based "star architecture" system design. The star architecture, with its multiple trunks emanating from the headend serving multiple nodes, allows for the reuse of the frequency bands available for cable television transmissions and improves the reliability, quality, and performance of the cable system. Ultimately, the utilization of a star architecture will also enable Cablevision to deliver video on demand and many interactive services more efficiently than with a tree-and-branch system.

service, the ability of non-telcos to consolidate regionally is critical to their ability to compete with their regionalized telephone company competitors.[12] Cablevision and other cable operators must likewise be permitted to establish and extend their networks regionally to be able to compete on a level playing field.

II. The Cable Act Channel Occupancy Limits, If They Are Constitutional, Can Only Restrict Cable System Carriage of Programming under Circumstances that Pose a Real Danger of Anticompetitive Harm

Constitutional constraints substantially limit the Commission's discretion in implementing the channel occupancy limits required by the Cable Act. Indeed, to the extent the channel occupancy provisions are not unconstitutional on their face,[13] the Commission's implementing regulations must, at a

[12] In re Application of Madison Cellular Telephone Company, 3 FCC Rcd. at 5397.

[13] Because the channel occupancy provisions directly restrict the speech of vertically integrated programming services, the editorial discretion of cable system operators, and the public's access to programming, they may be sustained only if they constitute a precisely drawn means of serving a compelling government interest. Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980). The channel occupancy provisions do not meet this test.

Even assuming the importance of promoting diversity, imposing limits on the number of channels that a vertically integrated programmer may occupy is a patently illegitimate means of achieving that end. The government simply may not restrict the speech of one class of speakers in order to promote the speech of another. See, e.g., Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). It may not limit the editorial discretion of cable operators,

(continued...)

minimum, apply those provisions narrowly to address only those circumstances in which vertical integration poses a real danger of anticompetitive harm.

A. **The Limits Should Not Apply to Programming in Which the Operator Does Not Hold an Attributable Interest**

The Commission's tentative decision to apply the channel occupancy limits only to video programmers affiliated with the particular cable operator is undoubtedly the correct one. Given obvious First Amendment concerns, and the statutory mandate to impose "reasonable" limits,[14] the Commission's rules should at most limit the number of channels occupied by the system operator's affiliated programming services.

Whatever risk of competitive harm vertical integration may pose, that risk is not implicated absent actual affiliation between the video programmer and cable operator. The premise that a cable system operator will favor a video programmer in which another cable system operator holds an interest is

---

[13] (...continued)
moreover, by establishing an arbitrary limit on the number of vertically integrated programming services they may carry. See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1459-62 (1985), cert. denied, 476 U.S. 1169 (1986); Cf. Riley v. National Federation of the Blind, 487 U.S. 781, 787-92 (1988) ("using percentages to decide the legality of [a charitable] fundraiser's fee is not narrowly tailored to the State's interest"). Finally, the government may not regulate the media in a way that completely disregards the public's "paramount" First Amendment interests. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Quincy Cable TV, Inc. v. FCC, 768 F.2d at 1453.

[14] See 47 U.S.C. § 533(f)(1)(B).

completely unfounded.[15] Even if such competitive harm could be shown, the remedy is not to limit carriage of all vertically integrated programming services. In addition to being grossly overbroad, such an approach would substantially reduce diversity by limiting the number of programming services that a system could carry to a mere handful.

B. Ownership in a New Programming Service or a Service With a Small Audience Should not be Attributable

In directing the Commission to establish reasonable channel occupancy limits, Congress specifically admonished it not to impose limitations that would "impair the development of diverse and high quality video programming."[16] Given this mandate, the Commission should not adopt the broadcast attribution rules. Those rules are likely to stifle the creation of new and diverse programming, without preventing anticompetitive acts or practices. The Commission should instead develop ownership attribution standards that specifically permit carriage of new or developing programming.[17]

---

[15] Indeed, the National Telecommunications and Information Administration study cited by Congress and the Commission found that the top five multiple system operators do not even favor the programming with which they are actually affiliated. Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-223, at 102 (June 1988) ("Video Program Distribution and Cable Television"); see also H.R. Rep. 628, 102 Cong., 2d Sess. 41 (1992) ("House Report"); Notice at ¶ 44.

[16] 47 U.S.C. § 533(f)(2)(G).

[17] See Notice at ¶ 46.

As the Notice recognizes, many of the most innovative programming services available today "would not have been feasible without the financial support of cable system operators."[18] Obviously, a cable operator can support a new service only if it is permitted to distribute it as widely as possible on its systems.[19] Similarly, the Commission should not attribute a cable operator's ownership interest in a service that has yet to achieve a significant audience. If, for instance, a programming service reaches fewer than one-third of all households in the geographic area in which service is available, its carriage should be supported, not threatened with discontinuation. To attribute the ownership interest in such instances would be to erect a substantial barrier to the introduction and growth of new programming services, contrary to the Act.[20]

---

[18] Id. at ¶ 44, citing Video Program Distribution and Cable Television at 102.

[19] Because a programming service typically requires several years of system carriage before becoming profitable, the Commission's rules should provide for non-attribution of any cable system interest in a programming service initiated within five years before or after enactment of the Cable Act. Non-attribution should continue indefinitely, moreover, since it would not serve the interests of subscribers or of diversity generally to require cable systems to discontinue carriage once the service becomes established.

[20] See 47 U.S.C. § 533(f)(2)(G). Such a result would also completely disregard Congressional and Commission findings that vertical integration offers efficiencies essential to the development of programming. See House Report at 41; 1990 Cable Report, 5 FCC Rcd. at 5003.

III. The Transfer Approval Process Should Permit Effective Review Without Unduly Burdening the Transferring Parties

A. The Commission Should Strictly Construe the 120-day Time Limit on Franchise Authority Review

Upon the expiration of a three-year "holding period" during which the sale or transfer of a cable system is generally barred, a franchising authority 120 days to act on a request for approval of such a sale or transfer that contains "such information as is required in accordance with Commission regulations."[21/] The Commission's regulations should ensure not only that a franchising authority has adequate information to conduct its review of a sale or transfer, but also that the review process is not used to impede transactions.

As the Notice correctly concludes, the 120-day review period commences upon the submission of a request for transfer approval, notwithstanding subsequent requests for additional information.[22/] Strict application of the 120-day time limit is essential to an effective review process because it encourages the requesting party to submit sufficient information with a request, while discouraging a franchise authority from delaying commencement of its review. Permitting a franchise authority to toll or recommence the 120-day period by requesting additional information would effectively nullify the requesting party's

---

[21/] *See* 47 U.S.C. § 537(e) (added by Section 13 of the 1992 Cable Act). The right of a franchising authority to review a transfer must emanate from the franchise agreement; the 1992 Cable Act does not independently confer such a right.

[22/] Notice at ¶ 21.

right to a grant of the transfer request upon expiration of the 120-day period.

B. **<u>The Commission Should Establish Specific Guidelines on the Information that a Franchise Authority May Request</u>**

The Commission should establish precise guidelines concerning the information required to be submitted with a request for municipal transfer approval. Those guidelines should focus the review on the buyer's qualifications to acquire the system, and on obtaining assurances of its ability to operate the system in a manner consistent with the franchise agreement. The Commission should also clarify the type and form of the required documentation so that the transfer review process will pose no more of an impediment to acquisitions and sales of cable systems than is necessary.

For instance, the Commission's rules should specifically permit the parties to a transfer to satisfy a franchise authority's request for information by providing drafts of documents so long as the material terms and conditions of the transaction are specified. This would enable the franchising authority to conduct its review of the transaction, without delaying consideration until the final version of all documents, which are often undergoing revisions up until closing, are ready. As a publicly traded company, Cablevision is permitted to submit draft versions of transaction documents to the Securities and Exchange Commission in conjunction with its securities filings. More definitive documentation is unnecessary in the context of a franchising authority's review of a sale or transfer. The submission of final documents would give the franchising authority no additional information relevant to its review of the transaction.

With the material terms of a sale or transfer before the franchising authority, there is little danger that the submission of draft documents would compromise the franchising authority's review of a transaction. The franchising authority could specify that, if the material terms of the transaction should materially change after approval, transfer would be subject to a new review. Given the delay and expense associated with a second review, a cable operator is likely to wait to request approval of a transaction until it is confident that the terms of the transaction are settled. A publicly traded company, in particular, is likely to delay its request until the terms are settled and notify the franchise authority of material changes because it is prohibited by the securities laws from material omissions in public disclosures concerning its operations.[23/]

C. **The Exception for Inter-company Transfers Should Encompass Transfers of Systems Between a Financing Entity and a Cable Operator That Exercises Management Control Over the System**

Congress's intent in enacting the anti-trafficking provisions of the 1992 Cable Act was to restrict "profiteering"

[23/]For instance, a publicly traded company would be prohibited from including "an untrue statement of material fact" or "omit[ting] to state a material fact" in a prospectus or oral communication associated with a public offering to finance a cable system acquisition. 15 U.S.C. § 771.

without obstructing legitimate cable system transfers.[24] To that end, the statute exempts any sale or transfer to one or more purchasers controlled by, controlling, or under common control with the seller or transferor. The Commission's regulations should broadly construe this exemption for "pro forma" transfers to exempt a cable operator's acquisition of a financing entity's majority ownership interest in a system (or the operator's sale of a majority interest to a financing entity), so long as the cable operator has exercised and continues to exercise management control over the system.

Cable operators have historically sold substantial ownership interests in their systems to financing entities as a means of recapitalizing the company in order to obtain cash to reduce debt, to meet operating expenses, or for other investments. Control of the system does not change in such a transaction because the operator, through a management agreement, retains responsibility for day-to-day operations.[25]

In exempting sales or transfers among affiliated entities from the three-year holding period, Congress expressly intended to permit "financing type transactions" to proceed unimpeded by the anti-trafficking rules.[26] It broadly defined the

---

[24] See House Report at 119.

[25] While a financing entity may obtain representation on the operator's board in such a transaction, the financing entity enters the transaction solely for financial reasons and has little or no interest in the operation of the system.

[26] House Report at 119.

affiliation between buyer and seller that would qualify a transaction for "pro forma" treatment to include an affiliation established "by virtue . . . of management control."[27] Thus, the sale of a majority interest to a financing entity should not be subject to the anti-trafficking rules, so long as the operator retains management control of the system. Likewise, when a cable operator with management control of a system purchases a financing entity's interest in that system, there is no cognizable transfer of control.

To require an operator to wait three years after acquiring a system to recapitalize it by selling a majority interest to a financing entity would, in effect, restrict the means otherwise available to the operator to finance its operations. Preventing the operator from repurchasing the majority interest from the financing entity until three more years had elapsed would likewise severely limit the attractiveness of such a recapitalization.[28] Such a result would be inconsistent with the intent of the statute and would disserve the public interest by limiting an operator's financing options and, quite possibly, driving up the cost of obtaining capital.

---

[27] Id.

[28] As part of a restructuring of its Adams-Russell subsidiary in 1992, for instance, Cablevision sold a majority interest in several of its systems to Warburg Pincus, Inc., an investment firm. Through a series of contractual arrangements, however, Cablevision exercises management control over these systems. Given Cablevision's pre-existing management control, its re-acquisition of a majority equity interest in these systems should be deemed an exempt inter-company transfer under the Act.

In view of the limited purpose of the anti-trafficking provisions of the Act, the Commission's rules defining "pro forma" transfers in the broadcast context, which would not include transfers between entities affiliated solely by management agreements,[29] are too restrictive.[30] The Commission's anti-trafficking standard should define "control" to include management control effectuated through contractual arrangements to permit transfers between cable operators and financing entities to continue unhindered by the three-year holding period.

D. The Commission Should Resolve Disputes Regarding Compliance With the Transfer Review Process and the Applicability of the Anti-trafficking Exceptions

While a franchising authority retains the authority to review sales and transfers "consistent with . . . applicable law,"[31] the Commission retains primary responsibility for implementing and enforcing Section 617 of the Communications

[29] See 47 U.S.C. § 73.3540(f).

[30] Of course, the cable anti-trafficking rules should permit transactions that would be classified as "pro forma" under the broadcast rules. For instance, Cablevision's sale to its affiliate, U.S. Cable, of a minority interest in its V Cable systems would constitute a pro forma transfer under the broadcast rules and should be exempt from the three-year holding period for cable systems. Cf. 47 C.F.R. § 73.3540(f). Likewise, Cablevision's acquisition of substantially all of its controlling shareholder's interest in Cablevision of New York City neither effected a substantial change in interests nor posed a danger of profiteering. Cf. 47 C.F.R. § 73.3540(f)(1).

[31] House Report at 121.

Act.[32] The Commission, and not the Federal or state courts, is therefore the proper forum for resolving disputes with respect to the application of the statutory exemptions and operator compliance with the information submission requirements established by the Commission.

As the proponent of the anti-trafficking rules, the Commission is singularly qualified to provide authoritative interpretations of the rules. No matter how comprehensive or carefully crafted, the Commission's rules will invariably engender disputes between franchise authorities and transferring parties regarding the adequacy of a request for transfer approval and the applicability of the anti-trafficking exemptions. Because the Commission lacks a party's interest in the outcome of such disputes, it is in the best position to resolve them.

Moreover, because a single transaction may entail transfer reviews by a number of franchise authorities, perhaps in several states,[33] there is a critical need for uniform interpretations of the Act and the implementing regulations. A cable operator should not face inconsistent demands by multiple franchising authorities reviewing a proposed transfer. Nor should its entitlement to an exemption depend on the particular franchising authority from whom transfer approval is required. Only the

---

[32] See 47 U.S.C. 152(a) (establishing Federal jurisdiction with respect to "cable service [and] to all persons engaged . . . in providing such service, . . . as provided in title VI").

[33] In 1989, for instance, Cablevision acquired cable systems located in Ohio and New York from Viacom International, Inc.

Commission can impose the uniformity and consistency necessary to the efficient enforcement of Section 617.[34]

IV. The Commission Should Interpret the Cable/SMATV Cross-Ownership Prohibition to Permit a Cable System to Acquire a SMATV System in Order to Extend Cable Service

The 1992 Cable Act establishes a narrow prohibition on the common ownership of a cable system and an MMDS or SMATV system in the cable system's franchise area, proscribing only the offering of MMDS or SMATV service by a cable operator "separate and apart from" the operator's cable service in a common geographic area.[35] The Commission's implementing regulations should therefore permit a cable system to acquire a SMATV system for the purpose of extending cable service via the SMATV facilities.

Barring a cable operator from acquiring a SMATV facilities for the purpose of interconnecting them with the operator's cable system[36] would have the effect of depriving a willing SMATV operator of the most likely buyer of its facilities, and would require the operator to make a wasteful, duplicative investment in distribution facilities in order to bring service to the building being abandoned by the SMATV operator.

---

[34] The Commission need not develop detailed appeal procedures because disputes will likely involve interpretations of the Act and the Commission's rules, and the record will be limited to the documentation submitted to the franchise authority in support of a transfer request or a claimed exemption.

[35] 47 U.S.C. § 533(a)(2).

[36] The means by which the operator interconnects its system with the SMATV facilities, whether by cable, microwave, or some other technology, should be irrelevant.

The Commission should also clarify that, once a cable operator acquires SMATV facilities in order to extend its cable service, the operator's use of those facilities should be governed by the Cable Act and the terms of the cable operator's franchise agreement. While the SMATV operator may have negotiated terms and conditions for the provision of SMATV service, those terms may be inconsistent with the statutory and other legal requirements governing such matters as rates and service imposed on a cable operator with respect to the provision of cable service. Given that the operator has acquired the SMATV facilities to provide cable service, the statutory and franchise requirements applicable to cable service must govern.[37]

Conclusion

In enacting the 1992 Cable Act, Congress wished to "promote the availability . . . of a diversity of views and information through cable television" and to "ensure that cable operators continue to expand . . . their capacity and the programs offered over their cable systems."[38] The regulations implementing the ownership and anti-trafficking provisions of the Act should reflect these policies. The Commission should not impose

---

[37] For instance, a SMATV operator may agree to pay the landlord a fee of ten percent of gross revenues in exchange for the right to offer service to a building. If the SMATV facilities are acquired by a cable operator, that agreement is preempted and superseded by the operator's obligation to pay a franchise fee of no more than five percent to the franchising authority.

[38] 1992 Cable Act, § 2(b)(1), (3).

regional subscriber limits on cable operators, or apply the channel occupancy limits to programming vendors unaffiliated with the particular cable system. New or developing programming services should also be exempted from the channel occupancy restrictions. With respect to the review of transfers by franchising authorities, the Commission should ensure the strict application of the 120-day review period and clarify the specific types of information that a franchising authority may require. To ensure the full range of financing options for a cable operator, the inter-company exemption to the anti-trafficking rules should apply to transfers between operators and financial entities without management control. The Commission, and not the Federal or state courts, should review of disputes regarding the information submitted by an operator in connection with a transfer and the applicability of the statutory exemptions from the anti-trafficking rules. Finally, the Commission should permit