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STEPHEN R. ROSS

February 9, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions
MM Docket No. 92-264

Dear Ms. Searcy:

Enclosed on behalf of InterMedia Partners, are the original and nine copies of InterMedia's Comments in the above-referenced proceeding.

Please address any questions concerning this letter to the undersigned.

Sincerely yours,

Stephen R. Ross

KAH/mec
Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
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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	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	

COMMENTS OF INTERMEDIA PARTNERS

I. INTRODUCTION

InterMedia Partners ("InterMedia"), by its attorneys, hereby submits the following comments in response to the Federal Communications Commission's ("FCC or "Commission") Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

InterMedia owns and operates cable television systems throughout the United States, and is thus subject to the ownership restrictions and anti-trafficking provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act"), as well as any regulations promulgated by the FCC to implement these statutory provisions. Accordingly, InterMedia submits the following comments on some of the issues raised by the Commission in its NPRM.

II. APPLICATION OF THE ANTI-TRAFFICKING RULE

A. Definition of "Transfer of Ownership"

The anti-trafficking provision of the Act prohibits cable operators from selling or transferring the ownership of a cable system within a 36-month period following either the acquisition or initial construction of the system. As the Commission notes, the Act does not specify exactly what kinds of transfers of ownership interests trigger the application of the three-year holding period. NPRM at ¶ 10. InterMedia supports the Commission's view that an appropriate basis for developing policies in this area is the Commission's broadcast transfer of control standards. NPRM at ¶ 12. The long line of Commission cases and judicial precedent developed under Section 310(d) of the Communications Act appropriately considers not only transfers of "legal" control, but also whether actual control is transferred based on the facts of each case.

Consistent with the application of the broadcast transfer of control standards, InterMedia submits that the Commission should clarify that transfers of minority (non-controlling) general partnership interests would not automatically trigger application of the anti-trafficking provision.

Such an interpretation is consistent with the Commission's long standing policy that the transfer of ownership requires the transfer of a controlling or substantial interest, which may occur as a result of either de jure or de facto transfer of control. A "controlling" or "substantial" interest has been consistently defined by the Commission as (a) whether 50 percent or more of the stock or equity ownership interest is being transferred and (b) whether as a result of the transaction 50 percent or more of the equity interest will be held by persons whose qualifications have not been previously approved by the Commission. See, Metromedia, Inc., 98 F.C.C. 2d 300, 305 (1984).

Similarly, pro forma assignments or transfers which do not involve a "substantial" change in ownership or control have historically been exempt from the Commission's statutory waiting period and from petitions to deny. Id.[1] Under the broadcast standard, pro forma applications to transfer minority ownership interests provide public notice of a non-controlling change in ownership and are almost universally ratified by the Commission since such transfers do not change the ultimate control of the entity. Applying this standard to cable ownership transactions would be, therefore, consistent with Congress' concern over transactions that "could affect cable television rates and service." NPRM at ¶ 9, citing House Report at 119. Pro forma transfers, by definition, do not result in a change in the ultimate control of the cable system, or those who would be responsible for establishing rates and levels of service.

Unlike a Board of Directors, which, as a matter of law, possesses de facto control, whether a general partner with a minority equity ownership interest possesses such control depends on the facts of each case. The mere transfer of a minority equity ownership interest, without a corresponding transfer of managerial or operational authority, is not a "transfer of ownership." Accordingly, InterMedia submits that the transfer of a minority general partnership interest should not fall within the scope of the three-year holding period unless the Commission finds that the general partner also exercised de facto control.

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[1] See also, 47 C.F.R. § 73.3540(f) which lists several illustrative (but not exhaustive) types of "short form" transfers, including "assignments of less than a controlling interest in a partnership."

B. Applicability of the Broadcast Attribution Rules

The Commission also solicits comment on whether it should employ the current broadcast attribution rules to define ownership interests subject to the anti-trafficking rule. NPRM at ¶ 12. InterMedia believes that the broadcast attribution rules should be used to apply the cable anti-trafficking rule, and believes that Congress was quite clear in this regard. In developing the anti-trafficking provision of the Act, Congress was well aware of the Commission's attribution rules and anticipated that such rules would be used to apply the provision, or at least be used as a model for similar rules adopted by the Commission. In fact, the Senate Committee stated:

> [i]n determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 CFR Section 73.3555 or other criteria the FCC deems appropriate.

Senate Report on S.12 at p. 80.[2]

Moreover, InterMedia believes that limited partnership interests are appropriately non-attributable interests for purposes of the three-year rule, as well as for determining horizontal and vertical ownership limitation. It is well established that insulated limited partnership interests are appropriately non-attributable and are exempt from attribution. See, Attribution of Ownership Interests in Broadcasting, Cable Television and Newspaper Entities, 97 F.C.C. 2d 997 (1984), recon. in part, 58 Rad. Reg. 2d [P&F] 604 (1985), further recon., 1 FCC Rcd. 802 (1986). Thus, as long as limited

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[2] See, 47 C.F.R. §73.3555, notes 1-3.

partners conform with the Commission's "no material involvement" standard, such interests are non-attributable.[3]

This position is consistent with the Commission's view that Congress did not intend "the anti-trafficking rule to restrict transfer of such non-controlling interests." NPRM at ¶ 12. Limited partners with no material involvement in the management and operation of the business are, by definition, non-controlling interests and such interests should be non-attributable.

C. Tax Certificated Transactions are Appropriate Exceptions to the Anti-Trafficking Rule

The Act specifies several exceptions to the anti-trafficking rule, one of which exempts transfers or assignments that are not subject to federal income tax liability. The Commission asserts, and InterMedia agrees, that transactions in which tax certificates are issued under Section 1071 of the Internal Revenue Code would be exempt from the rule. NPRM at ¶ 15. Thus, the sale of ownership interests to qualified minority-controlled entities or persons, or sales which "are in furtherance" of a Commission policy, are eligible for tax certificates and should be exempt from this provision of the Act.

This approach is consistent with established Commission policy in the broadcast area. See, 47 C.F.R. § 73.3597(a) which

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[3] In general, limited partners must refrain from running the day-to-day operations of the business. The Commission has recognized that the amount of a limited partner's ownership interest is largely irrelevant for purposes of determining whether a limited partner is insulated. Rather, the powers granted to LPs by virtue of the contract is the determining factor. See, 1 FCC Rcd., supra at 802, 804 ("a limited partner possessing a 99% equity interest who is governed by restrictive provisions of the partnership agreement may be a purely passive investor").

provides an exemption to the one-year broadcast holding period for transactions involving the transfer to minority-controlled entities. Congress, like the Commission, has a parallel interest in promoting minority ownership and diversity. Therefore, the Commission should clarify that such transactions are exempt from the three-year rule.

D. Waivers of the Anti-Trafficking Rule

The Act authorizes the Commission to grant waivers of the three-year holding requirement if such a waiver would be in the public interest. As the Commission recognizes, Congress' intent in adopting the anti-trafficking rule was to alleviate its concern that certain "profiteering" transactions may adversely impact the rates or services of a cable system. NPRM at ¶ 4. InterMedia notes that, as a general matter, the local franchise authority is the most appropriate entity to judge whether a particular transaction may result in the adverse effects which Congress sought to avoid. Therefore, InterMedia submits that if the franchise authority consents to a transfer of ownership of a particular system, then there should be a presumption that the transfer is in the public interest.

Second, the Commission must recognize that cable systems are often developed and expanded in "regional clusters." By acquiring nearby and contiguous cable systems over a period of years, cable operators can achieve certain economies of scale by consolidating headends and/or offices, which economics of scale greatly benefit the subscribers of the systems. In addition, the integrated system as a whole is more valuable than its component parts. InterMedia submits that application of the three-year rule should not force cable operators to sell regional clusters on a piecemeal basis simply because some of the components of an integrated system were acquired within the previous 36 months. Rather, the Commission should clarify that the three-year period would be measured from the date of acquisition of the franchise(s) which contain the majority of subscribers in the cluster. Otherwise, the cable operator might be unable to sell one integrated system and would thereby be forced to sell component parts at a lower price. Additionally, service to new communities adjacent to the existing system might not be undertaken for fear that a sale could not be effectuated until operations in the new community met the three year rule. Such a result would reduce operator's incentives to achieve economies of scale, which ultimately benefit the subscribers.

The Act further allows the Commission to grant waivers of the three-year holding requirement to permit the transfer of a cable system in cases of "default, foreclosure or other financial distress." As the Commission notes, "financial distress" is not defined in the Act, however, it is clearly something less than default or foreclosure. <u>See</u>, Conference Report at p. 84. It is clear that Congress preferred that service should not interrupted (as might be the case in default or foreclosure), and recognized that subscribers would benefit the most from a waiver in such circumstances. The Commission must recognize, however, that many franchise agreements contain "financial capability" provisions by which an operator would be in violation of the franchise if it did not comply with this standard. InterMedia urges the Commission to adopt a waiver policy which takes into account these potentially conflicting provisions. Obviously, the purpose of Congress' express waiver provision would be frustrated if a "financially distressed" system owner sought to sell the system only to find that the franchise authority had revoked the franchise agreement because of alleged failure to meet the "financial capability" provisions.

Therefore, the Commission must adopt a flexible waiver policy which would allow it to recognize that "financial distress" covers circumstances that does not mean the operator is unable to meet its franchise obligations and provide service to its subscribers. In fact, a new owner might be able to provide enhanced and improved services to the subscribers in the community through rebuilds, technological innovations, etc. The public interest is furthered by allowing a more financially capable owner to take over a system without waiting for the expiration of the three-year period.

III. ESTABLISHMENT OF SUBSCRIBER LIMITS

The Act requires the Commission to establish limits on the "number of cable subscribers a person is authorized to reach through cable systems owned by such person . . ." 47 U.S.C. § 533(f)(a)(A). Since the Act does not define "reach" for purposes of this provision, the question raised by the Commission is whether this limit should be defined by the actual share of subscribers attributable to a single entity, or whether the limit should be based on the number of homes passed (i.e., potential subscribers). NPRM at ¶ 36.

InterMedia asserts that any subscriber limit should be based on the actual number of subscribers rather than on the number of homes passed. This is appropriate for several reasons. First, Congress was concerned about the "reduction of media voices available to consumers." NPRM at ¶ 31. The Senate Report's findings which led to the adoption of this provision illustrated this concern in terms of actual subscribers attributable to specific MSOs. See, NPRM at ¶ 31 citing Senate Report. Therefore, it appears that Congress sought to prescribe, through the Commission, limits on the actual number of subscribers served by one entity rather than the number of homes passed.

Second, the Commission should establish national subscriber limits within the context of the overall structure of the Act, which anticipates the development of effective competition and the eventual deregulation of the cable industry as market forces supersede the need for regulation. To assess accurately the state of competition and program diversity on a national level, the Commission must compare apples with apples. For example, the second statutory definition of effective competition is based on requisite subscriber counts of competing multichannel video program distributors ("MVPDs"), not homes passed by MVPDs. Direct Broadcast Satellite ("DBS") service penetration cannot even be expressed as a factor of homes passed since satellite coverage is nationwide. Accordingly, any meaningful comparison of national competition must be based on the number of subscribers.

Finally, it is difficult to obtain accurate figures on homes passed in a given franchise area. Such figures are based on Census Bureau statistics and are updated infrequently. In contrast, obtaining current and accurate subscriber counts is a necessity for any video entertainment industry. Therefore, the most accurate and least burdensome method for determining national subscriber limits is to base such a cap on the number of subscribers.

IV. CONCLUSION

InterMedia emphasizes that the broadcast attribution rules should be used to implement the subject provisions of the Act. As stated above, Congress was familiar with the attribution rules and expected that the Commission would apply them in this context. Further, in implementing the three-year rule, the Commission should ensure that its policies to promote minority ownership of media voices are not inhibited. Finally, ownership changes that do not affect the ultimate control of the cable system should not fall within the scope of the three-year rule.

Based on the foregoing, InterMedia Partners respectfully requests that the Commission consider the concerns and proposals raised herein and incorporate them into the final rules governing ownership restrictions on the cable television industry.

Respectfully submitted,

INTERMEDIA PARTNERS

By: ______________________

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Dated: February 9, 1993