implementing standards, the three year holding period will require that the FCC act as the primary interpretive body to avoid subjecting cable operators to a multiplicity of potentially inconsistent interpretations.16/

The statute and its legislative history indicate that the FCC is to have primary jurisdiction. The statute vests only the FCC with waiver authority. NPRM ¶ 8; 47 U.S.C. § 537(d). Franchising authorities are given rights to concur in the waiver only if their franchises give them the right to approve the underlying transfer. The legislative history of this section specifically rejects any interpretation that would allow franchising authorities the power to determine whether the three-year holding rule or one of its exceptions applies to transfers. The House Report explains:

> The Committee does not intend that the 3-year holding period requirement expand or restrict the current rights that any franchise authority may have concerning approval of transfers or sales.

House Report at 120. There are currently no franchises or local laws which confer upon a franchising authority the power to

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[Footnote Continued]

pro forma); Tender Offers and Proxy Contests, 59 R.R.2d 1536 (1986) (governing intra-corporate proxy contests); Metromedia, Inc., 55 R.R.2d 1278 (1984) (governing leveraged buy-out of substantially all the shares of a publicly held entity by the principal stockholder).

16/ Uniformity is one of the overriding purposes behind Congress's regulation of cable television. 47 U.S.C. § 521(1).

determine whether a cable operator has satisfied the three year holding period of the 1992 Cable Act and any FCC rule that confers this power upon franchise authorities would expand the rights of franchise authorities concerning approval of transfers or sales, contrary to Congress's express intent.

This is not to say that the FCC should have a role in every franchise transfer, or that a franchising authority has no role whatsoever. But there is no reason to make the particular ownership provisions of Section 617 more burdensome or complex than any other. Cable operators are already subject to cross-ownership constraints with respect to MMDS, broadcast, telephone and (to a limited extent) networks. Every transaction has the potential to implicate these rules, and attorneys routinely conduct due diligence to assure that transactions comply with them. No special pre-closing certifications are required. See, e.g., 47 C.F.R. § 76.501; 47 C.F.R. § 73.3555. If the Commission wishes to create some checkpoint, FCC Rule 76.12 could be amended to require a cable operator to include with its post-closing notice a statement that the system transfer or assignment complies with the trafficking rule. If a franchising authority or other interested party believes that a proposed transfer may not be permitted under the three-year rule, it would be free to file a complaint with the Commission. This process would mirror the current situation in cable cross-ownership rules generally.

This proposal would shield the FCC from involvement in the great majority of cable television system transfers, which would proceed without implicating the three year holding period. Yet the process is necessary to protect cable operators and potential buyers of cable systems from those franchise authorities which use a transfer as an opportunity to renegotiate the franchise terms and to extract other concessions, often monetary, from the parties to the transaction. The anti-trafficking rule should not be allowed to become another weapon for those franchising authorities that would abuse it. Concessions extracted in this process themselves place pressures on rates contrary to the intent of Congress.

2. Limitations On Franchising Authority Power To Disapprove Transfers

Congress recognized the problem of franchising authorities that abuse the power to approve transfers. Section 13 of the 1992 Act includes a provision that limits the time in which a franchising authority must approve a sale or transfer (after the 36-month period following acquisition) to 120 days following "any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority." 47 U.S.C. § 537(e). This provision recognizes the real-world problems of a cable operator or prospective buyer of a cable systen when a franchising authority holds up the transaction. Loan commitments expire, buyers find other properties, and transactions fall through. This provision underscores the need for expeditious resolution of any complaint by a franchising authority that believes a proposed transfer or sale would violate the three year holding period. Only the Commission can offer a relatively expeditious and uniform resolution of such a complaint through a national standard. If the cable operator and franchising authority were forced to resolve the matter in state or federal courts, the backlogs of those courts and the uncertainty of resolving the issues before a multitude of authorities would effectively torpedo any proposed sale or transfer subject to the dispute.

A request for transfer approval is deemed granted if the franchising authority "fails to render a final decision on the request within 120 days," unless the parties agree to an extension of time. The 120 day time limit, however, applies only to a request for approval of sale or transfer that "is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority." The statute suggests that the Commission is to determine what information must accompany such a transfer request. NPRM ¶ 22. According to the Conference Report, the period applies to "any request for approval of such sale or transfer <u>that contains or is accompanied by such information as is required in accordance with Commission regulations</u>." Conference Report at 83.

A cable system whose franchise does not require franchising authority approval of a transfer has no obligation at all to provide anything to the authority. The trafficking rule is not intended to expand the power of any local government over a proposed transfer. House Report at 120. Where the franchise requires approval, a simple certification from the cable television operator that the transfer complies with Section 617 should suffice.[17/] Transfers proposed after the initial 36 month period are not limited by this law, and should be presumed to be legal. A requirement that a cable operator provide the franchising authority with financial information, contracts, or other information beyond that required by the existing franchise for approval of transfer would serve no purpose, because there is no restriction in federal law on the transfer.

There is no basis to read into the Cable Act the conferral of discretion upon a franchising authority to request any additional information, and thereby hold up a proposed transfer. The statutory reference to information required "by the franchising authority," according to the legislative history, means information "require[d] in franchises." House Report at 120. If a franchise contains specific requirements for information to be supplied upon the transfer or assignment of a

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17/ CR&B questions "whether . . . extensive information is necessary in connection with every transfer of a cable system." NPRM ¶ 23.

cable television franchise, the statute is intended simply to preserve these provisions. It would be absurd, however, to allow a franchising authority to evade the 120 day limit for approval of a request for authority to transfer a franchise by the simple expedient of repeatedly requesting additional documentation with unlimited discretion. Such an exception would eradicate the intended protections of the 120 day period. The Commission should clarify that a franchising authority may only request information specified in the franchise.

3. **Waivers** (NPRM ¶ 19)

Section 617(d) of the 1992 Cable Act states that "[t]he Commission may, consistent with the public interest, waive the requirement" of the three year holding period. In the second sentence of the subsection, the statute declares that "[t]he Commission shall use its authority under this subsection to permit appropriate transfers in the cases of default, foreclosure, or other financial distress."

The statute provides the Commission with authority to issue general waivers in the public interest, and simultaneously directs the Commission to waive the requirement in certain cases. If the Commission's waiver authority were limited to cases of default, foreclosure or financial distress, the entire first sentence of Section 617(d) would be rendered superfluous. This would contradict basic statutory construction, see, e.g., 2A Norman J. Singer, Sutherland Statutory Construction § 46.06 at

119-126 (Sands 5th ed. 1992) (every word and sentence should be given effect), and would undermine the spirit of the provision, which is intended to block only those transactions which might adversely affect subscriber rates or services. Congress did not limit the Commission's general waiver authority in the statute; it only provides specific waiver circumstances as illustrative examples.

The Commission's ability to waive the three year holding period in the public interest is necessary to temper the harshness of the rule. Although Congress has set forth several circumstances in which the rule should not apply, these examples were added as specific illustrations to accomodate lenders who were dismayed at the absence of clarity in earlier versions of the legislation. See, H.R. Rep. No. 682, 101st Cong., 2d Sess. at 21 (1990 version without examples of waiver to protect creditors). The Commission's records contain abundant examples of unpredictable circumstances that might require a waiver. See, e.g., John W. Munson, 87 F.C.C.2d 995 (Rev. Bd. 1981) (amateur radio licensee suffering from insanity violated FCC rules and threatened to kill FCC personnel); Stereo Broadcasters, Inc., 87 F.C.C.2d 87 (1981) (licensee claimed inability to appreciate FCC rules because of distress caused by wife's multiple sclerosis). It would be presumptuous to assume that the illustrative waiver situations cover all conceivable instances in which the rule would work an unnecessary hardship without conferring any benefit on the public.

The statutory mandate that the Commission "shall use its authority . . . to permit appropriate transfers in the cases of default [or] foreclosure" supports a blanket exception for transfers that meet established parameters. Whenever a creditor seeks to take control of a cable system because the cable operator has defaulted or because the creditor has foreclosed, the three year holding period should be waived by operation of the statute, without need for further FCC consideration.

In cases of default and foreclosure, the creditor taking over the system should also be granted a waiver of the three year holding period for subsequent transfer. Creditors generally are not in the business of operating or reselling cable television systems for profit. They are in the business of providing financing. Such creditors should not be forced to retain ownership of a cable system that they have acquired as a last resort to protect their investment.

The statutory waiver for transfers in the case of "other financial distress" is more ambiguous than exceptions for transfers upon default or foreclosure, and would appear not to lend itself to the type of blanket waiver described above. In these cases, the cable operator would have to request and receive an FCC waiver. The current exception to the broadcast one-year holding period where a station "establishes that because of the unavailability of capital a proposed assignment or transfer would satisfy the public interest" (NPRM ¶ 19) is a useful starting point, but the final definition should allow greater flexibility for waivers in the public interest.

It is critical that the Commission issue waivers contingent upon ultimate approval by the franchising authority. NPRM ¶ 20. As with FCC approval of the transfer of licenses for CARS microwave stations, the cable operator needs to line up the regulatory approval first because the timing of the closing often depends on last-minute satisfaction of municipal concerns and requests for information. See Jill Abeshouse Stern, 66 R.R.2d 1349 (MMB 1990). To prohibit the filing of a waiver request until the franchising authority grants its approval would unreasonably delay every transfer in which a waiver is needed. Indeed, it would reverse roles between the FCC and franchising authorities, many of whom do not require consent to transfer and would not be involved in consenting to waiver. The Commission will routinely be asked to issue waivers in such cases; there is no reason to postpone that process if one particular franchise also requires local consent. Moreover, it may be impossible for a cable operator to secure financing until a contingent waiver is obtained, thereby preventing any proposed transfer from materializing. The grant of a waiver contingent on the approval of the local franchising authority to the transfer would not undermine Section 617 of the 1992 Cable Act in any way, and would provide cable operators and buyers of cable television systems with a much more efficient administration of the new rule.

4. Documentary Support For Exceptions

A cable operator that proposes a transfer under one of the statutory exceptions should not be required to provide the franchising authority with a certification that the proposed transfer complies with Section 617. Cable operators do not certify to franchising authorities that a transfer complies with the cross-ownership or other FCC rules, and the three year holding rule should be no different. This system will avoid unnecessary paperwork for both the cable operator and franchising authority. The franchising authority will have first-hand knowledge of the facts of the transfer as part of its regular oversight. If it questions whether a proposed transfer is prohibited by the rule, it may informally ask the operator to explain, and if still unsatisfied, the franchising authority may file a complaint with the Commission.

If a complaint is filed challenging a proposed transfer, an operator should be allowed to respond with a simple explanation of the applicability of one of the exceptions. If the Commission desires further documentation, the cable operator could provide supplemental documents. For example, in some cases a minority tax certificate will have been issued by the FCC. In other cases, a more thorough description of the affiliation between transferor and transferee, and perhaps organizational corporate documents or publicly available corporate documents could be provided to support a claimed transfer between affiliated entities. In the event of a transfer required by law, a copy of a court order, FCC order, or death certificate would suffice.

As for transfers under the exception for transactions that are free from federal income tax liability (other than those with a tax certificate), documentary proof may be difficult to supply. It is not routine for cable operators to obtain written opinions of tax counsel that a particular transaction qualifies for one of the internal revenue code provisions that allow deferral of gain recognition for certain transactions. Theoretically, a cable operator could obtain such an opinion, but an opinion will not prove conclusively that the proposed transfer qualifies for one of the exceptions, because the IRS has up to three years in which to challenge the claimed exemption. In such cases, however, a good faith opinion of counsel that the proposed transfer qualifies for one of the IRS exemptions should be sufficient documentation that the proposed transfer is also exempt from the Section 617 three year holding period.

5. Remedies (NPRM ¶ 13)

The 1992 Cable Act is silent as to what remedies should apply to willful violations of the anti-trafficking rule. CR&B believes that the Commission's general forfeiture procedures under Section 503 of the Communications Act would apply to willful violations of the rule. The current standards for assessing FCC forfeitures include a base penalty for unauthorized substantial transfers of control of licensed cable television facilities, and would apply equally to the anti-trafficking rule.[18/] There should be no forfeiture, however, for improper transfers or assignments that were conducted in good faith.

CR&B agrees that the anti-trafficking provision does not necessarily require the unwinding of transfers of ownership based on good faith interpretations of the rule, when such transfers are subsequently found to violate the rule. NPRM ¶ 13. If parties have completed a transfer or assignment in good faith before the Commission issues its rules, and the new rules make clear that the transaction required a waiver, the Commission should allow the parties to seek a retroactive waiver. These comments and those of other commenters provide ample evidence that the anti-trafficking provision is fraught with uncertainty, and undoubtedly there will remain areas of ambiguity (particularly in the application of exceptions) despite the Commission's best efforts to implement the statute with clear rules. Where a transfer can be shown to be based upon a good faith interpretation of law, the transfer should not be subject to reversal.

18/ See Standards For Assessing Forfeitures, 6 F.C.C. Rcd. 4695, 4697 (1991).

II. MMDS/SMATV CROSS-OWNERSHIP PROHIBITION

A. MMDS (NPRM ¶ 24-28)

CR&B generally agrees that the Commission's existing cable/MMDS cross-ownership prohibition serves the same purposes as Section 613 of the 1992 Act, and contains the necessary provisions to implement the statutory prohibition.

The statutory cable/MMDS cross-ownership prohibition permits a cable television operator to own an MMDS facility in one situation where the Commission's current rules would prohibit such ownership. Section 613(a) of the 1992 Cable Act only prohibits cable ownership of MMDS "in any portion of the franchise area served by the cable operator's cable system." This statutory language permits a cable operator to own MMDS within its franchise area so long as the cable system does not pass that portion of the franchise area. In contrast, the Commission's rules prohibit cable ownership of MMDS if the MMDS station's protected service area (15 mile radius) overlaps the cable operator's franchise area, regardless of the area actually served by the cable system. 47 C.F.R. § 21.912.[19/] The Commission should modify its existing MMDS/cable cross-ownership rule to conform with the statute by allowing a cable system to own MMDS in parts of a franchise area not "served" (i.e. passed) by the cable system.

19/ The rules provide an exception for cable systems subject to overbuilds in the franchise area, cable systems in rural areas, and an exception for local programming. 47 C.F.R. § 21.912.

B. <u>SMATV</u> (NPRM ¶ 26-28)

CR&B similarly agrees that the existing MMDS/cable cross-ownership prohibition readily can be adapted to include a prohibition on cable/SMATV ownership, as provided in Section 613(a)(2) of the 1992 Cable Act. As with the cable/MMDS cross-ownership rule, however, the Commission's rules should conform to the statutory allowance for cable ownership of SMATV in portions of the franchise area that are not passed by that cable operator's cable system.

Additionally, the statute prohibits a cable operator from offering only SMATV service "separate and apart from any franchised cable service." The Commission's rules should clarify that where a cable operator integrates an existing SMATV system into the distribution system of the cable system, the former SMATV service becomes part of the franchised cable system. The Commission should specify a reasonable transition period after the acquisition of a SMATV by a cable operator (CR&B suggests 6 months) in order to accomplish the integration of facilities. Failure to specify a transition period after closing will needlessly complicate and even preclude, transactions by requiring separate systems to be physically integrated <u>before</u> closing.

The Commission should also clarify that any SMATV systems that are interconnected through coaxial cable, fiber or other physical connections that cross or use the public right-of-way are "cable systems", whose operators may not own a separate stand-alone SMATV system in any portion of the franchise area served by the operator's interconnected SMATV service. There is nothing in the statute or its legislative history to suggest that SMATV operators who operate facilities that qualify as a cable system under Section 602(7) of the Cable Act are allowed to own separate stand-alone SMATV service in violation of the statute.

C. <u>Grandfathering</u> (NPRM ¶ 27)

CR&B agrees that the Commission should continue to grandfather only cable/MMDS cross-ownership interests grandfathered or holding a waiver under the current Commission rules. Only those cable/MMDS combinations are currently legal, and therefore only those could be grandfathered under the terms of the 1992 Cable Act.

As to grandfathering of existing cable/SMATV cross-ownership, CR&B agrees that such interests in existence as of October 5, 1992 should be grandfathered.

D. <u>Waiver and Enforcement</u>

Section 613(a)(2)(B) of the 1992 Cable Act requires the FCC to waive the cross-ownership prohibition for both MMDS and SMATV "to the extent the Commission determines it is necessary to ensure that all significant portions of a franchise area are able to obtain video programming." CR&B believes that the existing public interest waiver standard is sufficient, and that a cable operator would be allowed to demonstrate that it meets the public interest standard by, among other things, showing that the proposed MMDS or SMATV ownership is necessary to enable significant portions of a franchise area to obtain video programming within the terms of the statute, or that the overlap is de minimus.[20/]

CR&B does not believe that any reporting requirement (except for 76.12) is necessary to monitor the cable/MMDS/SMATV cross-ownership prohibition. Such a certification would not create any meaningful opportunity for FCC or public review of the cable operator's compliance, yet would impose additional paperwork burdens and would require the Commission to undertake the creation of a new form or revision of an existing form. There is no similar requirement for existing cable cross-ownership rules.

A more appropriate mechanism for enforcement would be the establishment of some complaint procedure. Any interested party that believes a cable operator is in violation of the cross-ownership prohibition could bring the matter to the Commission's attention for review under the existing provision of 76.7 of the Commission's rules. As the NPRM points out, existing mass media enforcement actions are generally exempt from the fee requirement, which logically suggests that complaints regarding

20/ The Commission has granted a waiver to a cable operator in Austin, Texas because the MMDS system overlaps less than 2% of the cable operator's subscribers.

cable cross-ownership similarly should be exempt from filing fees. Petitions for special relief are subject to public notice requirements, thereby creating an opportunity for all interested parties to comment.

III. CONCLUSION

CRB respectfully requests that the Commission adopt rules implementing Sections 617 and 613 of the 1992 Cable Act consistent with the foregoing comments.

Respectfully submitted,

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TeleCable Corporation
KBLCOM, Inc.
Columbia International, Inc.
Western Communications, Inc.
Greater Media, Inc.
Helicon Corp.
Monmouth Cablevision Assoc.
Allen's Television Cable
Service, Inc.
Frederick Cablevision, Inc.
Gilmer Cable Television
Company, Inc.
Grassroots Cable System
Halcyon Group, Inc.
OCB Cablevision, Inc.
United Video Cablevision,
Inc.
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