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Before the  
Federal Communications Commission  
Washington, D.C. 20554

MAR 3 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re )  
)  
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

REPLY COMMENTS OF COLE, RAYWID & BRAVERMAN

Jones Intercable, Inc.  
Century Communications Corp.  
TeleCable Corporation  
KBLCOM, Inc.  
Western Communications, Inc.  
Columbia International, Inc.  
Greater Media, Inc.  
United Video Cablevision, Inc.  
Monmouth Cablevision Assoc.  
Helicon Corp.  
Frederick Cablevision, Inc.  
Acton Cable Partnership  
Zylstra Communications  
Corporation  
Allen's Television Cable  
Service, Inc.  
Halcyon Group, Inc.  
Gilmer Cable Television  
Company, Inc.  
OCB Cablevision, Inc.  
Cable Television Association  
of Maryland, Delaware and  
District of Columbia  
New Jersey Cable Television  
Association  
Tennessee Cable TV Association  
Texas Cable TV Association  
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REPLY COMMENTS OF COLE, RAYWID & BRAVERMAN

The law firm of Cole, Raywid & Braverman ("CR&B"), hereby submits its reply comments in the captioned proceeding. CR&B files these comments on behalf of those cable television operators and those state and regional cable television associations listed below.<sup>1/</sup> CR&B replies herein only to those comments filed by cities, counties, other franchising authorities, and related entities.

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<sup>1/</sup> The following parties are participating in these comments: Jones Intercable, Inc.; Century Communications Corp.; TeleCable Corporation; KBLCOM, Inc.; Western Communications, Inc.; Columbia International, Inc.; Greater Media, Inc.; United Video Cablevision, Inc.; Monmouth Cablevision Assoc.; Helicon Corp.; Frederick Cablevision, Inc.; Acton Cable Partnership; Zylstra Communications Corporation; Allen's Television Cable Service, Inc.; Halcyon Group, Inc.; Gilmer Cable Television Company, Inc.; OCB Cablevision, Inc.; Cable Television Association of Maryland, Delaware and District of Columbia; New Jersey Cable Television Association; Tennessee Cable TV Association; Texas Cable TV Association; West Virginia Cable Television Association.

I. **THE ESTABLISHED BROADCAST TRANSFER OF CONTROL STANDARDS SHOULD DETERMINE WHAT CONSTITUTES A "TRANSFER OF OWNERSHIP" UNDER SECTION 617**

In its initial Comments in this proceeding, CR&B explained that the statutory term "cable operator" in Section 613 excludes all ownership interests which are non-attributable under the Commission's attribution rules from the new three-year holding period established in Section 617 for ownership of cable television systems. CR&B at 3. CR&B further explained that the broadcast transfer of control standards should define those transfers subject to the three-year holding period, in order to provide cable operators and investors with the certainty of a developed body of law. CR&B at 4-5. The comments of the New York State Commission on Cable Television ("NYCC") and the comments of the National Association of Telecommunications Officers and Advisors, et al. ("NATOA") generally agree with this approach. NYCC at 4 ¶ 6; NATOA at 10.

Yet the New Jersey Office of Cable Television ("NJCT") urges the Commission to adopt "the most inclusive application" of the statutory limitation on transfers. NJCT at 2. This view ignores the purposes of the statute. Section 13 of the 1992 Cable Act is intended to eliminate "profiteering" transactions only. CR&B at 2 (citing House Report at 119, and reports of FCC, GAO and FTC concluding that there was little, if any correlation between cable system transfers and higher rates). Apparently, NJCT would have the Commission halt the trading of most shares of publicly held cable television operators, and curtail significant private investment as well. Rational "passive" or minority investors may

not buy ownership interests that must be held for a minimum of three years. See Comments of Sandler Capital Management at 4-17; Comments of Corporate Partners at 5-18. This statute was not intended to block transfers of all ownership interests, and the Commission should reject NJCT's proposal.

Although NATOA supports the broadcast transfer of control standard generally, it would modify the standard to require approval of all transfers of 5% or more of stock or other ownership interests. NATOA at 10-11. NATOA's proposal, like NJCT's, presumes that transfers of certain non-attributable ownership interests are prohibited. Yet, as CR&B explains in its comments, one who possesses a non-attributable interests is not a "cable operator" within the meaning of the Communications Act. CR&B at 3. Section 617 thus does not apply to limit transfers by such owners.

NATOA calls for a "rebuttable presumption" that any transfer of 5% or more of stock or other ownership interests is a transfer of control. NATOA at 10. Section 617 has no such presumption, and the law of broadcast transfers has never had such a presumption. Instead, the broadcast rules (including the attribution rules) presume that a number of different types of transfers of "stock or other ownership interest" do not constitute a transfer of control, even if the interest transferred exceeds 5%. The existing presumptions that certain transfers are pro forma should be retained.

## II. MSOs REQUIRE A DIFFERENT STANDARD OF COMPLIANCE

CR&B's comments explained that sales of MSOs require a standard different than sales of individual systems. Transfers of equity that do not constitute a "transfer of control" of an MSO should be freely allowed, not only to permit investment that does not implicate the policies of the trafficking rule, but because it is unlikely that the transfer of an ownership interest spread among a large number of systems will affect subscriber rates or services in the systems. Likewise, a transfer of even a majority of the ownership in an MSO should be allowed because, under current and coming rate-regulation, such transactions will not be premised on the ability of the buyer to "profiteer" through unreasonable rates.

Some municipal commenters urge that transfers or assignments of interests in MSOs should be strictly held to the three-year holding period, and would require each individual system to satisfy the three-year holding period. See NATOA at 12-13. Even NYCC, a state-wide franchising authority, agrees with CR&B that "the rule need not require that each and every system independently reach the three year test." NYCC at 8. Like CR&B, NYCC believes that the transfer of an MSO should be permitted when the MSO has acquired or initially constructed cable systems serving a certain percentage of its total subscribers within three years. NYCC at 8. Several commenters agree. See, e.g., Comments of National Cable Television Assoc. at 45; Comments of TCI at 50-51; Comments of Viacom International, Inc. at 22-23. CR&B's proposal, which would set 50% as the relevant percentage of subscribers an MSO should

have served for three years or more, establishes an appropriate standard, and harmonizes the rule with the single majority shareholder attribution rule. CR&B at 7-8.

**III. THE FCC, NOT LOCAL FRANCHISING AUTHORITIES,  
SHOULD HAVE PRIMARY JURISDICTION OVER THE  
INTERPRETATION AND ENFORCEMENT OF SECTION 617**

A. Jurisdiction. CR&B's comments explain that only the FCC should interpret and enforce Section 617 (as a prerequisite to any court challenge) because the provision addresses a perceived national problem, and involves understanding and application of federal law. Any other solution exposes cable operators to potentially inconsistent standards in a multiplicity of jurisdictions. CR&B at 18-19.

Several municipal commenters assert that local franchising authorities should be the primary interpreters and enforcers of Section 617. NATOA at 5-7; NJCT at 2-3; NYCC at 3-4. Even NATOA, however, recognizes that the key legislative history to this provision prohibits any expansion of "the current rights that any franchise authority may have concerning approval of transfers or sales." NATOA at 7 (quoting House Report at 120). Any rule that places primary enforcement and interpretation authority for Section 617 in local franchising authorities would, in fact, "expand" the current rights of the franchising authorities, and would contradict congressional intent. The FCC is the only entity with statutory power to waive Section 617, and is the only appropriate entity to exercise primary jurisdiction over Section 617.

B. Certification. Some municipal commenters would have a cable operator intending to transfer or assign ownership of a cable system submit to the franchising authority a certificate that the transfer complies with Section 617. CR&B agrees that, when a franchise requires the consent of the franchising authority to a transfer or assignment, the submission of a certificate of compliance is not an unreasonable burden. Yet NATOA, NJCT, and NYCC would have each cable operator submit a certificate of compliance regardless of whether the franchise requires the franchising authority's consent. NATOA at 7; NJCT at 2; NYCC at ¶ 5. This proposal would add a new layer of cable oversight to state and local law. When the franchise does not require the operator to obtain consent for a transfer, no certificate should be required.

NATOA would have cable operators go beyond mere certification, and would require that operators submit unspecified "evidence" demonstrating either (i) that three years have passed since the operator acquired or constructed the system, or (ii) that one of the exceptions applies. NATOA at 7-8. This system would impose a needless burden on cable operators, and would create, in effect, a presumption that the transfer is prohibited by the statute. Section 617, however, requires no regulatory approval when an operator determines that one of the exceptions applies. All other FCC ownership restrictions presume that a transfer is valid, and require evidence that the transfer satisfies ownership rules only when the transfer is challenged by a valid complaint. A certification process normally is intended to limit the burden of filing

evidence. If a certification process is adopted, a cable operator should be able to rely upon the certification as evidence of compliance unless a third party files a complaint at the FCC.

C. Approval of Transfers. Similarly, several commenters would have the Commission enact rules that grant franchising authorities unlimited discretion to request information under Section 617(e) before granting consent to a transfer of those franchises that require consent. As CR&B has explained, the plain intent of Section 617(e) is to limit the ability of a franchising authority to block a proposed transfer. CR&B at 21-24. The Commission should resist the invitation to imply congressional intent to confer discretion upon a franchising authority to request information not required within the franchise. CR&B at 23.

The legislative history clarifies that the statutory reference to information required "by the franchising authority" means information "require[d] in franchises." House Report at 120. NATOA even cites to this portion of the legislative history, quoting a passage which further clarifies that the ability of a franchising authority to deny a request for approval of a sale or transfer must be "consistent with the franchise and applicable law." NATOA at 7. The FCC must clarify that the power of a franchising authority to request additional information as part of its review of a request for transfer consent is limited to requests for information specified within the franchise or applicable law. If the franchise and "applicable law" do not specify what information is to be provided, the Commission should clarify that a

request for transfer is deemed granted 120 days after an operator first applies in writing for approval. Any other rule would expand the discretion of a franchising authority to hold up a transfer through repeated requests for ever-more detailed information, and would render superfluous the statutory 120 day period for approval of a request for consent.

**IV. CONDITIONAL WAIVERS OF SECTION 617**  
**SERVE THE PUBLIC INTEREST**

Only NATOA would preclude the Commission's grant of waivers conditioned upon subsequent approval, when required, of the franchising authority. NATOA at 14. CR&B's comments explained how conditional waivers are critical to prevent unreasonable delay of every transfer in which a waiver is needed, and may be necessary to secure financing. CR&B at 27. NYCC agrees with CR&B that conditional waivers are in the public interest so long as they do not affect the jurisdiction of a franchising authority over the same transfer. NYCC at 9. The Commission's recent decision in Application of King Kable, Inc., DA93-156 (MMD Feb. 9, 1993), demonstrates that a conditional waiver serves the public interest by permitting transactions to go forward, without undermining in any way the existing power of franchising authorities to approve the proposed transaction. The Commission should incorporate the conditional waiver process into its rules implementing Section 617.

**V. MUNICIPAL OWNERSHIP**

Only NATOA suggests that systems owned by municipalities should be exempt from the three-year holding period established in Section 617. NATOA at 13. NATOA suggests that municipally-owned systems do not implicate Congress' concern with "profiteering," without further explanation. In fact, if Congress believed that short term "flipping" increases customers rates, the identity of the seller is irrelevant. Moreover, cash-starved municipalities will be no less inclined to seek windfall profits in the sale of a cable system, if they are available. The statute does not provide an exemption for municipal entities from the three-year holding period, and this Commission should not invent one.

**VI. CONCLUSION**

CR&B respectfully requests the the Commission adopt rules implementing Sections 617 and 613 of the 1992 Cable Act consistent with the foregoing reply comments, and those comments CR&B filed on February 9, 1993.

Respectfully submitted,

Jones Intercable, Inc.  
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