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

Re: MM Docket No. 92-264

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

Dear Ms. Searcy:

Filed herewith, on behalf of Cablevision of Texas III, L.P., are an original and ten (10) copies of its Reply Comments in the above-referenced matters. We have enclosed sufficient copies so that each Commissioner can be served with a copy.

Should you have any questions regarding this filing, please contact the undersigned.

Very truly yours,

Mark J. Palchick (LJP)
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CABLEVISION OF TEXAS III, L.P.

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Enclosures
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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of)
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Horizontal and Vertical Ownership)
Limits, Cross-Ownership Limitations)
and Anti-Trafficking Provisions)

To: The Commission

REPLY COMMENTS OF CABLEVISION OF TEXAS III, L.P.

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To: The Commission

REPLY COMMENTS OF CABLEVISION OF TEXAS III, L.P.

Cablevision of Texas III, L.P. ("Cablevision"), through undersigned counsel, hereby submits its Reply Comments in response to the above-referenced Notice of Proposed Rulemaking and Notice of Inquiry, 8 FCC Rcd. 210, released December 28, 1992, issued by the Commission pursuant to the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Act").

Cablevision earlier addressed in its Comments the Commission's enforcement of Section 613(a) of the 1992 Act, which, by its express language, prohibits the common ownership of a cable television system and a MMDS facility in any part of the franchise area served by a cable operator's cable system. Cablevision demonstrated in its Comments the incorrectness of the Commission's tentative conclusion that its "recently adopted [cable/MMDS cross-ownership] rules are consistent with and effectively implement the cross-ownership

prohibitions of the 1992 Cable Act."¹ Cablevision showed instead that the Commission's current rules are at variance with the plain language of the 1992 Act.

SUMMARY OF COMMENTS

Certain of the Commenters support the Commission's tentative conclusion, but articulate no legal bases for their reading of the statutory ban. For example, Three Rural Telephone/Cable Companies ("Companies") claim that the Commission's tentative conclusion is "well founded" based on their conclusory assertion that the Commission's cable/MMDS cross-ownership restriction "appear to fulfill the requirements of the 1992 Cable Act."²

Companies advance the theory that the rural exemption contained in Section 21.912(d) of the Commission's rules is consistent with the 1992 Act, because cable service will be extended into rural areas which otherwise might go unserved. Companies additionally argue that the Section 21.912 cross-ownership provision presently prohibits issuance of an MMDS authorization to an existing cable operator for its franchise area³, but permits a MMDS licensee to obtain a traditional cable franchise in its community as long as cable competition

¹8 FCC Rcd. at 215, para. 26.

²Companies Comments at p. 3.

³Companies also request that the Commission amend its cross-ownership rules so as to no longer exclude rural cable systems from a cross-ownership exemption in those cases where a four-channel MMDS competitor is already present. Commenters' request goes well beyond the purpose of this rulemaking and must be rejected.

already exists. Companies reason that the rule is in the public interest because permitting a MMDS licensee to overbuild allows the operator to utilize the most efficient and effective video delivery technology.

A few additional Commenters also urge that the Commission retain its existing cable/MMDS cross-ownership rules, including its exceptions for rural areas and local programming for cable/MMDS cross-ownership. They contend, but do not demonstrate, that the Commission's present regulations carry out the Congressional mandate contained in Section 613(a)(2) of the 1992 Act.⁴

On the other hand, National Private Cable Association, et al. ("NPCA") and GTE Service Corporation ("GTE") both point to the obvious fact that the 1992 Act does not contain either a rural exemption or local programming exemption or, for that matter, an overbuild exemption.⁵ As such, both Commenters recommend that the Commission eliminate its existing cable/MMDS cross-ownership rules and implement a single set of new rules, consistent with the express terms of the 1992 Act, that will prohibit a cable system from owning an MMDS or SMATV system whose protected or actual service area overlaps with

⁴See e.g. National Cable Television Association, Inc. Comments at pp.56-57; Time Warner Entertainment Company, L.P. Comments at pp 54-57; Tribune Regional Programming, Inc. Comments at pp. 4-5; Liberty Cable Company, Inc. Comments at p. 3; National Association of Telecommunications Officers and Advisors, et al. Comments at p. 18.; Cole, Raywid & Braverman Comments at p. 31.

⁵NPCA Comments at pp. 3, 5-6; GTE Comments at p. 2.

the actual service area of the cable system.

DISCUSSION

The issue of whether the Commission's present cable/MMDS cross-ownership rules are consistent with the 1992 Act is not a difficult one. It does not necessitate elaborate discussion. The Commission must recognize that its current cross-ownership rules are patently and facially inconsistent with the 1992 Act. That Congress could have chosen to adopt the Commission's existing rules and exemptions into law is undeniable. However, it did not. Whether the Commission's rules should have been codified in the statute is irrelevant. Congress did not do so and the Commission may not on its own grant itself additional authority to regulate cable/MMDS cross-ownership beyond that limited authority granted it by Congress. "Administrative rulings cannot add to the terms of an act of Congress." U.S. v. Standard Brewing, 251 U.S. 210,218 (1920).

Unlike the Commission's rules, the 1992 Act contains no overbuild exemption. See Section 21.912(a). Likewise, the 1992 Act contains no rural exemption as the Commission's rules do. See Section 21.912(d). Nor did Congress adopt an exemption for the use of MMDS frequencies by cable operators for the transmission of locally-produced programming to cable headends. See Section 21.912(e).

"[T]he starting point in every case involving construction of a statute is the language itself." Greyhound

Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978) (citations omitted). See also Sutherland, Statutory Constitution, 4th Ed. V.2A § 45.01. "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended." U.S. v. Missouri Pac. R. C., 278 U.S. 269, 278 (1929).

The clear and unambiguous language of Section 11 of the 1992 Cable Act permits exemptions to the cable/MMDS cross-ownership ban in only two cases, neither of which codified the Commission's existing exemptions. Because the language of the statute is clear, it is controlling. See American Civil Liberties Union v. FCC, 833 F.2d 1554 (D.C. Cir. 1987) (Commission may not redefine "basic cable service" where language of statute is clear); Montgomery Charter Service, Inc. v. W.M.A.T. Commission, 325 F.2d 230, 232-33 (D.C. Cir. 1963).

The 1992 Cable Act contains two exceptions -- a waiver provision which grandfathers existing cross-ownership situations and a permissive waiver provision which the Commission may invoke when it desires to ensure that video programming is available to all significant portions of a franchise area. Under the usual canons of statutory construction, where a statutory mandate is laid down, followed by specifically enumerated exceptions, the enumerated

exceptions are deemed to be exclusive and any other exception is ruled out implicitly. See National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458-59 (1974); Saxon v. Georgia Ass'n of Independent Insurance Agents, Inc., 399 F.2d 1010, 1013-14 (5th Cir. 1968); Sutherland, Statutory Construction, 4th Ed. V.2A § 47.11. Thus, Congress' inclusion of but two exemptions to an otherwise systematic policy negates the existence of any other exemptions, including those currently contained in the Commission's rules.

Those Commenters who argue in favor of the Commission retaining its current exemptions ignore the fact that Congress has failed to codify those exceptions. While Congress has authorized waiver of the cross-ownership ban where it is "necessary to ensure that all significant portions of a franchise area are able to obtain video programming,"⁶ the Commission can scarcely transmogrify that language into the blanket exceptions contained in the Commission's current cross-ownership rules. "It is for Congress to determine whether the Commission should have more authority . . . [Administrative] construction may not be substituted for legislation." U.S. v. Missouri Pac R. Co., *supra*, 278 U.S. at 278; ACLU v. FCC, *supra*.

Accordingly, the Commission must adopt rules that embody the statute's specific waiver policy which must be applied on

⁶Section 613(a)(2)(B) of the 1992 Act.

a case-by-case bases after consideration of the merits of each request. Blanket exemptions and policies of forbearance or other mechanisms that avoid case-by-case waiver consideration constitute an excess beyond the Communication's statutory authority. As such, the Commission must adopt new cross-ownership rules, consistent with the language of the 1992 Act, that will prohibit a cable system or MMDS licensee from owning an MMDS or cable system whose protected or actual service area overlaps with the actual service area of the other system.

Respectfully submitted,

CABLEVISION OF TEXAS III, L.P.

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March 3, 1993

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CERTIFICATE OF SERVICE

I, Marianne C. Lynch, a secretary at the law firm of Baraff, Koerner, Olender & Hochberg, P.C., certify that I have this 3rd day of March, 1993, sent by regular United States mail, postage prepaid, a copy of the foregoing "Reply Comments" to:

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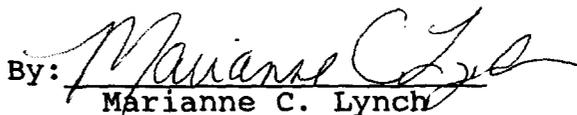
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