

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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MAR 3 1993

FEDERAL COMMUNICATIONS COMMISSION
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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

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Daniel L. Brenner
Loretta P. Polk
National Cable Television
Association, Inc.
1724 Massachusetts Ave., NW
Washington, DC 20036
(202) 775-3664

Seth A. Davidson
FLEISCHMAN AND WALSH
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900

Attorneys for National Cable
Television Association, Inc.

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The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding. In its initial comments, NCTA addressed a wide range of issues raised by the provisions of the 1992 Cable Act (the "Act") dealing with horizontal and vertical ownership limits, anti-trafficking, and MMDS and SMATV cross-ownership restrictions. Pursuant to the Commission's Order of February 26, 1993, NCTA is limiting its reply comments at this time to the issues related to anti-trafficking and cross-ownership limitations.

INTRODUCTION AND SUMMARY

As the legislative history of the Act and the initial comments reflect, the Commission should adopt anti-trafficking regulations that will guard against instances of profiteering in the sale or transfer of cable systems without inhibiting

legitimate transactions. Indeed, applying the three-year holding requirement in a broad and sweeping manner could have the unintended effect of forestalling transfers that could bring in new capital investment, economies of scale and other efficiencies in the public interest. Such benefits translate into new and better programming, technological upgrades and overall improved service for consumers.

Moreover, the anti-trafficking provision does not stand alone against the supposed evils associated with profiteering--higher rates and inferior service. It is part of an extensive fabric of regulation under the Act covering rates, service and other areas that together will protect against any abuses.

Thus, as NCTA and other parties pointed out, the Commission should have the responsibility for monitoring and enforcing the federal anti-trafficking rules in order to ensure that they do not go beyond the Congressional objective and are not applied inconsistently. In particular, the Commission should limit the three-year holding requirement exclusively to transactions involving a substantial change in ownership or control. It should adopt specific rules on the calculation of the time period, with certain flexibility for transactions involving multiple system operators ("MSOs"). It also should establish a definite starting point for calculation of the 120-day statutory limitation on a franchising authority's approval of a transfer that can not be circumvented with repeated requests for information. And it should exempt all transactions that fall

within the statutory exceptions and should grandfather all transfers pending at the time of the Act's passage.

With regard to the cross-ownership restrictions, the comments tend to confirm the Commission's tentative conclusion that its existing cable/MMDS cross-ownership rules satisfy the statutory provision and that the Commission should retain its existing exceptions for rural areas and local programming and its public interest waiver standard. In addition, as NCTA argued in its initial comments, the cable/SMATV cross-ownership ban should be interpreted in a manner that exempts not only SMATVs that are physically interconnected with the cable system, but also those that are being operated in accordance with the terms of the cable operator's franchise. Moreover, under the statute, cable operators should be able to extend SMATV service to unserved areas in their franchise community.

DISCUSSION

I. SECTION 617: SALES OF CABLE SYSTEMS

A. The Commission Should Have Sole Responsibility for Enforcement of the Federal Anti-Trafficking Rules

NCTA and many commenters strongly believe that the Commission, not local governments, should exercise exclusive jurisdiction and enforcement of the federal anti-trafficking

rules.^{1/} Indeed, national standards are critical to ensuring that the three-year holding requirement is applied in a uniform and consistent manner in franchise communities throughout the country.

In a joint filing, the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively the "Local Governments") express a desire for almost complete autonomy to enforce the federal anti-trafficking law. Under their scheme, cable operators would be required to provide a certificate to the franchising authority that any proposed sale or transfer complies with the provision, together with sufficient evidence to establish such compliance.

In support of this broad power, the Local Governments assert that their knowledge of the day-to-day operations of cable systems and their role in approving transfers or sales under local franchise agreements give them some special expertise to enforce the three-year holding requirement. However, the local transfer process is not synonymous with review and evaluation of transactions for purposes of anti-trafficking. As NCTA pointed out in its initial comments, it is the Commission that has the expertise -- in the broadcast, cellular and other areas -- to

1/ See e.g. Comments of NCTA, TCI, Time Warner, Coalition of Small System Operators.

evaluate complex transactions engaged in for mere short-term profit and which may have national implications.^{2/} Moreover, relying on local officials to determine whether a cable system has complied with the anti-trafficking requirement in the context of a local transfer process is likely to result in such determinations being influenced by a host of other issues that have nothing to do with profiteering concerns.

Nevertheless, the Local Governments suggest that the Act "contemplates that the enforcement responsibilities under Section 13 will be coordinated with the responsibility of franchising authorities to approve transfers pursuant to local franchise agreements and applicable law."^{3/} But there is nothing in statute, express or implied, to support the view that Congress directed local governments to have primary responsibility over the anti-trafficking provisions. And, contrary to Local Governments claims, there is nothing in the legislative history. Indeed, the House Report simply provides that:

The Committee did 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.^{4/}

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- 2/ The New Jersey Board of Regulatory Commissioners and the New York State Commission on Cable Television at least acknowledge the importance of the FCC's role in setting standards for transfers or sales of cable systems.
- 3/ Comments of Local Governments at 6.
- 4/ H.R. Rep. No. 628, 102d Cong., 2d Sess. 120 (emphasis added).

This language does not indicate that Congress contemplated that local governments would have independent, autonomous enforcement authority in the anti-trafficking arena. All that it indicates is that by enacting a federal three-year holding requirement, Congress did not intend to interfere with any rights that a local franchising authority may have obtained under the franchise agreement or local law with regard to approval of transfers. Indeed, the fact that Congress stated that the anti-trafficking provision is not designed to "expand" current franchising authority rights could be interpreted as precluding their enforcement authority in this area altogether.^{5/}

In any event, given the Commission's own recognition of the importance of uniformity and consistency, it should not cede jurisdiction over the anti-trafficking rules to local governments.^{6/} In that regard, there is no need for cable operators to submit certifications to franchising authorities that proposed transfers satisfy the three-year holding requirement. And certainly there is no need for local authorities to have open-ended rights to demand additional information from cable operators to demonstrate compliance with

5/ See Comments of Cole, Raywid & Braverman at 19-20.

6/ Notice of Proposed Rulemaking at para. 13; The Local Governments also desire the authority to resolve complaints at the local level. As with other aspects of the new anti-trafficking rules, the Commission is the proper forum for applying and setting uniform and consistent national anti-trafficking standards through its existing complaint and dispute-resolution procedures.

the rule. As with other federal laws and regulations, anti-trafficking rules can be implemented effectively without unnecessary and costly administrative procedures.^{7/}

B. The Commission Should Adopt Anti-Trafficking Rules Narrowly Tailored To Profiteering Transactions

Although anti-trafficking regulation is targeted at purely speculative cable transactions, the Local Governments would apply the rule inflexibly to all cable transfers whether or not they implicate profiteering concerns. Their overly broad interpretation of the three-year holding requirement is unreasonable and ultimately counter-productive.

1. Transfer of Control

For example, with regard to what constitutes a transfer of control, the commenting parties almost universally found that the rule should only apply to transfers of actual working control of a system, i.e. 50 per cent or more ownership interest.^{8/} Yet the Local Governments advocate the adoption of a rebuttable presumption that a transfer of as little as five per cent or more of the stock or other ownership interests in a cable system constitutes an actual transfer of control.

7/ See e.g. Comments of TCI, Time Warner, NCTA.

8/ See e.g., Comments of NCTA at 40-43 (transfers of substantial ownership as defined in broadcast area under sections 309 and 310 of the Communications Act); TCI at 47 (transfers of 50 per cent or more of equity); Sandler Capital Management at 4-10; Cablevision Systems at 18.

But, as NCTA pointed out in its initial comments, the application of such a low ownership threshold would sweep many transfers of noncontrolling interests under the rule and thereby create a disincentive for minority investments in cable systems. Moreover, as the Commission acknowledged, Congress did not intend the anti-trafficking rule to restrict transfers of such noncontrolling interests since they are not likely to occur for purposes of profiteering.

Thus, the Local Governments recommended approach is entirely unreasonable and unwarranted in light of the objectives of the anti-trafficking provision. The Commission should confine the rule to transfers involving a substantial change in ownership or control or a fixed threshold of at least 50 per cent or more transfer of ownership interest.

2. MSO Transfers

The Local Governments also seek a rigid application of the three-year holding requirement to transactions involving MSOs. Given their almost myopic attention to local concerns, they assert that it is "irrelevant whether one system is being transferred or 1,000".^{9/} In their view, the three-year holding period must be satisfied for each system owned by the MSO.

As many commenting parties noted, however, the reality of MSO sales or transfers is that they frequently involve some systems which have been held more than three years and others

9/ Comments of Local Governments at 12.

which have been held less than three years.^{10/} If the three-year holding requirement is rigidly applied on a system-by-system basis, the Commission would forestall transfers with no taint of profiteering and effectively deny economies of scale and other efficiencies to consumers. Indeed, the minimal risks associated with incorporating "some degree of flexibility" in the rules as they pertain to MSO transfers are far outweighed by the cost of holding up an MSO transfer until every system is held for at least three years.^{11/} Consumers could be denied the benefits of new programming services and technological innovations, not to mention an operator who wants to provide service to them.^{12/}

Therefore, as many cable commenters recommended, the Commission should adopt a "subscriber" test in evaluating MSO transfers for purposes of anti-trafficking.^{13/} Under this test, if a majority of the subscribers are being served by systems held more than three years, the transaction satisfies the three-year holding requirement.

3. Calculation of Three-Year Period

10/ See e.g. Comments of Liberty Media at 47; Viacom at 21.

11/ See e.g. Comments of New York State Cable Commission at 8.

12/ Comments of Coalition of Small Operators at 4.

13/ See e.g. Comments of NCTA at 45; TCI at 50 (percentage of subscribers); Viacom at 22 (50 percent of homes passed); Cole, Raywid & Braverman (50 percent or more subscribers served.)

The state and local regulators, notably the Local Governments, also advocate an uncertain and potentially inconsistent starting point for the calculation of the three-year holding period. For initial construction, the Local Governments would not begin to measure the holding period until construction is completed throughout the entire franchise area and service is offered and available to all consumers throughout the franchise area.^{14/} The New York State Commission on Cable Television proposes a more sensible starting date -- the date when the operator begins construction-- but would tie fulfillment of the three-year holding period to whether or not the operator can show that it has complied with the construction timetable in the franchise agreement.

Neither of these approaches is appropriate. As NCTA and other cable commenters pointed out, the more appropriate-- indeed, the more definitive date-- for determining when the three-year period is triggered is when the main facilities and plant are in place that will activate delivery of service to the first subscriber. This approach lends itself to consistent application and is not subject to the vagaries of individual franchise agreements. It also ensures that line extensions and subsequent construction under the franchise agreement do not disrupt calculation of the three-year period.

14/ Comments of Local Governments at 9.

In the case of sale or transfer of an existing system, the Local Governments again propose an untenable measuring point: when the new owner "first assumes actual working control of an operating cable system and such exercise of actual working control has been approved by the franchising authority and the Commission, as appropriate."^{15/} Adopting a standard based on "actual working control" is a potentially uncertain benchmark. As NCTA and other parties argued, a readily discernible date is the closing of the transaction transferring control of the system to the new owner. This date is appropriate because at that time the transferee assumes full responsibility and control of the system whether or not it has physically assumed operational working control.

4. Statutory Exceptions

With regard to the statutory exception for transfers to affiliated entities, one cable regulator believes that the clear presence of a transfer between commonly-owned and controlled companies should not be dispositive of whether the three-year holding period is applicable. Specifically, the New York State Commission on Cable Television looks askance at such pro forma transfers because they may have "the effect of modifying existing security interests or otherwise increasing the financial burden on the cable system."^{16/}

15/ Comments of Local Governments at 9.

16/ Comments of New York State Cable Commission at 6.

But inter-company restructuring or refinancing is a common occurrence and there is simply no statutory basis for excluding such transactions from the exception. As long as there is no transfer of ownership or control to an unaffiliated entity, all inter-company transfers should be exempt under the Act. Indeed, as Congress recognized, transfers between affiliated entities historically have occurred without abuse and are not profiteering transactions of the kind sought to be limited by the anti-trafficking rule.^{17/}

5. Conditional Waivers

As we noted in our initial comments, Section 617 provides the Commission with general authority to grant waivers in the public interest. The Local Governments contend that the Commission has misinterpreted its authority under the statute by concluding that it may grant conditional waivers in situations where the cable operator is required to obtain transfer approval from the local franchising authority. They believe that conditional waivers are not permitted and that the cable operator must first obtain local transfer approval before applying to the Commission for a waiver.

We submit that the granting of a waiver, contingent upon final approval of the transfer by the franchising authority, is not only permissible but beneficial to the transfer process. Indeed, the local transfer approval process involves a complex

^{17/} House Report at 119.

array of issues that may be unrelated to the waiver request and may not be resolved until the eve of the closing. There is no public interest rationale for delaying the transfer because of uncertainty over the waiver and the time lapse between obtaining local approval and commencing the FCC's waiver process. The most efficient approach is to grant conditional waivers.

C. The Commission Should Establish Definitive Standards that Will Effectively Implement the 120-Day Statutory Limitation on A Franchising Authority's Approval of a Transfer

As discussed by numerous commentators, Congress enacted a precise timeframe for local franchising authorities to act upon any request for approval of a transfer of a cable system held for the requisite three years. The mere presence of this 120-day limitation in the legislation indicates Congressional recognition that the local transfer process is often subject to inordinate delay and outright abuse. It sought, therefore, to prevent local authorities from unnecessarily impeding transfers of cable properties.

Although Congress recognized that 120 days is ample time to review and act upon transfer requests, the state and local governments readily indicate that they can and will effectively circumvent the rule with open-ended and unlimited information requests. In fact they repeatedly assert their "broad authority to request any information that the franchising authority deems relevant to its inquiry" and "power to obtain a broad range of information "that it deems necessary or appropriate to review of a

transfer.^{18/} With virtually no limitation on their requests and the ability to decide when and if the 120-day period has commenced (or is tolled) the statutory provision is rendered meaningless.

The Commission should therefore adopt rules defining the limits on the information that local authorities can request and set uniform information requirement to effectively begin the evaluation of a request for approval. Uniform standards will ensure that the statute is not repeatedly tolled by additional information requests otherwise the 120-day statutory period will never run.

II. SECTION 613(a)(2): MMDS/SMATV CROSS-OWNERSHIP PROHIBITION

A. The Commission's Existing MMDS/Cable Cross-Ownership Rules Are Consistent with Section 613(a)

As discussed in NCTA's initial comments, the Commission has tentatively concluded that its existing MMDS/cable cross-ownership rules are consistent with and effectively implement the provisions of Section 613(a) relating to MMDS/cable combinations and should be extended to implement the Act's restrictions on SMATV/cable cross-ownership as well.^{19/} A few of the

18/ Comments of Local Governments at 3, 15. See also Comments of New Jersey Board, New York Commission on Cable Television.

19/ NCTA Comments at 56-57.

commentators have challenged this conclusion, arguing that the 1992 Act broadly prohibits the common ownership of cable and SMATV or MMDS facilities except where such common ownership existed on October 5, 1992 or where the Commission determines common ownership is necessary to ensure that all significant portions of a franchise are able to obtain video programming.^{20/} According to these commentators, the Act requires the Commission to revise its existing rules to eliminate the "overbuild," "rural," and "local programming" exceptions.^{21/}

In fact, the Commission's tentative conclusion is correct and there is no need to delete or narrow the exceptions to the existing MMDS/cable cross-ownership provisions. As NCTA demonstrated in its initial comments -- and as other commentators have pointed out as well -- neither the statutory language nor the legislative history mandate an inflexible reading of Section 613(a).^{22/} For example, both the "rural," and "local programming" exceptions serve purposes closely related to the purposes underlying the waiver standard specified in the Act. Moreover, as the legislative history makes clear, applying

20/ See Comments of GTE at 2; Comments of Cablevision of Texas at 3.

21/ See, e.g., Comments of National Private Cable Ass'n et al. at 4-6.

22/ See, e.g., Comments of NATOA at 18; Comments of Tribune Regional Programming at 4 (local programming exception); Comments of NCTA at 3 (rural exception); Comments of Liberty Cable Co. at 4 ("overbuild" exception).

ownership restrictions requires a balancing of competing concerns. Consequently, the Commission should reject blind interpretations of Section 613(a) that would unduly constrict its discretion to apply the cross-ownership provisions in a manner that best serves the public interest.

B. The Commission Should Not Apply the Cable/SMATV Cross-Ownership Prohibition More Broadly Than, The Statute Requires

While NCTA agrees that the Commission can and should rely on its existing MMDS/cable cross-ownership rules in implementing Section 613(a), it also is clear that the Commission must avoid applying the SMATV/cable cross-ownership provisions any more broadly than the statute actually requires. In particular, the Commission should confirm that the Act (i) permits a cable operator to offer SMATV service within unwired areas of the operator's franchise territory (i.e., within portions of the franchise area not actually "served" by the cable system) and (ii) does not apply where SMATV service is being provided in accordance with the terms of the operator's franchise (i.e., the SMATV service is not offered "separate and apart" from the franchised cable service).^{23/} Other commentators, representing SMATV as well as cable interest, have reached similar

23/ See, e.g., NCTA Comments at 58-59.

conclusions.^{24/}

Another issue that has drawn fairly widespread comment concerns the need for an exemption from the cross-ownership to cover situations in which a cable operator purchases (or builds) a stand-alone SMATV facility with the intention of integrating it into the franchised cable system. The parties have suggested transition periods ranging from 90 days to two years.^{25/} NCTA agrees that cable operators should be given a reasonable time to integrate SMATVs into existing cable systems. We suggest that a one-year period would be appropriate.

Finally, NCTA wishes to address Nationwide Communications, Inc.'s suggestion that a "SMATV" which qualifies as a cable system under Section 602(7) of the Act (and, thus, is required to obtain a franchise) is not barred from owning other stand-alone SMATV facilities.^{26/} Nationwide's position is based on an untenable and unjustified distinction between "traditional" cable systems and interconnected SMATV facilities that fall within the Cable Act's "cable system" definition. No such distinction exists within the law. A facility either is a "cable system," in which case the cross-ownership provisions apply, or it is not a

24/ Comments of National Private Cable Ass'n at 12-13; Comments of Cole, Raywid & Braverman at 32; Comments of Time Warner at 62-68.

25/ See, e.g., Comments of Time Warner at 67 (6 months); Comments of National Private Cable Ass'n at 10 (90 days); Comments of Viacom at 24-25 (2 years).

26/ Comments of Nationwide at 2-8.

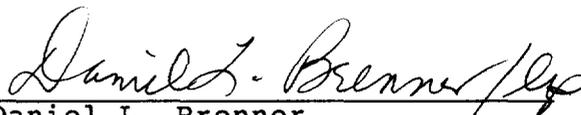
cable system. It cannot be one for some purposes, but not for others.^{27/}

CONCLUSION

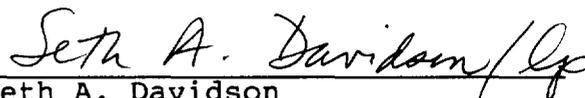
NCTA urges the Commission to adopt implementing rules in this proceeding in accordance with its initial comments and the foregoing reply comments.

Respectfully submitted,

NATIONAL CABLE TELEVISION
ASSOCIATION, INC.



Daniel L. Brenner
Loretta P. Polk
National Cable Television
Association, Inc.
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3664



Seth A. Davidson
FLEISCHMAN AND WALSH
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900

27/ See Comments of Cole, Raywid & Braverman at 33. As a practical matter, ownership of a stand-alone SMATV by a "SMATV cable system" will rarely be barred under the cross-ownership provisions because the stand-alone facility typically will not be located within the franchise service area of the SMATV cable system.

Attorneys for National Cable
Television Association, Inc.

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