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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	)	

EMERGENCY MOTION FOR PARTIAL STAY

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.3 of the Commission's Rules, hereby moves the Commission to stay the September 5, 1993 effective date of the revisions to Section 21.912 of the Commission's Rules adopted in the *Report and Order and Further Notice of Proposed Rule Making* in the captioned proceeding ("*Report and Order*").[1] Specifically, WCA urges the Commission to maintain the *status quo* until it has an opportunity to address a petition being filed today by WCA seeking reconsideration of the Commission's failure to grandfather from the effects of newly-adopted Sections 21.912(a)-(c) those wireless cable operators that took advantage of the so-called "overbuild exception" to the cable/wireless cable cross-ownership restriction between February 8, 1990 and December 4, 1992.

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[1]*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*, FCC 93-332, MM Docket No. 92-264 (rel. July 23, 1993)[hereinafter cited as "*Report and Order*"].

Since it was first adopted, Section 21.912 of the Commission's Rules has generally barred a cable operator from holding a license for, or leasing transmission capacity of, any Multipoint Distribution Service ("MDS") station having a protected service area that overlaps the cable operator's franchise area.[2] However, Section 21.912 has always included an overbuild exception that permitted a cable system franchisee to hold a license for or lease transmission capacity of an MDS station regardless of any overlap where there were two or more cable franchisees serving the franchise area. In recent years, several wireless cable operators have taken advantage of it, securing overbuild cable television franchises for areas overlapping their protected service areas. Generally, these operators continue to rely primarily on wireless transmissions to deliver service to consumers, but wire small areas where restrictions on the installation of antennas, line-of-sight limitations or other factors dictate the use of coaxial cable technology.

Section 11(a) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") provides that no cable operator may hold an MDS license with a protected service area overlapping its cable service area. Finding that the overbuild exception "appears to conflict with the statutory cable/MMDs [*sic*] cross-ownership ban, and Congress did not specifically provide for such an exception," the *Report and Order*

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[2]*Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410, 6417 (1990), *on recon.* 6 FCC Rcd 6764, 6775-76 (1991).

promulgates a revised version of Section 21.912 -- one that eliminates the overbuild exception.[3]

In the petition it is filing concurrently with this motion, WCA is seeking reconsideration of the Commission's decision not to grandfather every situation where parties have relied on the overbuild exception prior to the December 4, 1992 effective date of the 1992 Cable Act. As set forth more fully in WCA's petition for reconsideration, the Commission's failure to grandfather those situations is not only bad public policy, it is fundamentally at odds with Congress' express mandate in Section 613(a) of the Communications Act of 1934 (the "Communications Act"), as amended by Section 11(a) of the 1992 Cable Act.

As is recognized in the *Report and Order*, "Section 613 . . . directs the Commission to waive all cable/MMDS . . . cross-ownership interests existing as of December 4, 1992, the effective date of the 1992 Cable Act."[4] Yet, the Commission has only grandfathered MDS/cable cross-interests existing as of February 8, 1990 in the apparent belief that no MDS/cable cross-interests could lawfully be established after that date.[5] The flaw in the Commission's approach is that it fails to consider those parties that have relied in good faith on the overbuild exception to establish lawful MDS/cable cross-interests after February 8, 1990. Under Section 11(a), those parties clearly are entitled to be grandfathered from the

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[3]*See Report and Order*, at ¶ 107

[4]*Id.* at ¶ 93.

[5]*See id.*

effects of newly adopted Sections 21.912(a)-(c), yet the Commission has, apparently inadvertently, neglected to do so.

Under these circumstances, a stay of the effective date of the new version of Section 21.912 is most appropriate. It is well established that a stay is to be granted where (1) the movant is likely to prevail, (2) there will be irreparable harm if the stay is not granted, (3) the stay would cause little harm to other interested parties, and (4) the stay would serve the public interest.[6] Each of those factors is present here.

First, WCA is certain to prevail on reconsideration; it is only through an apparent oversight that the Commission failed to implement Congress' mandate that all cross-interests lawfully arising prior to December 4, 1992 be grandfathered.

Second, there can be no doubt that irreparable harm will occur if the stay is not granted.[7] Unless a stay is granted, those who relied on the overbuild exception will have to divest their MDS or cable interests prior to the September 7, 1993 effective date of the amendments to Section 21.912. As a practical matter, those who took advantage of the overbuild exception will fact no choice but to abandon either their MDS or cable interests -- the Commission has not even provided sufficient time between the July 23, 1993 release of

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[6]*See, e.g. Washington Area Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 295 F.2d 921 (D.C. Cir. 1958); *Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, FCC 93-361 (rel. July 28, 1993).

[7]Although a showing of irreparable harm is generally believed to be a prerequisite to the issuance of a stay, the Commission has stay new rules pending reconsideration even when irreparable harm has not been shown. *See Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, MM Docket No. 86-406, FCC 87-248 (rel. July 17, 1987).

the *Report and Order* and the September 7, 1993 effective date of the new rules to provide for an orderly disposition of assets. Not only must buyers be located and agreements reached, but the transfer of most MDS or cable interests require Commission and/or local regulatory approval. The seven-week period afforded by the Commission is hardly sufficient to permit asset sales to occur at all, much less in an orderly manner that avoids the irreparable economic harm attendant to "fire sales." The inevitable asset abandonment the Commission has inadvertently forced clearly constitutes irreparable harm.[8]

Third, it is difficult to conceive of a situation in which the stay will cause cognizable harm to any legitimately interested party. The only party that gains by the Commission's failure to grandfather those that took advantage of the overbuild exception is the local cable operator that does not utilize both technologies. However, particularly given the certainty that the Commission will on reconsideration revise Section 21.912(e) to grandfather those that took advantage of the overbuild exception, it cannot be said that cable operators in that position will suffer harm as a result of a stay.

Fourth, and most importantly, the public interest will be served by grant of a stay pending reconsideration. As noted above, absent a stay wireless cable operators that have also secured a cable franchise could be forced to discontinue serving subscribers through one technology or another. Should that occur, consumers will be deprived of a competitive source

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[8]In *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allocated to the Specialized Mobile Radio Pool*, 8 FCC Rcd 3974 (1993), the Commission recently stayed the effective date of new rules pending reconsideration where the new rules would have resulted in licensees forfeiting their authorizations.

of video programming -- a result that the Commission repeatedly has recognized to be inconsistent with the public interest.[9]

In short, a stay of the effective date of the revisions to Sections 21.912(a)-(c) for the benefit of those that took advantage of the overbuild exception prior to December 4, 1992 is warranted by the facts and the law. Indeed, stays pending reconsideration have been granted under circumstances far less compelling that those present here.[10] Therefore, WCA urges the Commission to grant this motion and order such a stay pending resolution of WCA's petition for reconsideration of the *Report and Order*.

Respectfully submitted,

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[9]*See, e.g. Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359 (1993).

[10]*See Amendment of Section 73.202(b)*, 2 FCC Rcd 6132 (1987); *Amendment of Section 73.202(b)*, MM Docket No. 87-289, DA 88-1063 (rel. July 11, 1988); *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, MM Docket No. 86-406, FCC 87-248 (rel. July 17, 1987).