

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

_____)
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

To: The Commission

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its Reply Comments in response to the Further Notice of Proposed Rule Making ("Further Notice") in the above-captioned proceeding.

DISCUSSION

The comments filed in response to the Further Notice confirm and support the fundamental position taken by NCTA throughout this proceeding -- namely that Congress did not intend, and the public interest does not require, the Commission to adopt ownership limits that would reverse or freeze current levels of horizontal and vertical concentration in

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the cable industry.¹ Rather, given the undeniable consumer benefits produced by horizontal and vertical concentration in the industry, and the availability of various statutory avenues for relief in the event such concentration were to produce anticompetitive behavior in particular instances, the proper course for the Commission to follow is to promulgate limits that will serve as safeguards against a significant alteration in existing market patterns, while allowing for moderate increases in horizontal and vertical growth.

In characterizing the record established in this proceeding as supportive of its fundamental position, NCTA acknowledges that a few commenters have urged the Commission to take a more restrictive approach. As discussed below, however, these commenters have failed to produce any evidence to warrant the imposition of stringent structural ownership limits at this time, nor have they given appropriate weight to the fact that Congress has enacted behavioral safeguards (including rules governing program access, must carry, leased access, and carriage agreements) to address anticompetitive abuses arising from vertical or horizontal ownership. Under the circumstances, the Commission should avoid adopting broadly applicable ownership limits that could undo or impede the development of the cable industry.

I. Subscriber Limits

With respect to the adoption of limits on horizontal concentration (i.e., "subscriber limits"), NATOA and MPAA are the only commenters to express support for the Commission's proposal to prohibit any one entity from owning cable systems that in the

¹See generally NCTA Comments in MM Docket No. 92-264 (filed February 9, 1993); NCTA Reply Comments in MM Docket No. 92-264 (filed May 12, 1993); NCTA Further Notice Comments in MM Docket No. 92-264 (filed August 23, 1993).

aggregate reach more than 25 percent of all cable homes passed nationwide.² However, neither NATOA nor MPAA have offered any evidence to support the imposition of such a stringent cap on horizontal concentration. In contrast, the record is replete with evidence based on economic analysis, antitrust precedent, historical experience, and the structure and history of the 1992 Cable Act, all of which indicate that, as NCTA has asserted throughout this proceeding, a subscriber limit on the order of 40 percent will strike an appropriate balance between the benefits and the potential harm of horizontal concentration.³ Indeed, given the record established in this proceeding, and the Commission's own determination that subscriber limits should be set "high enough to preserve the benefits of horizontal concentration, while ensuring that cable operators cannot impede the flow of video programming,"⁴ NCTA submits that adoption of the proposed 25 percent cap would be arbitrary and capricious.

NCTA also submits that, in light of the comments submitted in this proceeding, the Commission should adopt an attribution standard based on actual or working control rather than the broadcast attribution criteria, as proposed.⁵ While MPAA, Cap Cities, and GTE all

²NATOA Further Notice Comments at 14; MPAA Further Notice Comments at 2-3.

³See, e.g., TCI Further Notice Comments at 10-18; Time Warner Further Notice Comments at 6-9; Liberty Media Further Notice Comments at 8-12. See also NCTA Comments at 15-18; NCTA Reply Comments at 4-6; NCTA Further Notice Comments at 6-9.

⁴Further Notice at ¶ 148.

⁵See, e.g., Time Warner Further Notice Comments at 12-13; NCTA Further Notice Comments at 10-11.

endorse the adoption of the broadcast rules,⁶ none of these commenters comes to grip with the fact that the 1992 Cable Act contains several provisions aimed at preventing abuses that might arise from horizontal concentration. In light of these behavioral restrictions, a stringent attribution standard is neither necessary nor appropriate in the context of a structural safeguard such as the subscriber limits provision.

Finally, the Commission should confirm its tentative decision (a) to deduct homes passed by systems subject to "effective competition" from the subscriber limits calculation and (b) to permit waivers of de minimis violations of the subscriber limits or of violations arising from the expansion of service into an unserved rural area.⁷ Although MPAA and NATOA contend that the presence of effective competition is irrelevant to the establishment of national subscriber limits, both NCTA and Time Warner have pointed out that where a system is subject to effective competition -- including competition evidenced by penetration levels below 30 percent -- it is unlikely to possess the market power to restrict the flow of programming to the public.⁸ As for the issue of waivers, both NATOA and MPAA acknowledge that the Commission should consider waivers of de minimis violations, but urge

⁶MPAA Further Notice Comments at 2; Cap Cities Further Notice Comments at 1-2; GTE Further Notice Comments at 4.

⁷Further Notice at ¶¶ 152, 165. The Commission also should confirm its tentative decision to enforce the subscriber limits at the federal level. *Id.* at ¶ 164. As NCTA has previously noted, there is no need, given the availability of publicly available industry ownership information, for an administratively burdensome certification procedure, such as that suggested by MPAA. NCTA Further Notice Comments at 12. See also Time Warner Further Notice Comments at 14.

⁸Compare MPAA Further Notice Comments at 5 and NATOA Further Notice Comments at 14 with NCTA Further Notice Comments at 9-10 and Time Warner Further Notice Comments at 10-11.

that, by rule, such waivers be limited in duration.⁹ NCTA submits that, to maintain maximum flexibility, the Commission should reject suggestions it require that all waivers to be temporary. For example, where the acquisition of a large system results in a de minimis violation of the subscriber limits, the public interest might well be better served by a permanent waiver than by a temporary waiver under which the MSO would be forced to divest some other property to erase the de minimis violation.¹⁰

II. Channel Occupancy Limits

Most commenters support the Commission's proposal to set a limit in the 40 percent range on the number of channels that can be occupied by a video programmer in which the cable operator has an ownership interest (*i.e.*, "channel occupancy limits").¹¹ MPAA alone suggests a lower limit, recommending simultaneously that the proposed 40 percent channel occupancy limit be reduced to 20 percent, and that the vertical integration attribution standard be increased to 15 percent (from the 5 percent level proposed).¹² As NCTA and

⁹NATOA Further Notice Comments at 15; MPAA Further Notice Comments at 6.

¹⁰See also NCTA Further Notice Comments at 12-13.

¹¹See, e.g., Viacom Further Notice Comments at 2; TBS Further Notice Comments at 6; TCI Further Notice Comments at 24-31; NATOA Further Notice Comments at 6.

¹²MPAA Further Notice Comments at 7-9. In support of its proposal, MPAA postulates the existence of hypothetical cable systems that would be able to comply with a 40 percent channel occupancy limit while carrying no (or only a minimal number of) unaffiliated programming networks. Leaving aside the fact that even MPAA's hypothetical cable systems would be required to carry a significant amount of unaffiliated broadcast and PEG programming, it is completely unrealistic to assume that cable operators will carry the maximum permissible number of affiliated networks if, in order to do so, they would have to forego carriage of many of the most popular (and generally available) services. Two of the top three networks (ESPN and USA) are completely unaffiliated with any cable operator; moreover, no operator, under any contemplated attribution standard, has an interest in more than nine of the top 20 networks (including C-SPAN).

others have demonstrated in their comments, however, the most appropriate outcome in this proceeding is for the Commission both to affirm the 40 percent channel occupancy limit and to raise the attribution standard.¹³

Most commenters also agree that the Commission should exempt systems that are subject to effective competition from the channel occupancy limits; that existing vertical relationships exceeding the channel occupancy limits should be grandfathered; and that the channel occupancy limits should be enforced at the federal level.¹⁴ To the extent that these positions are opposed (principally by NATOA), the arguments presented are without merit. For example, NATOA contends that had Congress intended for the Commission to exempt competitive systems from the channel occupancy limits or to grandfather existing vertically integrated relationships, it would have stated this intent explicitly.¹⁵ This argument simply ignores the fact that, both in the legislative history of the 1992 Cable Act and in the Act itself, Congress made clear that, in establishing the reasonable limits on ownership required by Section 11, the Commission has the discretion to weigh public interest considerations, including concerns about impeding the development of programming and disrupting existing

¹³NCTA Further Notice Comments at 17-21. See also Liberty Media Further Notice Comments at 17; Time Warner Further Notice Comments at 32. As NCTA has previously indicated, adoption of the broadcast attribution criteria as proposed by the Commission will unduly restrict cable operator investment in new programming services. NCTA continues to support the adoption of an attribution standard based on working or actual control. In the alternative, NCTA believes a higher attribution standard should be applied when more than one operator holds an interest in a programmer.

¹⁴See, e.g., Viacom Further Notice Comments at 9-10; TBS Further Notice Comments at 7 (effective competition); TCI Further Notice Comments at 34-36; Discovery Further Notice Comments at 6 (grandfathering); Time Warner Further Notice Comments at 38-39; NCTA Further Notice Comments at 25 (enforcement).

¹⁵NATOA Further Notice Comments at 12-13.

market relationships.¹⁶ Similarly, NATOA undermines its insistence that the channel occupancy limits be enforced at the local rather than federal level by acknowledging that not all local franchising authorities are capable of enforcing the channel occupancy provisions.¹⁷ Dividing (or sharing) enforcement responsibility, as proposed by NATOA, would lead to precisely the administrative burdens and inconsistent decisions that a federally administered, complaint-based enforcement approach will avoid.¹⁸

Finally, and most significantly, most of the commenters recognize the need for the Commission to exempt certain categories of services from the channel occupancy limits and/or to establish a ceiling on the channel capacity to which such limits apply. Indeed, the comments present a compelling case for the adoption of exemptions for certain categories of channels and a cap on the channel capacity subject to occupancy limits, demonstrating not only that channel capacity growth will eliminate the concerns underlying the occupancy limits, but also that the unnecessary imposition of such limits will slow the deployment of the advanced technologies that will make channel capacity growth possible.

¹⁶S. Rep. No. 92, 102d Cong., 1st Sess. 80 (1991); 47 U.S.C. § 533(f)(2)(C), (G).

¹⁷NATOA Further Notice Comments at 4-6. CBA, which also supports local enforcement, fails to offer any support for its position. CBA Further Notice Comments at 1.

¹⁸MPAA supports federal enforcement, but suggests that the Commission should establish an annual certification procedure rather than relying on a complaint-driven approach. MPAA Further Notice Comments at 10-11. As NCTA has indicated, complaint-based enforcement will allow operators to utilize channels that might otherwise be left vacant. NCTA Further Notice Comments at 26. MPAA's approach imposes unnecessary administrative burdens that could frustrate this goal. For similar reasons, NCTA opposes as unnecessarily burdensome the certification approach proposed by NATOA with regard to the use by a vertically integrated programmer of channel capacity that would otherwise go unused. See NATOA Further Notice Comments at 8-9.

More specifically, the record in this proceeding establishes that the Commission not only should adhere to its proposal to apply the channel occupancy limits only to nationally-distributed video programming services, but also should adopt exemptions for pay-per-view services and new video programming services.¹⁹ While MPAA and NATOA oppose these exemptions, their arguments fail to take into account the availability of other statutory provisions aimed at promoting diversity and protecting against anticompetitive behavior.²⁰ They also fail to consider the existence of express statutory policies supporting the development of new services in general and locally-originated services in particular.²¹

Furthermore, as noted, the comments demonstrate that the public interest would best be served by the adoption of a cap on the channel capacity to which the channel occupancy limits apply. Opposition to the imposition of such a cap on the grounds that it would be

¹⁹See, e.g., TBS Further Notice Comments at 7; ARC Further Notice Comments at 1-9 (exemption for local/regional services); Viewer's Choice Further Notice Comments at 6-9; NCTA Further Notice Comments at 22-23 (pay-per-view); Rainbow Further Notice Comments at 6-9; E! Further Notice Comments at 4-6 (new services).

There also appears to be widespread support for a minority programming source exemption. NCTA originally endorsed the use of the definition of "qualified minority programming source" in 47 U.S.C. § 532(i)(2) for the purpose of such an exemption. However, as TBS and BET have pointed out, the goals of promoting diversity and minority ownership would be better served by a test that covers services that are either minority-oriented or minority-controlled. TBS Further Notice Comments at 6-7; BET Further Notice Comments at 4.

²⁰MPAA Further Notice Comments at 9-10; NATOA Further Notice Comments at 6, 9.

²¹As an alternative to a new programming service exemption, the Commission may wish to consider an exemption for widely-distributed programming services. See Viacom Further Notice Comments at 5-7; Time Warner Further Notice Comments at 34-36. In any event, it also should be noted that there is widespread agreement that the Commission cannot and should not apply the channel occupancy limits to non-video programming services. See, NCTA Further Notice Comments at 15; GTE Further Notice Comments at 8; Liberty Media Further Notice Comments at 16-17.

premature are wholly unfounded.²² The technology required to provide cable operators with vastly expanded channel capacity exists today; however, the deployment of such technology likely will be impeded if the uses to which the new capacity can be put are unnecessarily restricted. As for the specific approach to be followed in setting a ceiling on the number of channels to which the occupancy limits apply, NCTA supports the bandwidth-based proposals put forward by Time Warner and TCI, although we continue to believe that there is ample statutory precedent for the adoption of a simple 36 channel cap.²³

²²See MPAA Further Notice Comments at 9; CBA Further Notice Comments at 3. NATOA flatly opposes the imposition of a cap. NATOA Further Notice Comments at 11. This position, along with NATOA's opposition to the inclusion of PEG and broadcast channels in the channel occupancy calculation, *id.* at 7, is yet another example of NATOA's refusal to recognize the Commission's obligation to adopt ownership restrictions that take into account the benefits of vertical and horizontal concentration in the cable industry.

²³See TCI Further Notice Comments at 36-50; Time Warner Further Notice Comments at 23-25. See also NCTA Comments at 33 (citing leased access and non-commercial must-carry rules).

CONCLUSION

The record compiled during four rounds of comments in this proceeding plainly establishes that the public interest will best be served by the adoption of channel occupancy and subscriber limits that continue to allow a moderate level of horizontal and vertical growth in the cable industry. NCTA has offered (and endorsed) a number of proposals designed to achieve this objective. The Commission is respectfully urged to adopt final rules in this proceeding consistent with these proposals.

Respectfully submitted,

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