DOCKET FILE COPY ORIGINAL

RECEIVED

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	)	

PETITION FOR RECONSIDERATION

Time Warner Entertainment Company, L.P. (Time Warner"), by its attorneys and pursuant to Section 1.106 of the FCC rules, herein petitions the Commission to reconsider in part its Report and Order and Further Notice of Proposed Rule Making in the above-captioned proceeding ("Report and Order").[1] Time Warner respectfully seeks reconsideration of certain conclusions adopted with respect to cable television/SMATV cross-ownership.

Time Warner is a partnership, which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., and comprised principally of three unincorporated divisions: Time Warner Cable, which operates cable systems; Home Box Office, which

[1]FCC 93-332, released July 23, 1993.

No. of Copies rec'd 0+4
List ABCDE

operates pay television programming services; and Warner Bros., which produces and distributes motion pictures and television programs.

Time Warner is the plaintiff in a lawsuit pending in Federal District Court in Washington, D.C., in which it takes the position, inter alia, that Section 11 and other provisions of the Cable Television Consumer Protection and Competition Act of 1992[2] violate its rights under the First Amendment to the United States Constitution.[3] Time Warner has participated in this rule making without prejudice to its claims and arguments in that lawsuit.

The 1992 Cable Act makes it unlawful for a cable operator "to offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system."[4] Time Warner's comments in this proceeding[5] urged the Commission not to interpret the statute in an overly broad manner, so as to prohibit franchised cable operators from choosing for reasons of cost and efficiency to serve their customers through facilities that could technically be defined as SMATV systems.

The Commission's Report and Order concluded that Congress did not intend to allow cable operators to acquire existing SMATV facilities within their service areas for the

---

[2]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act").

[3]See Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494 (D.D.C. filed November 5, 1992).

[4]47 U.S.C. § 533(a)(2) (1993).

[5]See Comments of Time Warner, filed February 9, 1993, and Reply Comments of Time Warner, filed March 3, 1993.

purpose of providing cable service. The Commission believed that this result served Congressional objectives of promoting competition and encouraging diverse programming sources. "Separate" SMATV operators were defined as providers of SMATV service within the cable operator's service area, which were not owned, operated or controlled by, or under common control with the cable operator as of the effective date of the 1992 Act. The Commission also adopted a strict attribution standard.[6]

The Commission's flat ban on SMATV acquisitions misconstrues the statute, which prohibits cable operators only from offering "satellite master antenna service" which is "separate and apart" from franchised cable service. Although the 1992 Cable Act provides no definition of SMATV service, Section 602(7) of the Communications Act (as amended by the Cable Communications Policy Act of 1984) defines SMATV as "a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public rights-of-way."[7] Once a cable operator physically interconnects a cable system facility with an existing SMATV facility, however, by a hardwire or non-hardwire means, the SMATV operation can no longer be considered "separate and apart" from the cable system and the cross-ownership prohibition should not apply.

Thus, past Commission decisions have repeatedly held that interconnected systems which are comprised of a cable system portion and an SMATV portion, are subject to regulation as cable systems in their entirety. In one such decision, for example, the

---

[6]Report and Order at ¶¶ 122-124.

[7]47 U.S.C. § 522(7) (emphasis added).

Commission held that a system interconnecting by hardwire single family homes and multiple dwelling units was a cable system under Section 602(6)(B), although the facilities were located entirely on private property.[8] Longstanding Commission precedent refused to extend unregulated SMATV status to facilities which serve single family homes.[9] Accordingly, once an SMATV system is interconnected in any fashion with a facility that crosses public rights-of-way or which serves single family homes, the entire facility must be considered a single cable system.

Time Warner submits that even where cable and SMATV facilities are interconnected via non-hardwire means, such as infrared or microwave, the fact that subscribers to the cable system portion of the interconnection are served via closed transmission paths renders the entire facility a cable system. Time Warner's Comments recognized that there may be situations where it is unclear whether cable and SMATV facilities that are interconnected by such non-hardwire means are to be considered a single technically integrated system. Accordingly, Time Warner proposed that the Commission consider a cable system and an interconnected SMATV facility to be one single system where the SMATV facility receives at least 75 percent of its programming from the cable system via microwave or other non-hardwire means.

---

[8]Massachusetts Community Antenna Television Commission, 64 RR 2d 173, 174 (1987).

[9]See Bayhead Mobile Home Park, 47 FCC 2d 763 (1974); Pacific Western Mobile Estates, Inc., 49 FCC 2d 269 (1974); Citizens Development Corporation, 52 FCC 2d 1135 (1975); Sanwick Cablevision, Inc., 48 FCC 2d 563 (1974); Big Canoe Television Systems, 47 FCC 2d 449 (1974); and Leacom, Inc., 31 RR 2d 156 (1974).

While the Report and Order initially concluded that a ban on SMATV acquisitions was required by the Congressional objectives underlying the Cable Act, the legislative history makes clear that the cross-ownership prohibition was not intended to be applied blindly but with a careful eye toward balancing competing policy interests:

> [A] policy that only focuses on diversity and restricts the ownership of other outlets may ignore important economies of scale or scope, also raising prices and limiting offerings. Thus, the overall objective in reviewing media ownership is to strive for diversity while balancing genuine and significant efficiencies.[10]

There is also no logical reason to distinguish between the acquisition of existing SMATV systems in those portions of a cable operator's franchise area actually served by the operator's facilities, which is banned by the Commission's rule, and the acquisition of existing SMATV systems in areas of the franchise which have not yet been wired, which is permitted provided that such SMATV system is then operated in accordance with franchise requirements. Where a cable operator is excluded from a building in favor of a SMATV system there is no head to head competition between them, just as where a building is located outside the wired area.

Accordingly, the ban on acquisitions adopted by the Report and Order is unsupported by either the statute or the overall Congressional objectives underlying it. Time Warner respectfully submits that on reconsideration, the Commission should permit cable operators to acquire SMATV facilities within their service areas on the condition that they be interconnected within a reasonable time period.

---

[10]S. Rep. No. 92, 102d Cong., 1st Sess. 46 (1991); S. Rep. No. 381, 101st Cong., 2d Sess. 40 (1990).

Finally, Time Warner submits that the Commission should permit cable operators to consummate any transaction to acquire SMATV systems within their service areas if the acquisition had been agreed to prior to the effective date of the 1992 Cable Act. It would be unfair to grandfather transactions which were consummated at a certain date, but not those pending at the same time.

Respectfully submitted,

TIME WARNER ENTERTAINMENT
COMPANY, L.P.

By: _____
Aaron I. Fleischman
Arthur H. Harding
Christopher G. Wood

Fleischman and Walsh
1400 Sixteenth Street, N.W.
Sixth Floor
Washington, D.C. 20036

Its Attorneys

Dated: September 7, 1993
9750