

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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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)

MM Docket No. 92-264

To: The Commission

**OPPOSITION OF THE NATIONAL
CABLE TELEVISION ASSOCIATION, INC.**

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SUMMARY

In seeking reconsideration of the subscriber limits adopted by the Commission, the Center For Media Education ("CME") and the Consumer Federation of America ("CFA") contend that the Commission: (1) should not have set those limits to avoid divestiture of cable systems; (2) should "clarify that customers served by a telephone company that is affiliated with a cable company should be included in the horizontal limits"; (3) gave "insufficient consideration to the diversity concern" expressed by Congress; and (4) failed "to acknowledge that existing levels of horizontal concentration are too high." They conclude that subscriber limits in the 10-20% range should be adopted.

CME/CFA also seek reconsideration of the 40% channel occupancy limits adopted by the Commission, suggesting instead that the Commission (1) establish a 20% limit; (2) subtract PEG, broadcast and leased access channels when calculating system capacity; (3) count affiliated local and regional networks toward the limit; (4) remove the 75 channel capacity threshold beyond which the occupancy limits do not apply; and (5) decline to grandfather existing vertical relationships.

The CME/CFA Petition must be dismissed for a number of reasons. First, virtually all of its arguments have already been addressed in the Commission's rulemaking proceeding which included two rounds of comments and reply comments. Over 40 parties -- including CFA -- participated in that proceeding. The CME/CFA Petition raises issues already fully considered by the

Commission. In addition, with respect to each of the issues raised by CME/CFA, the Petition presents a one-sided view of the context in which the Commission adopted its cable ownership limits. It completely ignores the fact that Congress directed the Commission to consider and balance a number of public interest objectives in establishing horizontal and vertical ownership limits, including directives to take into account "any efficiencies and other benefits that might be gained through increased ownership or control" and "impose no limitations that will impair the development of diverse and high quality programming." 47 U.S.C. Section 533(f)(2)(D) and (G). Because they ignore statutory dictates and give short shrift to both legislative history recognizing the benefits of horizontal and vertical cable ownership as well as similar conclusions previously reached by NTIA and the Commission (in its 1990 Cable Report), the Petition's conclusions simply cannot be credited.

The only issue raised in the Petition which had not been fully addressed previously is the request that the Commission "clarify that customers served by a telephone company that is affiliated with a cable company should be included in the horizontal limits." However, the 1992 Cable Act directs the Commission to establish "reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such persons." It does not contemplate inclusion of telephone subscribers regardless of the degree of affiliation between their telephone company and a cable company.

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**OPPOSITION OF THE NATIONAL
CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA"), pursuant to Section 1.429(f) of the Commission's Rules, hereby submits its Opposition to the "Petition For Reconsideration" ("Petition") filed on December 15, 1993, by The Center For Media Education ("CME") and the Consumer Federation of America ("CFA") in the above-captioned proceeding.

I. INTRODUCTION

The CME/CFA Petition seeks reconsideration of a number of matters decided by the Commission in its rulemaking on horizontal and vertical ownership limits for cable operators.¹ In particular, CME/CFA take issue with the Commission's decisions:

- (1) to establish a 30% limit on the number of homes passed nationwide that any one entity can reach

1 Second Report and Order in 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, FCC 93-456 (rel. Oct. 22, 1993) ("Second Report").

through cable systems in which such entity has an attributable interest ("subscriber limits");

- (2) to adopt a 40% limit on the number of channels that can be occupied on a vertically integrated cable system by video programmers in which the cable operator has an attributable interest ("channel occupancy limits");
- (3) to employ, for measuring both subscriber and channel occupancy limits, the Commission's broadcast attribution standards;
- (4) to include public, educational and governmental ("PEG") channels, as well as leased access and must carry channels, when calculating system capacity for purposes of the channel occupancy limits; and
- (5) to apply the channel occupancy limits only to the first 75 channels on a particular cable system and to grandfather existing carriage arrangements.

At the outset, two significant facts must be noted. First, the Second Report was the result of a lengthy and well-considered FCC rulemaking process. Following the initial Notice of Proposed Rulemaking and Notice of Inquiry² in this proceeding, extensive comments and reply comments were received from over 40 interested parties. After evaluating those submissions, the Commission requested additional comments on specific proposals regarding subscriber limits and channel occupancy limits.³ It was only after receiving and carefully considering that second round of

2 Notice of Proposed Rulemaking and Notice of Inquiry, 8 FCC Rcd. 210 (1992) ("Notice").

3 Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-264, FCC 93-332 (rel. July 23, 1993) ("Further Notice").

comments and reply comments that the Second Report, now challenged by CME/CFA, was adopted. As is evident, the Commission has examined all significant issues regarding horizontal and vertical ownership in response to four sets of pleadings. The CME/CFA Petition adds nothing of substance to the record already established in this proceeding.

In fact, virtually all of the issues raised by CME/CFA have already been thoroughly considered by the Commission.⁴ While NCTA disagrees with some of the decisions reached by the Commission in this proceeding (particularly with respect to the attribution standard adopted), there is no question that all sides of the relevant issues have been presented and fully ventilated. It is well-settled that a petition for reconsideration may not be used to raise issues already fully considered by the Commission.⁵ For this reason alone, the CME/CFA Petition should be dismissed. In any event, as NCTA

4 CFA itself filed comments in response to the Notice and reply comments in response to the Further Notice. See Second Report and Order at Appendix A and B. In those filings, CFA raised essentially the same arguments now raised in the CME/CFA Petition. See e.g., Reply Comments, filed by CFA on September 3, 1993 at 2-4 (subscriber limits); 4-5 (attribution standards); 5-7 (channel occupancy limits).

5 See, e.g., WWIZ, Inc., 37 F.C.C. 685, 686 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966).

previously demonstrated⁶ and does so again herein, the CME/CFA arguments are without merit.

The second significant fact to bear in mind is CME/CFA's one-sided presentation of the context in which the Commission's decision was adopted. The Petition completely ignores the fact that "Congress directed the Commission to consider and balance" a number of public interest objectives in establishing horizontal and vertical ownership limits. This task comprised directives "to take into account any efficiencies and other benefits that might be gained through increased ownership or control" and "to impose no limitations that will impair the development of diverse and high quality programming."⁷

Because the CME/CFA Petition ignores these statutory dictates and gives short shrift to unambiguous legislative history

6 Because most of the CME/CFA arguments have been addressed in the NCTA pleadings previously filed in this Docket, NCTA incorporates by reference those pleadings and will only briefly discuss in this Opposition the issues raised in the Petition. See Comments of the National Cable Television Association, Inc., filed February 9, 1993 ("NCTA Comments"); Reply Comments of the National Cable Television Association, Inc., filed May 12, 1993 ("NCTA Reply Comments"); Comments of the National Cable Television Association, Inc., filed August 23, 1993 ("NCTA Further Notice Comments"); Reply Comments of the National Cable Television Association, Inc., filed September 3, 1993 ("NCTA Further Notice Reply Comments").

7 Second Report at para. 8, citing, 47 U.S.C. Section 533(f)(2) (D) and (G).

recognizing the benefits of horizontal and vertical cable ownership as well as similar conclusions previously reached by NTIA and the Commission (in its 1990 Cable Report),⁸ the Petitioner's arguments simply cannot be credited. In fact, NCTA has demonstrated that, in light of all of the considerations which Congress directed the Commission to consider, subscriber limits higher than the 30% limit ultimately adopted by the Commission were warranted. Further, in calculating subscriber limits, an attribution standard based on actual or working control, not the 5% (broadcast) standard eventually adopted, was appropriate.⁹ Similarly, while observing that a 40% channel occupancy limit might be appropriate, NCTA indicated support for such a limit only if the Commission changed its proposed 5% vertical integration attribution standard to one based on actual or working control,¹⁰ which it declined to do.

Despite its refusal to adopt the ownership proposals advanced by NCTA, the Commission appeared to recognize -- as NCTA had urged -- that Congress did not intend that the Commission adopt ownership limits that would reverse or freeze current

8 Report in MM Docket No. 89-600, 5 FCC Rcd. 4962 (1990).

9 See NCTA Comments at 13-23; NCTA Reply Comments at 4-6; NCTA Further Notice Comments at 3-13; NCTA Further Notice Reply Comments at 2-5.

10 See NCTA Comments at 23-36; NCTA Reply Comments at 6-11; NCTA Further Notice Comments at 3-13; NCTA Further Notice Reply Comments at 5-9.

levels of horizontal and vertical ownership in the cable industry. See, e.g., Second Report at paras. 27, 45, 94. The Commission also acknowledged that, contemporaneously with enacting the horizontal and vertical ownership provisions of the 1992 Cable Act, Congress had mandated other requirements (including rules governing program access, must carry, leased access, and carriage agreements) which also could ameliorate any anticompetitive abuses arising from horizontal and vertical ownership. See e.g. id. at paras. 26, 70. Against this background -- totally ignored by CME/CFA -- the Commission adopted the limits now challenged in the Petition.

NCTA continues to believe that the subscriber and channel occupancy limits (in conjunction with the strict attribution standard) adopted by the Commission are significantly more burdensome than required by Congress or justified by the record in this proceeding. But there is no question that the draconian proposals advanced by CME/CFA in their Petition are wholly unwarranted and unjustified. Even were those proposals not repetitive of matters already considered and settled in this proceeding, they should be rejected as being without merit.¹

II. SUBSCRIBER LIMITS

In seeking reconsideration of the subscriber limits adopted by the Commission, CME/CFA contend that the Commission (1) should not have set those limits to avoid divestiture of cable systems; (2) should "clarify that customers served by a telephone company that is affiliated with a cable company should be included in the

horizontal limits"; (3) gave "insufficient consideration to the diversity concern" expressed by Congress,¹¹ and (4) failed "to acknowledge that existing levels of horizontal concentration are too high." CME/CFA conclude that subscriber limits in the 10-20% range should be adopted.

In particular, CME/CFA take issue with the Commission's statement that "Congress did not intend necessarily to require the divestiture of any existing interest" (Pet. at 5, citing, Second Report at para. 27), calling it "not a sound reason on which to base a policy judgement [sic]." But, as the Commission correctly observed, Congress directed the Commission to "take particular account of the market structure, ownership patterns and other relationships in the cable television industry in establishing such [ownership] limits." Second Report at para. 94, citing, 47 U.S.C. Section 533(f)(2)(c). And, as the Senate Report stated: "The legislation does not imply that any existing company must be divested and gives the FCC flexibility to determine what limits are reasonable."¹²

11 In light of the fact that the Commission's statutory authority to adopt horizontal ownership limits has been held unconstitutional as a violation of the First Amendment, the CME/CFA argument (at 3-4) that the Commission's Rules do not promote "First Amendment diversity" is particularly ironic and unwarranted. See Daniels Cablevision v. United States, No. 92-2292 (D.D.C. released September 6, 1993).

12 Senate Report at 34 (emphasis added).

To the extent the Commission in this proceeding considered potential disruption to existing ownership patterns and the resulting subscriber confusion that might attend a limit requiring divestiture, the Commission appropriately exercised the discretion accorded it by Congress. It did so by determining that "in the absence of definitive evidence that existing levels of ownership are sufficient to impede the entry of new video programmers or have an adverse effect on diversity, existing arrangements should not be disrupted." Id. at para. 27. Contrary to the Petition's claim, such considerations are indeed "sound reasons" upon which to base policy judgments.

In any event, CME/CFA are simply wrong in suggesting that avoidance of divestiture was the driving force behind the subscriber limits ultimately adopted by the Commission. As is clear from the decision itself, the Commission considered "a number of factors" in proposing, as well as adopting, subscriber limits. Id. In sum, CME/CFA quarrel with the Commission's exercise of the discretion vested in it by Congress in determining appropriate subscriber limits, but advance no sound reason to reverse the Commission's conclusions in that regard.¹³

13 CME/CFA also take issue with what they view as the Commission's insufficient consideration of First Amendment "diversity concerns." Pet. at 3. But, in fact, CME/CFA themselves give insufficient consideration to the Commission's reasoned conclusion that subscriber limits are only one means to address diversity concerns. Indeed, the Commission correctly cited the "cumulative effect" of its regulations, including its behavioral regulations adopted pursuant to Sections 12 and 19 of the Cable Act, as well as must carry and
(Footnote continues on next page)

CME/CFA (at 11-13) also urge the Commission to "clarify that customers served by a telephone company that is affiliated with a cable company should be included in the horizontal limits." But there is no basis for applying these limitations to a telephone company's cable ownership interests beyond where the telephone company also provides video services directly to subscribers. Moreover, to the extent CME/CFA are asking the Commission to include such a telephone company's telephone subscribers in the calculation of "homes passed" by the affiliated cable company, there is no basis in the statute for doing so.

The 1992 Cable Act directs the Commission to establish "reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such persons."¹⁴ Telephone subscribers are not "cable subscribers" regardless of the degree of affiliation between their telephone company and a cable company. At such time as an affiliated telephone company offers cable service, the Commission may determine how to account for the potential cable subscribers the

(Footnote continued)

leased access requirements, as addressing such concerns. Second Report at para. 26. Moreover, as noted above, the Commission's statutory authority to adopt any subscriber limits has been held unconstitutional based on the very First Amendment considerations CME/CFA cite in support of adoption of more stringent ownership limits. See n.11 supra.

14 47 U.S.C. Section 533(f)(A)(emphasis added).

telephone company could reach in calculating its cable affiliate's subscriber limits.¹⁵

But that calculation would not be the end of the matter. Under the CME/CFA theory all telephone subscribers are "potential" cable subscribers. If a telephone company's telephone subscribers must be included in calculating cable subscriber limits for an affiliated cable company, then all telephone subscribers nationwide must be counted in determining the total number of potential "cable subscribers" nationwide (i.e. the denominator) used to calculate each cable company's subscriber limit percentage. This would reduce dramatically the percentage concentration levels attributable to even the largest cable companies. Nevertheless, it is the logical outgrowth of the CME/CFA position that all telephone subscribers are potential cable service subscribers and demonstrates the absurdity of that position.

III. CHANNEL OCCUPANCY LIMITS

CME/CFA seek reconsideration of the 40% channel occupancy limits adopted by the Commission, suggesting instead that the

15 The Commission has held that telephone company provision of video dialtone service is not "cable service" and video dialtone systems are not "cable systems." Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd. 5069, 5071-72 (1992), appeal pending sub nom. National Cable Television Ass'n, Inc. et al. v. FCC, Case No. 91-1649 (D.C. Cir.). Under those rulings, read in light of the statutory mandate, a telephone company's actual or potential video dialtone customers would not be included in any calculation of cable subscriber limits.

Commission (1) establish a 20% limit; (2) subtract PEG, broadcast and leased access channels when calculating system capacity; (3) count affiliated local and regional networks toward the limit; (4) remove the 75 channel capacity threshold beyond which the occupancy limits do not apply; and (5) decline to grandfather existing vertical relationships. Each of these issues was fully briefed, considered and addressed in this proceeding. CME/CFA have added nothing new to the arguments already rejected by the Commission on these matters. For this reason alone, the Petition should be dismissed. WWIZ, Inc., supra.

CME/CFA contend that "a 40% limit will fail to prevent MSOs from discriminating against unaffiliated programmers as Congress intended."¹⁶ In support of this naked conclusion, however, they merely assert that the "Commission has overestimated the beneficial effects of vertical integration" and that "[c]able affiliation has become a prerequisite to secure or to retain access to cable systems." Aside from repeating arguments already addressed by the Commission, CME/CFA offer no significant evidence to support their bald assertions. The conclusory statements in the

16 Pet. at 20. CME/CFA also assert that the Commission "ignored evidence provided by the Motion Picture Association of America ('MPAA') that a 40% limit could result in instances where no channels are available to unaffiliated programmers." Id. at 15. Far from ignoring the MPAA contention, as even CME/CFA concede, the Commission addressed the MPAA claim and found it wanting. CME/CFA are simply dissatisfied with the FCC's reasonable answer to the MPAA contention. See Second Report at n.88.

CME/CFA Petition provide no basis for reconsideration of the Commission's channel occupancy limits decision.¹⁷

In adopting its channel occupancy limits the Commission correctly decided that cable carriage of leased access, PEG and must carry channels should be included in calculating channel capacity. It observed that carriage of such channels addressed the very concerns about diversity that Congress had with vertical concentration. In so doing, the Commission also noted that "there is precedent for including all channels in the calculation for channel capacity in the must carry and leased access provisions of the Communications Act which take into account all activated channels in determining a cable operator's carriage obligations." Second Report at para. 54.

The CME/CFA contention (at 17) that PEG, must carry and leased access channels should not be counted when calculating channel capacity ignores the fact that cable operators are obligated to carry or to reserve capacity for such channels. It would be unreasonable, as the Commission recognized, "to use such channels to reduce the base of channels available for carriage of vertically integrated programming." Id. And excluding such

17 In a footnote, CME/CFA take issue with the Commission's decision not to include local and regional networks as affiliated channels. Pet. at n.10. Contrary to the CME/CFA contention, the Commission's decision on this issue was well-reasoned, particularly in recognizing that exempting local and regional networks would encourage MSO investment in the development of often costly local cable programming which serves the public interest and Congressional objectives. Second Report at para. 78.

channels would penalize those operators who offer a wide array of broadcast and access services by limiting their options in programming their remaining channels.¹⁸

Moreover, as the Commission observed, carriage of such channels "promotes diversity and provides alternate sources of unaffiliated programming to cable subscribers" -- the very goals Congress sought to achieve in mandating adoption of channel occupancy limits. Id. Therefore, CME/CFA's argument that must carry channels are only available to local broadcast stations (and may have been adopted for reasons aside from strict concerns with diversity), and that "PEG channels are available only to governmental institutions, educational organizations and members of the public" (Pet. at 18), is unavailing. The simple fact is that the mandated carriage of those -- as well as leased access -- channels by entities unaffiliated with the cable operator contributes to the goals of the vertical ownership provisions.¹⁹ Arguments to the contrary, identical to those raised in the CME/CFA Petition, were considered and rejected by the Commission; reconsideration of this issue is not warranted.

18 Id. See also NCTA Further Notice Comments at 15.

19 The CME/CFA reference (at 18) to the Senate Report's "suggestion" that PEG, must carry and leased access provisions should be excluded from the channel capacity calculus ignores the fact that the statute requires no such calculation. The Commission was not compelled to adopt what even the Petition concedes was merely a "suggestion" not reflected in the legislation ultimately adopted. See Second Report at para. 54.

The Commission decided to apply its channel occupancy limits only to the first 75 channels on a particular cable system. Second Report at para. 84. CME/CFA (at 20) take issue with this decision, arguing "consumers will not see increased diversity of sources unless channel occupancy limits are applied to all channels." Because this issue too was thoroughly considered by the Commission, reconsideration is not warranted. In any event, the Commission's decision was based on the view that 75 channels "appears to be a reasonable cutoff for application of the channel occupancy limits" because 75 channels are the limit of channels distributed using traditional technology. To adopt a higher cap, it concluded, might stifle development in cable technology. Id. While NCTA argued for a lower cap on channel occupancy limits, the Commission's decision can hardly be faulted for failing to adopt a higher threshold which could have significantly impaired the development of cable technology.

Moreover, CME/CFA (at 21) admit that, if the need arises, "the Commission could revisit the need for limits [on additional channels] in the future." In fact, the Commission emphasized that its 75-channel cap is "subject to periodic review ... and will be eliminated if developments warrant." Id. Under these circumstances, reconsideration of the Commission's decision to apply its channel occupancy limits only to the maximum number of channels distributed using traditional cable technology is not warranted.

CME/CFA also take issue with the decision to grandfather existing carriage of vertically integrated programming beyond the

new channel occupancy limits. The Petition (at 21) questions the Commission's ability to make that decision in the absence of evidence of the number of systems which might exceed the limits. But the Commission was well within its discretion in determining that grandfathering was appropriate to avoid potential disruption to the industry (and subsequent subscriber confusion) that might result from application of its new rules to existing ownership arrangements. That decision plainly "reflects a rational weighing of competing policies" and should not be reconsidered. See FCC v. National Citizens Committee For Broadcasting, 436 U.S. 775, 803 (1978). It hardly "rendered impotent [the FCC's] regulations and Congress' intent," as the Petition asserts.

Finally, CME/CFA contends (at 22) that the attribution standards adopted by the Commission are "too liberal and do not reflect the reality that influence is just as harmful as control." In fact, as NCTA has shown, the attribution standard adopted by the Commission is much too strict, and will bring within its sway relationships where no influence of the type which concerned Congress can be exerted.²⁰ Because the Commission's broadcast attribution standards are so strict, they include a number of exceptions to mitigate the adverse impact application of the standards can have in circumstances where attribution is unwarranted and unnecessary. The single majority

²⁰ See NCTA Comments at 19-21, 28-29; NCTA Reply Comments at n.17; NCTA Further Notice Comments at 10-11; NCTA Further Notice Reply Comments at 5-6.

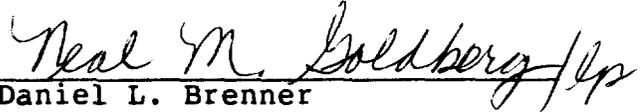
shareholder exception included in the standard adopted in this proceeding is one such exception. CME/CFA seek reconsideration of the Commission's decision to include the single majority shareholder exception in the cable ownership attribution standard but they offer no reasons -- beyond those already considered by the Commission -- for eliminating the exception.

The issue which the Commission addressed in adopting cable ownership attribution standards was the ability to influence in a meaningful way the programming decisions of the cable operator. The single majority shareholder exception recognizes that, in circumstances to which the exception applies, the influence of the non-majority shareholder(s) is significantly attenuated and attribution is not required. The Commission's decision to adopt the exception in conjunction with adopting the strict broadcast attribution standard was well-grounded in fact and precedent and reconsideration is not warranted.

CONCLUSION

For the reasons stated above, the CME/CFA Petition should be denied.

Respectfully submitted,


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February 14, 1994

CERTIFICATE OF SERVICE

I, Tonya K. Bartley, hereby certify that, on this 14th day of February, 1994, I have served a copy of the foregoing "Opposition of the National Cable Television Association, Inc." by first-class U.S. mail, postage prepaid, upon:

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