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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

FCC 95-21

In the Matter of )  
)  
Implementation of Sections 11 )  
and 13 of the Cable Television )  
Consumer Protection and ) MM Docket No. 92-264  
Competition Act of 1992 )  
)  
Horizontal and Vertical Ownership )  
Limits, Cross-Ownership Limitations )  
and Anti-Trafficking Provisions )

**MEMORANDUM OPINION AND ORDER  
ON RECONSIDERATION OF  
THE FIRST REPORT AND ORDER**

Adopted: January 12, 1995

Released: January 30, 1995

By the Commission:

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## I. INTRODUCTION

1. In the *Report and Order and Further Notice of Proposed Rule Making*<sup>1</sup> in this proceeding (the "*First Report & Order*"), we adopted rules implementing the cross-ownership and anti-trafficking provisions of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").<sup>2</sup> We address herein petitions for reconsideration of that *First Report & Order*.<sup>3</sup>

2. In the *First Report & Order*, we adopted a rule that prohibited cable system operators from acquiring satellite master antenna television ("SMATV") systems within their actual service areas.<sup>4</sup> On reconsideration, we find that such a prohibition is inconsistent with the statutory provision upon which it was based. Consequently, we herein revise that part of our rules that governs cable operators' ownership of SMATV systems within their franchise areas. We believe our analysis in this order on reconsideration, and our determination to revise the ownership rules we adopted in June of 1993, more accurately reflect the intent of Congress and comport with the meaning of Section 613(a)(2) of the Communications Act of 1934, as amended by the 1992 Cable Act (the "Communications Act").<sup>5</sup>

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<sup>1</sup> *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits, Cross-Ownership Limitations & Anti-Trafficking Provisions), Report & Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 6828 (1993) (MM Docket No. 92-264).

<sup>2</sup> Pub. L. No. 102-385, secs. 11, 13, 106 Stat. 1460, 1486-89 ("1992 Cable Act").

<sup>3</sup> Also pending before us are petitions for reconsideration of the horizontal and vertical ownership rules that were adopted in the *Second Report and Order* in this proceeding. *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits), Second Report & Order*, 8 FCC Rcd 8565 (1993), recon. pending (MM Docket No. 92-264). Those petitions will be addressed in subsequent orders.

<sup>4</sup> *First Report & Order* ¶¶ 113-129, 8 FCC Rcd at 6844-47.

<sup>5</sup> 47 U.S.C. § 533(a)(2).

3. We further affirm our decision in the *First Report & Order* to adopt a regulatory framework implementing the anti-trafficking provision of Section 13 of the 1992 Cable Act, finding that our rules fulfill Congress' mandate and are consistent with the goal of promoting competition in the multichannel video marketplace. We take this opportunity, however, to clarify the manner in which those rules apply to various transactions.

4. Section 11(a) of the 1992 Cable Act amended the Communications Act by adding an ownership provision restricting multichannel multipoint distribution service ("MMDS") and SMATV ownership interests by cable operators.<sup>6</sup> That provision, now Section 613(a)(2) of the Communications Act, prohibits a cable operator from holding a license for MMDS, or from offering SMATV service that is separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system.<sup>7</sup> It grandfathers all such service in existence as of the date of enactment of the 1992 Cable Act,<sup>8</sup> and authorizes the Commission to waive the requirements of the provision to the extent necessary to ensure that all significant portions of a franchise area are able to obtain video programming.<sup>9</sup>

5. Section 13 of the 1992 Cable Act amended the Communications Act by establishing a three-year holding requirement for cable systems (the "anti-trafficking provision").<sup>10</sup> That provision, now Section 617 of the Communications Act, restricts the ability of a cable operator to sell or otherwise to transfer ownership in a cable system within thirty-six months following either the acquisition or initial construction of the system by such operator.<sup>11</sup> It also delineates specific exceptions to the general rule and provides waiver authority to the Commission.<sup>12</sup>

6. In the *First Report & Order*, we adopted rules implementing the ownership and

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<sup>6</sup> 1992 Cable Act sec. 11(a) (amending the Communications Act § 613, 47 U.S.C. § 533).

<sup>7</sup> 47 U.S.C. § 533(a)(2).

<sup>8</sup> Communications Act § 613(a)(2)(A), 47 U.S.C. § 533(a)(2)(A); *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits, Cross-Ownership Limitations & Anti-Trafficking Provisions)*, Erratum, 8 FCC Rcd 6884 (1993) (MM Docket No. 92-264).

<sup>9</sup> Communications Act § 613(a)(2)(B), 47 U.S.C. § 533(a)(2)(B).

<sup>10</sup> 1992 Cable Act sec. 13 (amending the Communications Act § 617, 47 U.S.C. § 537).

<sup>11</sup> 47 U.S.C. § 537.

<sup>12</sup> 47 U.S.C. §§ 537(c), (d).

anti-trafficking provisions of the 1992 Cable Act.<sup>13</sup> In particular, we: (a) revised the existing MMDS-cable cross-ownership rules;<sup>14</sup> (b) adopted SMATV ownership rules;<sup>15</sup> and (c) adopted rules implementing the statutory anti-trafficking provision.<sup>16</sup>

7. In this *Memorandum Opinion and Order* (the "MO&O"), we address the various petitions for reconsideration and/or clarification, oppositions and replies that have been filed with respect to those ownership and anti-trafficking rules.<sup>17</sup> For the reasons stated below, we clarify and modify the regulations adopted in the *First Report & Order* in several respects. These modifications are in furtherance of the statutory objectives of the 1992 Cable Act, and are consistent with our intent to eliminate artificial regulatory barriers to competitive and efficient delivery of multichannel programming services to the American public. In addition to responding to the parties' petitions, we take this opportunity to clarify several matters that have arisen during the course of our administration of those regulations.

8. First, with respect to the SMATV ownership rules, we remove the prohibition against cable operators' acquisitions of SMATV systems within their actual service areas based upon a revised interpretation of the language of Section 11(a) of the 1992 Cable Act. Second, we affirm that any SMATV system owned by a cable operator within the operator's franchise area must be operated in accordance with the terms and conditions of the local franchise agreement. We conclude that our revised rules are more fully supported by the statute and Congressional statements of intent than were the rules adopted in the *First Report & Order*. We further find, based on the record before us, that the policy of promoting competition to traditional coaxial cable systems is at least as well served, if not better served, by the revisions we make today.

9. With respect to anti-trafficking, we first affirm the Commission's rules regarding action by franchise authorities on requests for approval of transfers or assignments of cable systems that have been held for three or more years. Second, we clarify certain aspects of FCC Form 394. Third, we clarify that a franchise authority may require approval of cable system transfers or assignments if so required by state or local law. Fourth, we clarify that the holding period does not recommence upon the consummation of a transaction that is exempt from the statutory three-year holding period. Fifth, we clarify certain aspects of calculating the holding period. Sixth, we affirm our decision to grant a blanket waiver of the anti-trafficking rules to small systems. Finally, based on our experience to date, we

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<sup>13</sup> *First Report & Order*, 8 FCC Rcd 6828.

<sup>14</sup> *Id.* at ¶¶ 5, 97-112, 8 FCC Rcd at 6829, 6842-44; 47 C.F.R. § 21.912.

<sup>15</sup> *Id.* at ¶¶ 6, 113-129, 8 FCC Rcd at 6829, 6844-47; 47 C.F.R. § 76.501(d)-(e).

<sup>16</sup> *Id.* at ¶¶ 3-4, 9-91, 8 FCC Rcd at 6829-6841; 47 C.F.R. § 76.502.

<sup>17</sup> See Appendix A for a list of parties participating in this proceeding.

conclude that in the future we will **generally look favorably** on requests for waiver of the anti-trafficking rules unless the request raises serious concerns on its face or any objections we receive to grant of the waiver provide evidence of other public interest bases for concern.

## II. STATUTORY SMATV OWNERSHIP RESTRICTIONS

10. *Overview.* SMATV systems (also known as "private cable systems") are multichannel video programming distribution systems that serve residential, multiple-dwelling units ("MDUs"), and various other buildings and complexes.<sup>18</sup> A SMATV system typically offers the same type of programming as a cable system, and the operation of a SMATV system largely resembles that of a cable system -- a satellite dish receives the programming signals, equipment processes the signals, and wires distribute the programming to individual dwelling units. The primary difference between the two is that a SMATV system typically is an unfranchised, stand-alone system that serves a single building or complex, or a small number of buildings or complexes in relatively close proximity to each other.<sup>19</sup>

11. A SMATV system is defined under the Communications Act by means of an exception to the definition of a cable system:

(7) the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment . . . but such term does not include . . . (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; . . . .<sup>20</sup>

Therefore, a SMATV system is different from a cable system only in that it does not use "closed transmission paths" to: (a) serve buildings that are not commonly owned, controlled, or managed; or (b) use a public right-of-way.

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<sup>18</sup> See *Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming), First Report* (hereinafter the "1994 Competition Report") ¶ 92, 9 FCC Rcd 7442, 7488-89 (1994) (CS Docket No. 94-48).

<sup>19</sup> We note that SMATV operators are permitted to use microwave facilities to interconnect properties. *Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band, Report & Order*, 6 FCC Rcd 1270, 1272 (1991) (PR Docket No. 90-5).

<sup>20</sup> Communications Act § 602(7), 47 U.S.C. § 522(7).

12. Thus, the distinction between a SMATV system and a cable system is based on the limited manner in which a SMATV system provides its services. When the service is no longer so limited, the SMATV system ceases to be eligible for the statutory exception set forth in Section 602(7)(B) and becomes a cable system.<sup>21</sup> If a system's lines interconnect separately owned and managed buildings or if the system's lines use public rights of way, the system is a cable system for purposes of the Communications Act.<sup>22</sup> Closed transmission path interconnection of a cable system and a SMATV system will, therefore, cause the SMATV system to become a part of the cable system.

13. Section 613(a)(2) of the Communications 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."<sup>23</sup> In the *First Report & Order*, we interpreted this provision as restricting franchised cable operators from acquiring existing SMATV systems within their actual service areas. We concluded, however, that Section 613(a)(2) does not prohibit all SMATV-cable cross-ownership within cable operators' actual service areas.<sup>24</sup> In particular, we determined that cable operators are permitted to construct stand-alone or integrated SMATV systems in their actual service areas, provided such SMATV service is offered in accordance with the terms and conditions of agreements with the local franchise authorities.<sup>25</sup> We found that common ownership of a SMATV system that itself qualifies as a "cable system under Section 602(7)(B) of the Communications Act and a separate stand-alone SMATV system" would also be permitted.<sup>26</sup> We also determined that a cable operator is permitted to acquire,

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<sup>21</sup> *Definition of a Cable System, Report & Order ("Definition of a Cable System")*, 5 FCC Rcd 7638 (1990), upheld in *FCC v. Beach Communications, Inc.*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2096 (1993) (prior and subsequent history omitted).

<sup>22</sup> *Id.*

<sup>23</sup> Communications Act § 613(a)(2), 47 U.S.C. § 533(a)(2) (emphasis added).

<sup>24</sup> *First Report & Order* ¶ 119, 8 FCC Rcd at 6845.

<sup>25</sup> *Id.* ¶¶ 6, 122, 8 FCC Rcd at 6829, 6845-46. The term "integrated SMATV system" is a misnomer. It was used in that part of the *First Report & Order* to describe a cable headend and wiring in a MDU that had at one time qualified for the SMATV exception, but no longer qualified for that exception due to interconnection with a cable system.

<sup>26</sup> *Id.* ¶¶ 95, 128, 8 FCC Rcd at 6842, 6846-47, relying on Report of the Senate Committee on Commerce, Science and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess. 81 (1991) ("*Senate Report*"). We recognize that a SMATV system cannot simultaneously qualify as both a cable system and a SMATV system because, as explained *supra* at paras. 11-12, a SMATV system is defined as an exception to the definition of a cable system. See e.g., *Definition of a Cable System* ¶ 5, 5 FCC Rcd at 7638.

or build, a stand-alone SMATV system located in the unserved portions of the franchise area, provided such cable-owned SMATV system is operated in accordance with the terms and conditions of the cable franchise agreement.<sup>27</sup>

14. However, we further determined that a cable operator would not be allowed to acquire existing SMATV facilities within the cable operator's actual service area for the purpose of providing cable service.<sup>28</sup> In reaching this conclusion we observed that in "light of the important statutory objectives of promoting competition and encouraging diverse sources of programming," such acquisitions would undermine the goals of a provision that we viewed as a traditional cross-ownership restriction and "eliminate an important potential source of competition for established cable operators."<sup>29</sup> We concluded that allowing cable operators to acquire existing SMATV facilities would undermine competition between cable operators and SMATV providers, reinforce existing cable monopolies, and reduce competitive opportunities for SMATV providers within the cable service area.<sup>30</sup>

#### A. Cable Operators' Acquisitions of Existing SMATV Systems

15. *Pleadings.* Several parties argue that it was an error to prohibit cable operators from acquiring existing SMATV systems within their service areas.<sup>31</sup> Those parties generally assert that the ban on such acquisitions is not supported by the 1992 Cable Act or overall Congressional objectives. In fact, Time Warner Entertainment Company, L.P., ("Time Warner") believes it is significant that parties from both the cable television and SMATV industries share this belief.<sup>32</sup>

16. The National Private Cable Association, MSE Cable Systems, Cable Plus and Metropolitan Satellite (hereinafter referred to collectively as "NPCA") and Time Warner argue that so long as the cable operator offers SMATV service that is not "separate and

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<sup>27</sup> *First Report & Order* ¶¶ 6, 127, 8 FCC Rcd at 6829, 6846.

<sup>28</sup> *Id.* ¶ 123, 8 FCC Rcd at 6846.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Reply Comments filed by Cablevision Systems Corporation ("Cablevision Reply Comments") at 2; Reply Comments filed by The National Cable Television Association ("NCTA Reply Comments") at 2; Consolidated Comments filed by Time Warner Entertainment Company, L.P. Concerning Petitions for Reconsideration and Clarification ("Time Warner Comments") at 2; and Joint Petition for Reconsideration filed by Multivision Cable TV Corp. and Providence Journal Company ("Multivision Petition") at 4.

<sup>32</sup> Time Warner Comments at 2.

apart" from its franchised service, it is in compliance with the statute, regardless of whether the cable operator acquired or installed the facilities.<sup>33</sup> Although NPCA agrees with the Commission's determination that the "separate and apart" language refers to service that does not comply with local franchise requirements, it argues that the language cannot also be the basis for an unrelated distinction created by the Commission between a cable operator who installs SMATV facilities and a cable operator who acquires such facilities.<sup>34</sup> NPCA maintains that the statute restricts the manner in which a cable operator may offer SMATV service, not the manner in which the cable operator acquires the facilities in order to offer such services.<sup>35</sup>

17. Cablevision Systems Corporation ("Cablevision") and Time Warner both argue that it is not necessary to make a distinction between the acquisition and construction of SMATV systems, or between the served and unserved portions of franchise areas, to ensure competition in the video distribution marketplace (they assert that nothing precludes a second video distributor from offering service to a building).<sup>36</sup>

18. Time Warner and the National Cable Television Association ("NCTA") argue that the Commission's notion that a restriction on cable operator's ability to purchase SMATV systems fosters competition is misplaced because cable operators and SMATV systems usually do not compete once an MDU owner has decided which multichannel video programming distributor ("MVPD") will serve the building.<sup>37</sup> Rather, Time Warner and NCTA contend that competition occurs when MVPDs seek rights from the MDU owner to provide multichannel video programming service within a building, and that once such a contract is entered into, the competitive environment is not adversely affected if a SMATV operator is allowed to sell its business as a going concern to the franchised cable operator.<sup>38</sup>

19. NPCA, Cablevision, Time Warner and NCTA all argue that the Commission's broad acquisition prohibition discourages investment in SMATV operations, and threatens

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<sup>33</sup> Petition for Clarification or, Alternatively, for Reconsideration filed by the National Private Cable Association, MSE Cable Systems, Cable Plus and Metropolitan Satellite ("NPCA Petition") at 10-12; Petition for Reconsideration filed by Time Warner Entertainment Company, L.P. ("Time Warner Petition") at 5.

<sup>34</sup> NPCA Petition at 12.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> Cablevision Reply Comments at 3; Time Warner Comments at 4.

<sup>37</sup> Time Warner Comments at 4; NCTA Reply Comments at 2-3.

<sup>38</sup> *Id.*

their overall viability.<sup>39</sup> NPCA further contends that a SMATV operator who tries to sell one SMATV system may actually be primarily interested in generating the cash necessary to make worthwhile investments in its other properties, thereby increasing the competitive pressure it places on the franchised cable industry as a whole.<sup>40</sup>

20. Taking an even stronger position in their petition, Multivision Cable TV Corporation and Providence Journal Company (hereinafter referred to collectively as "Multivision") argue that when Congress intended to enlarge governmental control over the acquisition of media competitors in the same market, it did so explicitly and precisely, and that no grant of authority was given to the Commission with regard to a cable system's acquisition of SMATV facilities.<sup>41</sup> Multivision points out that the Notice of Proposed Rule Making<sup>42</sup> in this proceeding did not address a possible distinction between the acquisition and construction of SMATV facilities by cable operators, thereby precluding interested parties from having notice of such a distinction or an opportunity to comment.<sup>43</sup> Multivision further notes that none of the commenters argued that cable operators should not be allowed to acquire, as opposed to construct, SMATV facilities.<sup>44</sup>

21. *Discussion.* On reconsideration, we modify our rules based upon a revised analysis of the language of Section 613(a)(2) and the Congressional intent underlying that provision. We also note that our modified rules are consistent with the diversity and competitive considerations associated with the statutory ownership restriction. In light of our action today with respect to cable operators' acquisitions of SMATV systems, Multivision's contention that parties were not provided adequate notice and opportunity for comment on our prior distinction is moot.

22. We begin by reexamining the language of Section 613(a)(2), which provides that a cable operator may not "offer satellite master antenna television service *separate and apart* from any franchised cable service, in any portion of the franchise area served by that

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<sup>39</sup> NPCA Petition at 13; Cablevision Reply Comments at 3; Time Warner Comments at 4; NCTA Reply Comments at 3.

<sup>40</sup> NPCA Petition at 13.

<sup>41</sup> Multivision Petition at 4.

<sup>42</sup> See *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits, Cross-Ownership Limitations & Anti-Trafficking Provisions), Notice of Proposed Rule Making and Notice of Inquiry* (hereinafter the "NPRM"), 8 FCC Rcd 210 (1993).

<sup>43</sup> Multivision Petition at 3.

<sup>44</sup> *Id.*

cable operator's cable system."<sup>45</sup> On reconsideration we believe that this language means that a cable operator may not offer SMATV service anywhere in its franchised service area unless such service is offered together with or as part of the cable service provided pursuant to its local cable franchise agreement. In other words, if a cable operator offers SMATV service to subscribers within its franchised service area, it must offer this otherwise unregulated multichannel video programming service to those subscribers pursuant to the same terms and conditions upon which the regulated cable television service is offered to subscribers within that same franchise. Thus, cable operators may not use facilities that meet the statutorily-created SMATV exception to the definition of a cable system to provide multichannel video programming service that does not comply with franchise obligations or the Commission's rules.

23. We do not believe Congress used the words "separate and apart" to require the physical interconnection of commonly-owned cable systems and facilities that would otherwise qualify for the SMATV exception. Rather, the words "separate and apart" refer to the service, not the delivery system, and are used to limit cable operators' ability to offer the unregulated SMATV service. Accordingly, we believe the statutory language requires cable operators to comply with all franchise requirements in their delivery of multichannel video programming without regard to whether any part of the facilities used might qualify as a SMATV system.<sup>46</sup>

24. In the *First Report & Order*, we reviewed the legislative history of the 1992 Cable Act, which reflected Congress' concern that the "common ownership of different media may limit the number of different voices available to the public."<sup>47</sup> Congress believed that certain ownership restrictions were necessary to "enhance competition" and "[t]o further diversity and prevent cable (operators) from warehousing its potential competition."<sup>48</sup> Based on these general policies underlying the 1992 Cable Act, we concluded that Congress intended to prohibit cable operators' acquisitions of SMATV systems within their actual service areas.<sup>49</sup>

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<sup>45</sup> Communications Act § 613(a)(2), 47 U.S.C. § 533(a)(2) (emphasis added).

<sup>46</sup> This construction of Section 613(a)(2) is consistent with that advanced by Time Warner and NPCA in their petitions for reconsideration. Time Warner Petition at 3-5; NPCA Petition at 10-13. It is also the construction advanced by NCTA and NPCA, among others, in comments in response to the original notice of inquiry in this proceeding. *First Report & Order* ¶¶ 114, 120, 125, 8 FCC Rcd at 6844-47.

<sup>47</sup> S. Rep. No. 92, 102d Cong., 1st Sess. 46 (1992); see *First Report & Order* ¶ 121, 8 FCC Rcd at 6845.

<sup>48</sup> S. Rep. No. 92, *supra*, at 47.

<sup>49</sup> *First Report & Order* ¶¶ 121-23, 8 FCC Rcd at 6845-46.

25. However, neither the statutory provision nor the legislative history address the manner in which cable operators obtain the SMATV facilities over which they "offer" service. We believe that, had Congress intended to draw a distinction between the offering of service through a SMATV system that was acquired as opposed to one that was constructed, it would have done so. Indeed, Congress included specific references to construction and acquisition in the anti-trafficking provision of Section 13 of the 1992 Cable Act.<sup>50</sup> It is therefore reasonable to conclude that in the context of the SMATV provision, Congress was unconcerned with the manner in which SMATV systems are obtained by cable operators and was mostly concerned with the manner in which such service is "offered" to subscribers in the cable operator's franchised service area; i.e., "separate and apart from any franchised cable service." Accordingly, on further analysis we conclude that revising our rule to eliminate the regulatory distinction between the acquisition and construction of SMATV systems accurately and appropriately interprets the statutory provision.

26. We further believe the revisions we adopt in this *MO&O* more closely comport with Congressional intent in enacting the SMATV ownership restriction. Our current interpretation of the statute is consistent with language in the report of the committee of conference that accompanied the 1992 Cable Act (the "Conference Report"), and in the report of the Senate Committee on Commerce, Science and Transportation that accompanied the Senate bill containing the provision that was ultimately adopted and included in the 1992 Cable Act (the "Senate Report"). The conference committee wrote that the final bill contained the relevant Senate provision,<sup>51</sup> and that the Senate provision "amends Section 613(a) . . . by adding a new paragraph (2) which prohibits a cable operator from owning . . . a satellite master antenna television service (SMATV) in the same areas in which it holds a franchise for a cable system."<sup>52</sup> The Senate Report contains the same explanation of the provision.<sup>53</sup>

27. We believe that Congress's intent to preclude franchised cable operators from owning SMATV services in their franchise areas was not directed at the technology involved, which is simply a cable headend that is not interconnected by wire with a building that is separately-owned or with property on the other side of a public right-of-way.<sup>54</sup> Cable operators may use facilities that could otherwise qualify for the SMATV exception to provide

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<sup>50</sup> 1992 Cable Act sec. 13, 47 U.S.C. § 537.

<sup>51</sup> H.R. Rep. No. 862, 102d Cong., 2d Sess. 82 (1992).

<sup>52</sup> H.R. Rep. No. 862, *supra*, at 81.

<sup>53</sup> S. Rep. No. 92, *supra*, at 46.

<sup>54</sup> *Supra* paras. 10-12.

franchised cable service to hotels, MDUs or large apartment complexes.<sup>55</sup> Rather, we believe that the conference committee's statement that cable operators would not be permitted to own SMATV service within their franchise areas meant that they cannot use the SMATV exception to offer service that does not comply with federal law and franchise obligations.

28. We continue to believe that the language of the statute, as supported by the conference committee's statement prohibiting a cable operator from owning a SMATV "in the same areas in which it holds a franchise for a cable system," evidences Congress's intent to prohibit SMATV-cable cross-ownership by requiring that a cable operator's offer of multichannel video programming throughout the entire franchise area be made only pursuant to the terms and conditions of its franchise agreement. This interpretation ensures competitive opportunities for SMATV operators and is consistent with the interpretation proffered in the *First Report & Order* where we also required cable operators to comply with the terms and conditions of their franchise agreements if they offered multichannel video programming services through SMATV facilities in the unserved portions of their service areas.<sup>56</sup> Thus, we believe our interpretation accurately reflects Congressional intent and properly promotes the underlying statutory goals of promoting competition throughout the franchise area.

29. We further believe that the revisions we adopt today are consistent with the overall policy goals of the 1992 Cable Act. For example, we believe diversity continues to be preserved and promoted through a number of regulatory rules implementing the 1992 Cable Act, including the program access and carriage rules, must carry, and franchise requirements. The revisions we adopt today that permit cable operators to acquire SMATV systems in their franchised service area are also consistent with the policy goals underlying our decision in the *First Report and Order*.<sup>57</sup>

30. In the *First Report & Order* we concluded that cable operators' acquisitions of SMATV systems within their service areas would eliminate an important potential source of competition for established cable operators. In reaching that conclusion, we viewed existing SMATV systems as engaged in direct competition with incumbent cable systems.<sup>58</sup> On

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<sup>55</sup> See, e.g., *First Report & Order* ¶ 8 FCC Rcd at 6845-46. According to Time Warner, cable operators often use facilities that meet the SMATV exception to the definition of a cable system to provide cable service in accordance with their franchise obligations. *Id.* n.104 (citing Time Warner Comments at 63).

<sup>56</sup> *First Report & Order* ¶ 127, 8 FCC Rcd at 6846.

<sup>57</sup> *Id.* ¶¶ 121, 123, 8 FCC Rcd at 6845-46.

<sup>58</sup> We wrote that cable operators' acquisitions of SMATV systems within their service areas:

(continued...)

reconsideration, we find that the record contains insufficient evidence on which to base an economic analysis as to the workings of the SMATV marketplace and on which to conclude with any degree of certainty that either the rule we adopted in the *First Report & Order* or the revision we adopt today would have particular economic consequences.

31. Notwithstanding our prior recognition that the concern underlying the statutory provision is the preservation and enhancement of competition in the delivery of multichannel video programming, several commenters argued that adverse competitive consequences are engendered by the rule we adopted in the *First Report & Order*. For example, these commenters argue that the availability of capital necessary to construct a SMATV system is often dependent upon the availability of exit strategies, and in particular the ability to recoup sunk costs by being able to sell to a locally-franchised cable operator when that operator is the only potential buyer.<sup>59</sup> The revision we adopt today would eliminate that constraint and level the competitive field for initial entry. We note, however, in view of the inconclusive economic evidence our determination to revise the rule rests on our interpretation of the language of the statute.

32. Accordingly, we reconsider our decision in the *First Report & Order* that cable operators may not acquire SMATV systems located within their service areas, and in this order, modify our rules by permitting cable operators to purchase SMATV systems located within their franchise areas, provided they operate such systems in accordance with the terms and conditions of their local franchise agreements.<sup>60</sup> We therefore eliminate the regulatory

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<sup>58</sup>(...continued)

would undermine the goals of the cross-ownership restriction and eliminate an important potential source of competition for established cable operators. Moreover, we believe that Congress sought to encourage cable operators and SMATV providers to compete directly with one another. In our view, a policy allowing cable operators to acquire existing SMATV facilities, rather than construct their own facilities, would not further this goal and would in fact, thwart the development of a promising competitive technology. Finally, we determine that such a policy would reinforce existing cable monopolies and reduce the competitive opportunities for SMATV providers within the cable service area.

*First Report & Order* ¶ 123, 8 FCC Rcd at 6846.

<sup>59</sup> NPCA Petition at 13; Time Warner Comments at 4; NCTA Reply Comments at 3.

<sup>60</sup> On the other hand, we deny petitioners' request to reconsider our determination that franchised cable operators must comply with their franchise obligations in the operation of all SMATV systems under their ownership, control or management that are located within their franchise areas. *Infra* paras. 37-40.

distinction drawn in the *First Report & Order* that accorded disparate regulatory treatment based upon distinctions between the construction and acquisition of SMATV systems. We conclude that the revised rule we adopt today is more consistent with and more accurately and appropriately interprets the language of Section 613(a)(2) than the rule adopted in the *First Report & Order*.

**B. Cable Operators' Use of SMATV  
Facilities Within Their Franchise Areas**

33. *Pleadings.* With respect to whether "integrated SMATV systems" must comply with the cable system's local franchise requirements, Time Warner argues that because a SMATV system is defined in terms of an exclusion from the "cable system" definition, one system can never constitute both a SMATV and a cable system "as the *Report & Order* erroneously suggests."<sup>61</sup> Once a SMATV loses the SMATV exemption (e.g., by interconnection), Time Warner believes that the SMATV system then becomes a cable system subject to all the regulatory requirements applicable to cable systems.<sup>62</sup> Time Warner goes on to state that stand-alone SMATV systems operated in accordance with local franchise requirements are not providing service that is "separate and apart" from franchised cable service, and are thus not subject to the cross-ownership prohibition.<sup>63</sup>

34. In support of its position, Time Warner cites cases in which the Commission has refused to extend unregulated SMATV status to facilities that serve only single family homes,<sup>64</sup> and a Commission decision finding that interconnected systems that are comprised of a cable system portion and a "SMATV portion" are subject to regulation as cable systems in their entirety.<sup>65</sup> Time Warner further proposes that even where a cable system provides a commonly-owned SMATV system with at least seventy-five percent of its programming by microwave or other non-hardwired means, the two should be deemed to be a single system,

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<sup>61</sup> Time Warner Comments at 5.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; see also NPCA Petition at 10-12. Time Warner opines that it makes no difference whether the SMATV system is a new construction or an acquired existing system. Time Warner Comments at 3.

<sup>64</sup> See, e.g., *Leacom, Inc.*, 31 R.R.2d 156 (1974); *Sanwick Cablevision, Inc.*, 48 FCC 2d 563 (1974).

<sup>65</sup> *Massachusetts Community Antenna Television Commission*, 64 RR 2d 173 (1987) (a system serving both single-family homes and MDUs, which was located entirely on private property and interconnected by hard wire, is a cable system under Section 602(6)(B)).

thereby subjecting the SMATV system to all of the cable system's franchise obligations.<sup>66</sup>

35. Multivision, on the other hand, asserts that neither stand-alone, nor integrated, SMATV systems should be subject to local cable franchise requirements<sup>67</sup> because SMATV facilities that serve subscribers in one or more MDUs under common ownership, control, or management and do not use public rights of way are excluded from the definition of a cable system (Section 602(7) of the Communications Act),<sup>68</sup> and are not subject to the franchise requirement of Section 621(b) of the Communications Act.<sup>69</sup> According to Multivision, because SMATV systems are not "cable systems," the Communications Act does not confer authority on the Commission or local governments to force SMATV systems owned by cable operators to comply with local franchise requirements.<sup>70</sup>

36. Multivision argues that there are no public policy reasons for subjecting SMATV systems to the franchise terms because: (a) local governments do not have jurisdiction since SMATV systems do not use public rights of way; (b) the entity in control of the development (i.e., the landlord, developer, condominium board or homeowner's association) does not need the protection of the local government because it has bargaining power equivalent to that of the cable operator, and it is better positioned to determine the needs of the development's multichannel video subscribers; and (c) the terms of the SMATV system's service agreement are the result of arm's length negotiations.<sup>71</sup> Further, Multivision adds that it is inappropriate to impose another level of regulatory requirements on SMATV service because economies of providing service to customers in MDUs are different, and franchise requirements will conflict with the terms and conditions of the private SMATV service contracts, thereby creating confusion and legal ambiguity.<sup>72</sup> Multivision also believes that requiring SMATV systems to be operated in accordance with franchise agreements will deny residents of buildings where SMATV service is offered of amenities and benefits they would otherwise be able to enjoy.<sup>73</sup>

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<sup>66</sup> Time Warner Petition at 4.

<sup>67</sup> Multivision Petition at 4.

<sup>68</sup> *FCC v. Beach Communications, Inc.*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2096 (1993).

<sup>69</sup> 47 U.S.C. § 541(b).

<sup>70</sup> Multivision Petition at 4-5.

<sup>71</sup> *Id.* at 5.

<sup>72</sup> *Id.* at 6.

<sup>73</sup> *Id.*

37. *Discussion.* As we discussed above, Time Warner is correct in its assertion that a SMATV system that is interconnected with a franchised cable system ceases to be a SMATV system, and customers that receive programming through the former SMATV facilities must be served by the cable operator in accordance with its franchise obligations.<sup>74</sup> By adding Section 613(a)(2) to the Communications Act, Congress has required cable operators to comply with their franchise obligations even where the facilities used would otherwise qualify for the SMATV exception to the definition of a cable system. Therefore, Time Warner and NPCA are correct in their assertions that a franchised cable operator's use of "SMATV facilities" in accordance with franchise obligations does not constitute service "separate and apart" from franchised cable service, and therefore, does not constitute a violation of the cross-ownership restriction.

38. We reject Multivision's argument that we lack authority to require franchised cable operators to operate SMATV systems under their ownership, control or management within their franchise areas in accordance with their franchise obligations. As we discussed more fully above, we conclude that Section 613(a)(2) clearly restricts cable system operators from offering SMATV service inconsistent with its franchised cable service.<sup>75</sup> Moreover, we believe that Section 613(a)(2) applies to all parts of the particular franchise area served by the cable system that is prohibited from offering SMATV service separate and apart from its franchised cable service. The revised rules that we adopt today are, therefore, fully consistent with Section 613(a)(2).

39. We also reject Multivision's argument that there are no public policy reasons for requiring cable operators to operate SMATV systems in accordance with their franchise obligations. Absent the requirement that cable operators who seek to offer multichannel video service within their franchise area through SMATV facilities must operate such system in accordance with their contract with that municipality and applicable laws, franchised cable operators could construct, acquire, or operate unregulated multichannel video programming distribution systems within their franchise areas, thereby avoiding the rate regulation provisions of the 1992 Cable Act, and our bulk discount regulations. We further note that the record in this proceeding does not contain evidence supporting Multivision's contentions regarding service contract negotiations or the bargaining power of the entities in control of MDUs.

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<sup>74</sup> *Supra* para. 12.

<sup>75</sup> We note that the revisions we adopt today do not alter the subsection of the rule that grandfathers inconsistent but previously authorized ownership arrangements predating enactment of Section 11 of the 1992 Cable Act. See Appendix B, Section 76.501(e)(1), as revised.

40. We further reject Multivision's contention that the economies of providing SMATV service in an MDU are sufficiently different from those involved in providing franchise-wide cable service that a cable operator acquiring a cable system should not be required to operate the SMATV system in accordance with its franchise agreement requirements. Multivision's argument is premised on two flawed assumptions: (a) that SMATV systems attain 100% subscriber penetration within MDUs; and (b) cable operators are unable to offer bulk rates. Multivision provides no evidence to support its suggestion that SMATV systems typically reach 100% penetration. In fact, we recently found evidence that indicates this assumption is incorrect.<sup>76</sup> Furthermore, we note that although Section 623(d) of the Communications Act requires a cable operator to have a uniform rate structure throughout the area served by its cable system, cable operators are permitted to offer bulk discount rates if they are made available to all similarly sized MDUs in the franchise area, and the cable operator demonstrates that it receives some economic benefit from offering the discount.<sup>77</sup>

### C. SMATV Operators' Sales or Assignments of Access Rights to Cable Operators

41. NPCA seeks clarification of a footnote in the *First Report & Order*,<sup>78</sup> which provides that "where a SMATV contract has been terminated by either party, we would not prohibit a cable operator from providing cable service over preexisting facilities."<sup>79</sup> NPCA states that "[w]ithin the CATV and SMATV industries, this language has been interpreted as prohibiting a SMATV operator from assigning its contractual rights in favor of the local cable operator since the assignment of a contract does not cause its termination."<sup>80</sup> NPCA argues that SMATV operators should be subject to the same rules that apply to MMDS

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<sup>76</sup> E.g., *1994 Competition Report* ¶ 93, 9 FCC Rcd at 7489. See also *Clearview Cable TV, Inc.*, DA 94-1172, ¶ 8, 9 FCC Rcd 6144, 6145 (CSB 1994) (SMATV system subscriber penetration rate of 66.9%).

<sup>77</sup> 47 U.S.C. § 543(d). See also *Implementation of the 1992 Cable Act: Rate Regulation & Buy-Through Prohibition, Third Order on Reconsideration*, 9 FCC Rcd 4316 (1994). In the *1993 Rate Report & Order*, the Commission observed that cable systems often offer bulk discounts to subscribers in MDUs, and expressed a desire that bulk discounts not be used as a means of displacing competition from alternative MVPDs, such as SMATV operators. *1993 Rate Report & Order* ¶ 424, 8 FCC Rcd at 5898.

<sup>78</sup> *First Report & Order* ¶ 124 n. 106, 8 FCC Rcd at 6846 n. 106.

<sup>79</sup> NPCA Petition at 15.

<sup>80</sup> *Id.*

operators, who can sell or assign access rights and internal wiring.<sup>81</sup> We conclude that our decision to permit cable operators to acquire SMATV facilities within their service areas renders moot NPCA's concerns regarding conveyances of access contracts and distribution facilities. Therefore, we do not further address those issues.<sup>82</sup>

#### D. Grandfathering

42. Section 613(a)(2)(A) of the Act provides that the Commission shall waive the ownership restrictions for all existing MMDS and SMATV services that were "owned by a cable operator on the date of enactment of this paragraph."<sup>83</sup> The Wireless Cable Association International, Inc. ("WCA") and Oklahoma Western Telephone Company ("Oklahoma Western"), request reconsideration or clarification of the rules adopted in the *First Report & Order* pertaining to the appropriate dates for grandfathering of permissible combinations.<sup>84</sup> In addition, Time Warner argues that we should permit cable operators to consummate any transactions involving the acquisition of SMATV systems within their service areas, if those acquisitions had been agreed to prior to the effective date of the 1992 Cable Act.<sup>85</sup>

43. *Discussion.* In two separate *Erratum* to the *First Report & Order* the Mass Media Bureau responded to WCA's and Oklahoma Western's concerns and corrected the relevant MMDS-cable and SMATV-cable cross-ownership rules to grandfather authorized combinations in existence as of October 5, 1992.<sup>86</sup> However, we decline to follow Time Warner's suggestion that we also grandfather arrangements between private parties that were

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<sup>81</sup> *Id.* at 2, 13-15.

<sup>82</sup> We note, however, that we may address MDU wiring concerns in connection with our resolution of the pending petitions for reconsideration of the home wiring rules. 47 C.F.R. § 76.802; *Implementation of the 1992 Cable Act (Cable Home Wiring), Report & Order*, 8 FCC Rcd 1435 (1993), *recon. pending* (MM Docket No. 92-260).

<sup>83</sup> 47 U.S.C. § 533(a)(2)(A).

<sup>84</sup> Petition for Partial Reconsideration filed by the Wireless Cable Association International, Inc. ("WCA Petition") at 4; Petition for Clarification or Reconsideration filed by Oklahoma Western Telephone Company ("Oklahoma Western Petition") at 4-5.

<sup>85</sup> Time Warner Petition at 6.

<sup>86</sup> *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal and Vertical Ownership Rules, Cross-ownership Rules and Anti-Trafficking Provisions), Erratum*, 8 FCC Rcd 6212 (MMB 1993); *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal and Vertical Ownership Rules, Cross-ownership Rules and Anti-Trafficking Provisions), Erratum*, 8 FCC Rcd 6884 (MMB 1993).

agreed to prior to December 4, 1992. First, the statutory language refers to interests "owned" on the enactment date. We believe this language restricts grandfathering to cross-ownerships actually in existence at that time, not to merely contemplated or planned arrangements. Second, Congress expressly provided for the grandfathering of MMDS and SMATV cross-ownership interests as of the enactment of Section 613. We believe that this was intentional: most other provisions of the 1992 Cable Act went into effect on its effective date -- December 4, 1992. Had Congress envisioned allowing additional cross-ownership, it would have set the effective date of the cross-ownership provision at the effective date of the 1992 Cable Act, not the enactment date, in order to allow parties negotiating transactions an opportunity to close by December 4, 1992. We believe that the fact that Congress specified the enactment date of the statute as the effective date for this provision demonstrates its intent that only cross-ownership arrangements in existence and authorized as of October 5, 1992, were to be grandfathered.

### III. ANTI-TRAFFICKING

44. *Background.* Section 617 of the Communications Act establishes a three-year holding requirement for cable systems that, with certain exceptions, restricts the ability of a cable operator to sell or otherwise transfer ownership in a cable system within a thirty-six month period following either the acquisition or initial construction of the system.<sup>87</sup> The statute expressly exempts from the restriction: "(1) any transfer of ownership interest in any cable system which is not subject to Federal income tax liability; (2) any sale required by operation of any law or any act of any Federal agency, any State or political subdivision thereof, or any franchising authority; and (3) any sale, assignment, or transfer, to one or more purchasers, assignees, or transferees controlled by, controlling, or under common control with, the seller, assignor, or transferor."<sup>88</sup> Section 617 also authorizes the Commission to grant waivers in cases of default, foreclosure or other financial distress, and on a case-by-case basis where a waiver serves the public interest; provides that certain subsequent transfers of systems are not subject to the holding requirement; and imposes a 120-day time limit on local franchise authority action on a request for approval of a transfer of a cable system held for three or more years.<sup>89</sup>

45. In the *First Report & Order*, we adopted rules that: (a) implement the statutory anti-trafficking provision; (b) delineate specific instances where waiver requests will be favorably reviewed; and (c) institute a blanket waiver for small systems.<sup>90</sup> We concluded that Congressional intent underlying the anti-trafficking provision was to restrict

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<sup>87</sup> Communications Act § 617, 47 U.S.C. § 537.

<sup>88</sup> Communications Act § 617(c), 47 U.S.C. § 537(c).

<sup>89</sup> Communications Act § 617(b), (d)-(e); 47 U.S.C. § 537(b), (d)-(e).

<sup>90</sup> *First Report & Order* ¶¶ 9-91, 8 FCC Rcd at 6830-41; see 47 C.F.R. § 76.502.

profiteering transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area, but not to inhibit investment in the cable industry or delay or disrupt legitimate cable transactions.<sup>91</sup>

46. Specifically, we determined that the three-year holding requirement applies to transactions involving changes in ownership that constitute a transfer of control.<sup>92</sup> We interpreted the exemptions as applying to changes of control that are the result of tax exempt transactions, involuntary transfers and transfers involving municipally-owned cable systems, and *pro forma* transfers or assignments.<sup>93</sup> We determined that the statutory 120-day time period for local franchise authority review of a request for approval of the transfer of a cable system owned for three or more years commences when the cable operator submits a transfer request to the local franchise authority that contains all the information required by Commission regulations and by the terms of the franchise agreement or applicable state or local law.<sup>94</sup> We adopted a blanket waiver of the Commission's anti-trafficking rules for transfers of cable systems serving 1,000 or fewer subscribers.<sup>95</sup> We also adopted a rule providing for favorable consideration of requests by multiple system operators ("MSOs") for waivers of the anti-trafficking rules for the purpose of facilitating the transfer or sale of multiple systems if two-thirds of the subscribers of the systems being sold or transferred are

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<sup>91</sup> *First Report & Order* ¶¶ 11, 21, 36, 8 FCC Rcd at 6830, 6831, 6833. Both the legislative history and the *First Report & Order* contain references to "profiteering" as behavior that the anti-trafficking statutory provision and rules are designed to prevent. S. Rep. No. 92, *supra*, at 120; *First Report & Order* ¶¶ 11, 21, 8 FCC Rcd at 6830-31. "Profiteering" is defined, however, as "[t]aking advantage of unusual or exceptional circumstances to make excessive profits; e.g. selling of scarce or essential goods at inflated prices during time of emergency or war." *Black's Law Dictionary* 1090 (5th ed. 1979). Therefore, on reconsideration we recognize that the term "profiteering" is a misnomer as it has been used with respect to the anti-trafficking rules. We believe Congress passed the anti-trafficking provision of the 1992 Cable Act, not because of a concern about "profiteering," but rather because of a concern over speculative purchases and sales of cable systems made for the purpose of realizing quick profits from increases in values, which could overburden systems with debt and thereby lead to higher rates and reduced services for subscribers.

<sup>92</sup> *First Report & Order* ¶ 23, 8 FCC Rcd at 6832.

<sup>93</sup> *Id.* ¶¶ 57-73, 8 FCC Rcd at 6837-39.

<sup>94</sup> *Id.* ¶ 84-86, 8 FCC Rcd at 6840; 47 C.F.R. § 76.502(i)(1).

<sup>95</sup> *First Report & Order* ¶ 91, 8 FCC Rcd at 6841. As with any anti-trafficking waiver granted by the Commission, whether a small system blanket waiver or an individual waiver, the underlying transfer remains subject to receipt of local franchise authority transfer approval where such approval is required by the terms of the franchise agreement or applicable state or local law.

served by systems owned for three or more years.<sup>96</sup>

**A. Local Franchise Authority Consideration  
of Transfer Requests**

**1. The 120-Day Period for Review of Transfer  
Requests for Cable Systems Held for Three Years**

47. *Pleadings.* 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, "NATOA") believe that although the anti-trafficking rules are based on a recognition of the role local franchising authorities have with respect to approving transfer requests, certain of the rules may encroach upon the traditional right of franchising authorities to review transfer requests, in contravention of the plain language and intent of Section 617.<sup>97</sup> NATOA argues that Section 617 of the Communications Act contains no limit on the information a franchising authority may require a cable operator to submit in connection with a request for approval of a sale or transfer, and challenges the propriety of the Commission's implementation of rules that limit the amount and type of information the local franchise authority may obtain from the cable operator to information specifically required by FCC Form 394, the terms of the franchise agreement or applicable state or local law.<sup>98</sup>

48. NATOA also argues that the 120-day period should not begin to run until all information requested by the local franchise authority has been submitted and the local franchise authority so notifies the cable operator. The current rule, according to NATOA, inappropriately limits the duration of local franchising authorities' power to disapprove cable system transfers.<sup>99</sup>

49. Time Warner and NCTA oppose NATOA's petition, asserting that extending the 120-day period for franchise authority approval of transfers of control would provide local franchising authorities with extraordinary authority to require virtually any type of information from cable operators, thereby effectively eviscerating the statutory time limit.<sup>100</sup> NCTA contends that the time limitation ensures that transfers of cable properties are not

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<sup>96</sup> *Id.* ¶ 52, 8 FCC Rcd at 6836; 47 C.F.R. § 76.502(g)(1).

<sup>97</sup> Petition for Reconsideration and Clarification filed by NATOA ("NATOA Petition") at 2.

<sup>98</sup> *Id.* at 3.

<sup>99</sup> *Id.* at 3-4.

<sup>100</sup> NCTA Comments at 2; Time Warner Comments at 6.

subjected to protracted approval processes, and that a definitive starting point for the 120-day statutory period is necessary to prevent unwarranted and abusive delays.<sup>101</sup> Time Warner also contends that a time limitation is necessary to help ensure that local franchise authorities do not use the transfer approval process to extract concessions or effect inappropriate policy objectives.<sup>102</sup> Time Warner further contends that the Commission's current rule is consistent with Congressional intent.<sup>103</sup>

50. *Discussion.* Section 617(e) of the Communications Act sets a 120-day time frame for local franchise authority action on requests for approval of transfers or assignments of control over cable systems held for more than three years, provided the local franchise agreement requires local franchise authority approval of a sale or transfer.<sup>104</sup> Our implementing rules provide for commencement of the 120-day period when the cable operator has submitted a completed FCC Form 394 and any additional information required by the terms of the franchise agreement or applicable state or local law.<sup>105</sup> We concluded in the *First Report & Order* that local franchise authorities are permitted to request additional information they deem reasonably necessary to determine the qualifications of the proposed assignee or transferee, but that requests for information not explicitly required by the franchise agreement or local law will not toll the statutory 120-day limitation unless the franchise authority and the cable operator agree to an extension of time.<sup>106</sup> The rationale underlying this rule is to provide cable operators some degree of assurance and certainty that local franchise authorities will act promptly and not unduly delay consummation of proposed transactions. We affirm the rule we adopted in the *First Report & Order* and, accordingly, deny NATOA's request that the 120-day period not commence until the cable operator is affirmatively advised that the franchise authority has received all information it seeks.

51. Section 617(e) provides that when a local franchise agreement grants the local franchise authority the right to review sales or transfers of cable systems held for three or more years, the franchise authority shall have 120 days to act upon any such request that contains the information required by Commission regulation or by the franchise authority.<sup>107</sup>

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<sup>101</sup> NCTA Comments at 3.

<sup>102</sup> Time Warner Comments at 7.

<sup>103</sup> *Id.*

<sup>104</sup> 47 U.S.C. § 537(e).

<sup>105</sup> 47 C.F.R. § 76.502(i)(1)

<sup>106</sup> *First Report & Order* ¶¶ 4, 85-86, 8 FCC Rcd at 6829, 6840.

<sup>107</sup> Specifically, Section 617(e) provides in relevant part that in the case of a cable system  
(continued...)

We have interpreted this language as a limitation on the information a cable operator must provide to trigger the 120-day time period. While this language arguably could be interpreted to allow unlimited requests for information by the franchise authority, we do not believe that such an interpretation comports with the intent of Congress.

52. In enacting Section 617(e), Congress imposed a 120-day approval period on the sale or transfer of cable systems held for three or more years because Congress wanted to ensure that the local franchise approval process not unduly delay the consummation of transactions that do not implicate the concerns underlying the anti-trafficking provision. The language of the statute and the legislative history reflect Congress' expectation that the Commission establish regulations designed to ensure that franchising authorities that possess the right to review transfer requests receive the information required to begin an evaluation of a request for approval of a sale or transfer of such a cable system.<sup>108</sup> Accordingly, we created FCC Form 394 with the expectation that the information required by the form would establish the legal, technical, and financial qualifications of the proposed transferee or assignee. The legislative history also clearly establishes that Congress intended to allow local franchise authorities to request information that is required by the franchise agreement, in addition to that required by Commission regulation.<sup>109</sup> Consequently, we adopted rules requiring a cable operator seeking local franchise authority approval of a proposed transfer to submit any additional information provided by the terms of the franchise agreement. The

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<sup>107</sup>(...continued)

owned for three or more years, "a franchising authority shall, if the franchise requires franchising authority approval of a sale or transfer, have 120 days to act upon any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority." 47 U.S.C. § 537(e).

<sup>108</sup> H.R. Rep. No. 628, 102d Cong., 1st Sess. 120 (1992) (the "House Report"). We noted in the Notice of Proposed Rule Making in this proceeding that the language of the 1992 Cable Act implies that the 120-day approval period will not commence unless a transfer request is accompanied by all information the Commission requires in connection with such transfer requests. *Implementation of Sections 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits, Cross-Ownership Limitations & Anti-Trafficking Provisions)*, Notice of Proposed Rule Making and Notice of Inquiry ¶ 22, 8 FCC Rcd at 214.

<sup>109</sup> H.R. Rep. No. 628, *supra*, at 120. In the discussion of Section 617(e) the House Report contains the statement that "[t]he amendment is not intended to limit, or to give the FCC authority to limit, local authority to require in franchises that cable operators provide additional information or guarantees with respect to a cable sale or transfer." *Id.* Further, the House Report also states, in reference to the grant of waiver authority to the Commission that the "Committee does 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." *Id.*

rules we adopted provide that the franchise authority shall have 120 days from the submission of a completed FCC Form 394 and any additional information required by the terms of the franchise agreement or applicable state or local law, to act upon the waiver request.<sup>110</sup> Thus, the cable operator is on notice that information requirements may exist in three locations and that the submission of all such information is necessary for the franchise authority to be bound by the 120-day time period. To the extent the local franchise authority seeks additional information, as we stated in the *First Report & Order*, cable operators are required to respond promptly by completely and accurately submitting all information reasonably requested by the franchise authority.<sup>111</sup>

53. We believe Congress sought to provide a degree of regulatory certainty to cable operators when it established the 120-day time period for franchise authority action on transfer requests pertaining to cable systems held for three or more years. We also believe that submission of the information required by FCC Form 394, the franchise agreement and state or local law, is sufficient to commence the 120-day time period for local franchise authority action on the request. This conclusion provides a degree of certainty to the parties, comports with the legislative history and is consistent with our rulings with respect to franchise authority action on rate regulation matters.<sup>112</sup>

## 2. FCC Form 394

54. *Pleadings.* Multivision requests that the Commission delete from FCC Form 394 the question that asks the transferee/assignee about "any plans to change current terms and conditions of service and operations of the system as a consequence of the transaction for which approval is sought."<sup>113</sup> Multivision asserts that the inquiry is difficult to answer; subjects the transferee to penalties under Section 1001 of Title 18 of the United States Code, and allegations of violating the transfer consent if plans do change; provides the local franchise authority an opportunity to weigh in on the transferee's plans; and does not focus

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<sup>110</sup> 47 C.F.R. § 76.502(i)(1).

<sup>111</sup> *First Report & Order* ¶ 86, 8 FCC Rcd at 6840. As we further stated in the *First Report & Order*, while franchise authorities are permitted to request additional information, "such requests for additional information, beyond the requirements of the franchise agreement or local law, will not toll or extend the 120-day period unless the cable operator and franchise authority otherwise agree to an extension of time as provided by the statute." *Id.*

<sup>112</sup> See, e.g., *Implementation of 1992 Cable Act (Rate Regulation), Second Order on Reconsideration, Fourth Report & Order & Fifth Notice of Proposed Rulemaking ("Second Rate Recon.")* ¶ 147, 9 FCC Rcd 4119, 4188 (1994) (MM Docket 92-266).

<sup>113</sup> Multivision Petition at 9.

on the transferee's qualifications.<sup>114</sup>

55. *Discussion.* Form 394 specifies the information requirements we deemed sufficient to establish the legal, technical and financial qualifications of the proposed transferee of a cable system held for three years. In developing the information requirements contained in Form 394, we looked to the information required by the Commission in connection with transfer requests for broadcast licenses and CARS (microwave cable antenna relay service) authorizations.<sup>115</sup> We also looked at the legislative history of Section 617 in developing the information requirements. We note that the House Report stated that such information may include "information concerning the transferee's plans for expanding (or eliminating) services to subscribers" and "detailed financial information showing the effect of the transfer or sale on rates and services."<sup>116</sup> We believe that the information sought in Form 394 regarding plans to change the terms and conditions of service and operation of the system is appropriate. The question is directed at the transferee's current plans. We do not expect cable operators to be prescient, nor is the question intended to elicit uncertain future possibilities. We do not foresee cable operators being held to unreasonable or unrealistic expectations to foretell future events, or being held accountable for failing to predict the future course of events, as Multivision suggests. Moreover, truthful answers are not subject to the penalties of 18 U.S.C. § 1001.

56. We note as a matter of clarification that transferees and assignees responding to the inquiry in Form 394 regarding their legal qualifications, in particular Question 5 of Section II pertaining to adverse findings or actions by courts and administrative bodies, should be guided by the character qualification policy statements adopted by the Commission in 1986 and 1990.<sup>117</sup>

57. We also take this opportunity to clarify that Form 394 is to be used to apply for franchise authority approval to assign or transfer control of a cable system owned for three or more years. Form 394 is not intended for use by a cable operator seeking local franchise authority approval of an assignment or transfer of a cable system held for less than three years.

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<sup>114</sup> *Id.* at 9-10.

<sup>115</sup> *First Report & Order* ¶ 85, 8 FCC Rcd at 6840.

<sup>116</sup> H.R. Rep No. 628, *supra*, at 120.

<sup>117</sup> *In the Matter of Policy Regarding Character Qualifications In Broadcast Licensing, Report, Order and Policy Statement*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421, *appeal dismissed sub nom.*, NABB v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987); *Policy Regarding Character Qualifications in Broadcast Licensing, Policy Statement and Order*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991).