

3. *Review Premised Upon State or Local Law*

58. *Pleadings.* NATOA asserts that franchise authorities' right to review transfer requests may arise from state or local law or ordinance and that the Commission's rules should be clarified to expressly state that a local franchise authority has the right to review a transfer request if permitted under applicable state or local law.¹¹⁸ In support of its argument, NATOA asserts that the Commission recognizes the rights conferred by state or local law in other aspects of its rules, for example, by providing that a small system waiver of the three-year holding period does not become effective until the transfer is approved by the local franchise authority where such approval is required by the terms of the franchise agreement or applicable state or local law.

59. *Discussion.* We agree with NATOA that where local or state law requires franchise authority approval of cable system transfers or assignments, local franchise authorities may require cable operators to obtain their approval, regardless of whether the franchise agreement so requires. We recognize in other aspects of the anti-trafficking rules that local or state law may impose obligations upon the franchise authority, and extending express recognition to basic transfer decisions merely clarifies this matter. We are revising our rules accordingly.

4. *Certifications of Compliance with the Anti-Trafficking Provision*

60. *Pleadings.* Multivision requests clarification as to whether cable operators must file certifications of compliance with the anti-trafficking provision in connection with transactions that are exempt from the three-year holding period.¹¹⁹ It further requests that cable operators be authorized to submit certifications of compliance to the Commission rather than to local franchise authorities.¹²⁰ Multivision asserts that cable operators should be permitted to submit anti-trafficking certifications to the Commission in every instance, but that, at a minimum, submission of the certification to the Commission should be permitted when the local franchise agreement does not require local consent to the transfer of the cable system.¹²¹ Multivision argues that providing the certification to the local franchise authority serves no useful public policy purpose, interjects a federal issue into local processes, and invites delays because it offers local franchise authorities an opportunity to scrutinize and delay transactions outside the scope of local jurisdiction, and to interject their own inconsistent rulings which will adversely impact buyers, sellers, investor and lenders who

¹¹⁸ NATOA Petition at 6.

¹¹⁹ Multivision Petition at 8-9.

¹²⁰ *Id.* at 7.

¹²¹ *Id.*

need predictability and certainty.¹²²

61. *Discussion.* We stated in the *First Report & Order* that every assignment or transfer of a cable system requires a certification of compliance with the anti-trafficking statutory provision. In particular, we required that a cable operator seeking to sell or transfer a cable system certify to the local franchise authority that: (a) the transfer complies with the anti-trafficking rule; (b) the transferrer is seeking or has obtained a waiver of the anti-trafficking rule from the Commission; or (c) the transfer is otherwise exempt from the anti-trafficking rule.¹²³ We also stated that, in the case of transactions that are exempt from the holding period, the certification submitted to the local franchise authority should "describe the nature of the transaction and identify the applicable exemption accompanied by a statement of the facts giving rise to the claimed exemption."¹²⁴ We further provided that "[l]ocal decisions regarding . . . eligibility for one of the exemptions . . . are reviewable by the FCC" ¹²⁵

62. We reject Multivision's suggestion that certifications of compliance should be filed with the Commission rather than the local franchise authority. We determined in the *First Report & Order*, consistent with the dual regulatory framework adopted in the 1992 Cable Act, to vest primary responsibility for enforcement of the statutory anti-trafficking provision with local authorities.¹²⁶ We affirm that conclusion. Most cable systems must be authorized by local authorities in order to provide service.¹²⁷ Thus, nearly every cable system is subject to local jurisdiction. The fact that a local franchise agreement may not expressly provide for local franchise authority approval of a proposed sale or transfer of a cable system does not diminish the fact that local jurisdiction exists, or as noted in the *First Report & Order*, that local authorities are best positioned to monitor compliance with the holding period in the first instance.¹²⁸ Moreover, as noted in the *First Report & Order*, we believe this procedure simplifies enforcement and minimizes administrative burdens on both cable operators and the Commission.¹²⁹ Multivision offers no new reasons for reversing our

¹²² *Id.* at 7-8.

¹²³ *First Report & Order* ¶ 37, 8 FCC Rcd at 6833.

¹²⁴ *Id.* ¶ 37, 8 FCC Rcd at 6834.

¹²⁵ *Id.* ¶ 39, 8 FCC Rcd at 6839.

¹²⁶ *Id.* ¶ 36, 8 FCC Rcd at 6833.

¹²⁷ *See, e.g.*, Communications Act § 621, 623, 47 U.S.C. § 541, 543.

¹²⁸ *First Report & Order* ¶ 36, 8 FCC Rcd at 6833.

¹²⁹ *Id.* ¶ 41, 8 FCC Rcd at 6834.

conclusion, and we reject the unsupported notion that local franchise authorities will interject uncertainty into the process. We thus reiterate that cable operators are obligated to submit anti-trafficking certifications to the local franchise authorities for all proposed transfers, assignments or sales of cable systems.

63. We also take this opportunity to clarify that if local franchise authority approval of an assignment or transfer of a cable system is not required and the system has been held for three or more years, the cable operator is not required to use FCC Form 394 solely for purposes of submission of the anti-trafficking certification. Rather, in that circumstance, the cable operator may submit its certification of compliance with the anti-trafficking provision as a separate document.

B. The Three Year Holding Period

1. Calculation of the Holding Period for Exempt Transactions

64. *Pleadings.* No party seeking reconsideration raised an issue regarding the timing of the commencement of the holding period. However, we have received a number of informal questions regarding this matter.¹³⁰ Therefore, we take this opportunity to clarify the application of the rules in this area. The issue is whether the three-year holding period commences anew when the transaction involves the transfer of a cable system that qualifies for one of the three exemptions. It has been informally suggested that such transactions do not invoke any of the concerns underlying Congress' adoption of the anti-trafficking provision, and that imposing a new three-year holding period on every exempt transaction would impede necessary and desirable transactions, frustrate Congress' purpose in granting the exemptions, and limit cable operators' "exit" strategies.

65. *Discussion.* As noted above, we concluded in the *First Report & Order* that the statutory exemptions from the three-year holding period apply to *pro forma*, tax exempt, and involuntary transfers, and to transfers involving municipally-owned cable systems. However, we did not address the calculation of the holding period for transactions that utilize one of the three statutory exemptions. In the *NPRM*, we alluded to the fact that a *pro forma* transfer would not cause a new three-year holding period to commence, but were silent as to tax exempt and involuntary transactions.¹³¹ For the reasons set forth below, and consistent with the public interest and our broad waiver authority under Section 617(d), we clarify that consummation of an exempt transaction does not restart the calculation of a new three-year

¹³⁰ For example, the law firm of Cole Raywid & Braverman ("CRB") informally sought clarification in a letter dated May 5, 1994, that has been placed in the record of this proceeding.

¹³¹ *NPRM* ¶ 17, 8 FCC Rcd at 213.

holding period.

66. First, we believe that no sound basis exists to require a new three-year holding period to begin after every *pro forma* transfer. A *pro forma* transfer is, by its terms, not a substantial change of control. Such transactions do not raise the specter of speculation or exploitation of short-term ownership that concerned Congress when it adopted the anti-trafficking provision. Moreover, imposing a new holding period every time *pro forma* restructuring occurs would impose unnecessary burdens on the cable industry without providing any commensurate benefits.

67. Second, we note that Congress exempted involuntary transfers of control from the minimum holding requirement in part because it did not want to tie the hands of the courts or local franchise authorities, or unnecessarily create a defense against foreclosure. We concluded in the *First Report & Order* that involuntary transfers are generally necessitated by changed or unforeseen circumstances.¹³² Indeed, we noted that such transfers would likely include involuntary transfers to effect bankruptcy, divorce or probate proceedings.¹³³ We believe that we would be imposing unnecessarily costly and burdensome obligations on those persons who acquire cable systems through involuntary transfer procedures if we were to require them to hold those systems for three years, or to obtain waivers of the statutory three-year holding period in order to sell those systems. Consequently, we conclude that the holding period should not recommence upon the consummation of an involuntary transfer.

68. Third, Congress provided an exemption for tax exempt transactions because it concluded that such transactions do not implicate the concerns underlying the three-year holding requirement. We believe applying the exemption to systems acquired pursuant to a tax exempt transaction is consistent with Congress' intent regarding treatment of such transactions. Moreover, we have seen no evidence to suggest that transactions that do not incur income tax liability will adversely affect cable subscriber rates and services. Consequently, we see no compelling basis to insist that such transactions be treated differently than *pro forma* and involuntary transfer transactions.¹³⁴

¹³² *First Report & Order* ¶ 67, 9 FCC Rcd at 6838.

¹³³ *Id.*

¹³⁴ We note that this determination does not affect any holding requirement that may exist pursuant to other Commission policies, and in particular does not affect any holding period required for a minority tax certificate issued by the Commission pursuant to Section 1071 of the Internal Revenue Code.

2. *Multiple System Transfers*

69. *Pleadings.* In a footnote, NATOA suggests that we should reconsider our decision to provide favorable treatment to MSO waiver requests, arguing that permitting the transfer of one-third of an MSO's systems that have not been held by the MSO for three or more years will have a greater impact on subscribers than even the small system blanket waiver simply because of the number of subscribers served by MSO's.¹³⁵

70. *Discussion.* We concluded in the *First Report & Order* that application of a separate three-year holding period to each system owned by a particular MSO may be inappropriate in some circumstances because common ownership may create economies of scale that benefit subscribers and common ownership of nearby cable systems may create operating efficiencies and allow expansion of service to previously unserved areas.¹³⁶ We therefore determined that we would look favorably upon waiver applications if two-thirds or more of the MSO's subscribers are served by systems owned for three or more years, and if an MSO transfers several systems in a single transaction and two-thirds of the subscribers of the systems being transferred are served by systems the MSO owned for three years or more.¹³⁷ NATOA does not offer any evidence that our MSO rules have had any adverse impact on subscribers nor does NATOA assert we erred in the rationale underlying the rules. Other than asserting that a large number of subscribers are served by MSOs, NATOA proffers no basis for reconsideration of our MSO transfer rules and we see no reason to revise these rules.

71. We take this opportunity, however, to clarify two aspects of our MSO transfer rules. First, Section 617(b) of the Communications Act provides that in the case of MSO transfers, "if the terms of the sale require the buyer to subsequently transfer ownership of one or more such systems to one or more third parties, such transfers shall be considered a

¹³⁵ NATOA Petition at 8 n. 6.

¹³⁶ *First Report & Order* ¶ 51, 8 FCC Rcd at 6836. In the *First Report & Order* we concluded that: (a) for initially constructed cable systems, the three-year holding period is measured from the date on which service is activated to the system's first subscriber; and (b) for acquired systems, the holding period commences on the effective date of the closing of the transaction in which the system was acquired. *First Report & Order* ¶¶ 46-47, 8 FCC Rcd at 6835. We also concluded that, rather than establish separate procedures for MSO transfers or impose uniform application of a separate holding requirement to each system owned by a particular MSO, we would treat waiver requests involving MSO transfers favorably. *Id.* ¶¶ 51-52, 8 FCC Rcd at 6836. We noted that the anti-trafficking provision is not intended to thwart the development of systems or unnecessarily deter MSO transfers and that applying a separate holding requirement on each individual system could sacrifice some of the benefits afforded by multiple system ownership. *Id.*

¹³⁷ *Id.* ¶ 52, 8 FCC Rcd at 6836.

part of the initial transaction."¹³⁸ In the *First Report & Order*, we determined that subsequent transfers must be completed within a reasonable amount of time following completion of the original transaction in order to qualify for the treatment provided by the statutory provision.¹³⁹ Our rules specify that in order to qualify as part of the initial transaction, a request for approval of the subsequent transfer must be filed with the local franchise authority within ninety days of the closing date of the original transfer and the closing date of the subsequent transfer must be no later than ninety days following the grant of the transfer approval by the local franchise authority.¹⁴⁰ If local franchise approval is not required, our rules specify that the subsequent transfer must be completed within 180 days of the date of the closing of the original transaction in order to qualify as part of the original transaction.¹⁴¹

72. Our rules do not address the situation where the subsequent transfer involves multiple systems with differing franchise approval requirements. For example, if franchise authority approval is required for some but not all of the transfers, our rules could require the subsequent transfer of the system not requiring franchise authority approval to close within 180 days, while the subsequent transfer to the same party of the system requiring franchise authority approval could conceivably consume 300 or more days (90 days to file the request, 120 days or more for franchise approval and 90 days to close). Although we recognize that the parties could hold separate closings, or could complete the entire transaction within 180 days,¹⁴² we are concerned that such a requirement would be inconsistent with our determination that the anti-trafficking provisions are not intended to impede MSO transactions. While we continue to believe that subsequent transfers should occur within a reasonable amount of time, we conclude that where a subsequent transfer involves both systems that require franchise approval and systems that do not, the original transferee must complete the subsequent transfers of all affected systems within 90 days of the date the last system involved receives franchise authority approval of the transfer.

73. Second, notwithstanding our determination to treat MSO transfers in a favorable fashion, some clarification is warranted regarding the basis for calculating subscribers served by systems held for three years. Generally, the commencement of the holding period is relatively straightforward, i.e., calculation of the holding period relates

¹³⁸ 47 U.S.C. § 537(b).

¹³⁹ *First Report & Order* ¶ 56, 8 FCC Rcd at 6836.

¹⁴⁰ *Id.*; 47 C.F.R. § 76.502(e)(1993).

¹⁴¹ *First Report & Order* ¶ 56, 8 FCC Rcd at 6836.

¹⁴² The transaction could be completed in 180 days if the approval request is filed within 30 days, the franchise authority acts within 120 days (assuming the original operator owned the system for three years) and closing occurs 30 days thereafter.

back to the date of activation of the system's first subscriber or the effective date of the closing of the transaction in which the system was acquired.¹⁴³ The three-year holding period does not begin anew when the system extends lines into existing or new communities, or when the system integrates previously separate communities through line extension. In other words, a large system that interconnects multiple communities via wire from a single headend calculates its holding period from either the date of activation of the system's first subscriber or the effective date of the closing of the transaction in which the system was acquired. However, a large system with multiple headends calculates the holding period for each system served by each headend. Our rule providing for favorable treatment of MSO transfers can be invoked in the event a multiple-headend MSO system is sold.

74. If a cable operator acquires an adjoining system served by a separate headend, the holding period for the adjoining system commences upon the date of the closing of the acquisition. The holding period attendant to the original system does not extend to the newly acquired system; rather, the newly acquired system maintains a separate three-year holding period. If, however, the purchaser removes the headend serving the acquired system and interconnects the acquired system with the original system through line extension, the holding period for that particular system becomes the same as the holding period for the system into which it was integrated. In other words, when systems are interconnected and served from a single headend, they maintain a uniform holding period.

75. We believe this clarification renders our rules neutral as to system upgrades, and permits expansion and deployment of new technologies without potentially adverse regulatory consequences. We further note that calculation of the holding period is for the purpose of determining whether it is necessary to seek a waiver from the Commission. The ultimate decision to approve a proposed transfer rests with the local franchise authority, if such authority is provided in the local franchise agreement or by state or local law.

C. Waivers

76. *Pleadings.* NATOA contends that the Commission's blanket waiver of the three-year holding requirement for small systems circumvents the "public interest" intent

¹⁴³ We note that a "cable system" is defined, in relevant part, in Section 602(7) of the Communications Act and Section 76.5 of our rules as a facility "consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7); 47 C.F.R. § 76.5. In terms of practical application of this definition, the parameters of a system are typically the area and subscribers served from a particular headend or connected set of headends. See, e.g., *Second Rate Recon.* ¶¶ 201, 226-27, 9 FCC Rcd at 4218, 4231-32.

behind the statutory waiver provision and should be eliminated.¹⁴⁴ NATOA argues that by focusing on the "financial and administrative burdens" the holding period places upon small system operators as justification for the blanket waiver, the Commission ignored that the holding requirement is intended to protect subscribers from transactions that will likely have an adverse impact on cable rates or service.¹⁴⁵ NATOA asserts that the impact is significant: more than half of all cable systems serve less than 1,000 subscribers; small systems serve approximately 1.9 million subscribers nationwide; and the value of such systems is conservatively placed at \$3.8 billion.¹⁴⁶ Time Warner contends that the Commission properly weighed numerous public interest considerations before adopting the blanket small system waiver and notes that the waiver is anticipated to cover only 3.6% of all cable subscribers nationally.¹⁴⁷

77. *Discussion.* In assessing the impact of the anti-trafficking provision upon small business, pursuant to our obligations under the Communications Act,¹⁴⁸ we determined in the *First Report & Order* that: (a) cable systems serving rural areas with low population density are unlikely to be the subject of transactions that implicate the anti-trafficking concerns; (b) the anti-trafficking rules would create significant costs and impose administrative burdens on small systems, and may deter expansion of cable service to rural areas; (c) the expense and delay attendant to individual waiver requests may be prohibitive to small systems; and (d) a blanket waiver would reduce the burden on the Commission and affect only a small number of cable subscribers.¹⁴⁹ Consequently, we adopted a blanket anti-trafficking waiver for small systems. We continue to believe that this weighing and assessing of costs and benefits was precisely the type of consideration of the public interest required under our waiver authority under the Communications Act, and consequently we affirm our small system blanket waiver. We reiterate, however, that the small system blanket waiver does not affect the rights of local franchise authorities to approve transfers or sales of small systems, to the extent such approval is provided for in local franchise agreements or by local or state law. Thus, while the blanket waiver provision exempts small systems from obtaining anti-trafficking waivers from the Commission, the ultimate decision to approve or deny a transfer and assignment rests, in most cases, with the local franchise authority.

¹⁴⁴ NATOA Petition at 6-7, 9.

¹⁴⁵ *Id.* at 7.

¹⁴⁶ *Id.* at 8.

¹⁴⁷ Time Warner Comments at 10-11.

¹⁴⁸ Communications Act § 623(i), 47 U.S.C. § 543(i); *see also*, Regulatory Flexibility Act of 1980, 5 U.S.C. § 603.

¹⁴⁹ *First Report & Order* ¶ 90, 8 FCC Rcd at 6841.

78. Small systems are defined as systems that serve 1,000 or fewer subscribers from a single headend.¹⁵⁰ This definition currently applies throughout Part 76 of our rules. However, we note that we are in the process of reviewing this definition.¹⁵¹ To the extent any definitional changes are adopted, we will also consider appropriate changes to the small system waiver rule unless such changes would alter the fundamental basis of our analysis. In that event, we will address the continuing viability of the blanket anti-trafficking waiver in light of those changes.

79. Finally, we take this opportunity to note that our experience to date with requests for waiver of the anti-trafficking rule has demonstrated that systems owned less than three years are not being transferred or assigned purely for purposes of quick economic gain.¹⁵² Rather, those waiver requests have been premised upon proposed transfers involving bankruptcy, systems barely over the subscriber limit established for the small system blanket waiver, a system with no change in *de facto* control and systems qualifying for treatment under our MSO transfer rules. We believe that it is appropriate, after one year of strictly scrutinizing waiver requests, to revise our approach to waiver requests. In the future, we generally will look favorably on waiver requests unless the transaction raises serious concerns on its face or any objections we receive to grant of the waiver provide other public interest bases for concern.

¹⁵⁰ *First Report & Order* ¶ 91, 8 FCC Rcd at 6841. See also *Second Rate Recon.* ¶¶ 201, 226-27, 9 FCC Rcd at 4218, 4231-32.

¹⁵¹ *Implementation of 1992 Cable Act (Rate Regulation), Fifth Order on Reconsideration & Further Notice of Proposed Rulemaking*, 9 FCC Rcd 5327 (1994) (MM Docket No. 93-215).

¹⁵² See e.g., *King Kable, Inc.*, 8 FCC Rcd 1515 (MMB 1993) (no anti-trafficking concern where seller was in bankruptcy); *D.D. Cable Partners, L.P.*, 9 FCC Rcd 590 (MMB 1994) (no anti-trafficking concerns where systems barely exceeded small system blanket waiver limit and transaction resulted in consolidation of systems with adjacent systems); *People's Cable, Inc.*, 9 FCC Rcd 6101 (CSB & MMB Oct. 21, 1994) (no anti-trafficking concern where waiver necessitated by transfer of negative control within past three years); *D.D. Cable Partners, L.P.*, 9 FCC Rcd 6109 (CSB, Oct. 24, 1994) (no anti-trafficking concerns where systems barely exceeded small system blanket waiver limit and franchise authority approval acquired); *HC Crown Corp.*, 9 FCC Rcd ___ (CSB, December 23, 1994) (transaction involving large MSO did not raise anti-trafficking concerns were MSO had held systems serving two-thirds of the subscribers involved in the transaction for more than three years).

IV. REGULATORY FLEXIBILITY ANALYSIS

80. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-602, the Commission's final analysis is as follows:

81. **Need and purpose of this action:** This action is taken to address petitions for reconsideration of the anti-trafficking and cross-ownership rules adopted by the Commissions to implement Sections 11 and 13 of the 1992 Cable Act.

82. **Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:** There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

83. **Significant alternatives considered:** We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the ownership and anti-trafficking provisions of the 1992 Cable Act. The Commission modifies its restriction on cable operators' acquisitions of SMATV systems within the portion of the franchised service area served by the cable operator. We affirm the limitation on the tolling of the statutory time frame for local franchise authorities' action on requests to approve the transfer of cable systems held for three or more years. These actions are aimed at reducing unnecessary regulatory restrictions and promoting competition within the multichannel video distribution marketplace.

84. **Federal rules that overlap, duplicate or conflict with these rules:** None.

V. EFFECTIVE DATE

85. **Effective Date:** The changes to the rules adopted in this *Memorandum Opinion and Order on Reconsideration of the First Report and Order* will become effective thirty (30) days from the date of publication in the Federal Register.

VI. ORDERING CLAUSES

86. Accordingly, **IT IS ORDERED**, that pursuant to the authority contained in Sections 2(a), 4(i), 4(j) and 303 of the Communications Act of 1934, as amended, and in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, the rules contained in Part 76 of the Commissions Rules, 47 C.F.R. Part 76, **ARE AMENDED** as set forth in Appendix B below, and will become effective 30 days after publication in the Federal Register.

87. **IT IS FURTHER ORDERED** that, pursuant to the authority contained in Sections 2, 4, 303, 405 and 601 of the Communications Act of 1934, as amended, the *Memorandum Opinion and Order on Reconsideration of the First Report and Order*,

affirming in part and modifying in part, the *First Report & Order* in this proceeding, IS ADOPTED, as provided herein.

88. IT IS FURTHER ORDERED THAT the petitions for reconsideration or clarification, set forth in Appendix A, are granted and denied to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
William F. Caton
Acting Secretary

APPENDIX A

MM Docket No. 92-264

Parties Requesting Reconsideration or Clarification

Wireless Cable Association International, Inc. ("WCA")

Multivision Cable TV Corp. and Providence Journal Company ("Multivision")

Time Warner Entertainment Company, L.P. ("Time Warner")

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 referred to as "NATOA")

Oklahoma Western Telephone Company ("Oklahoma Western")

National Private Cable Association, MSE Cable Systems, Cable Plus and Metropolitan Satellite (collectively referred to as "NPCA")

Parties Filing Oppositions

National Cable Television Association ("NCTA")

Time Warner

Parties Filing Replies

NATOA

Cablevision Systems Corporation ("Cablevision")

NCTA

Ex Parte Contacts

Cole Raywid & Braverman

Gardner, Carton & Douglas

Wiley, Rein & Fielding

APPENDIX B

Part 76 of Title 47 of the United States Code of Federal Regulations is amended to read as follows:

1. The authority for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. § § 152, 153, 154, 301, 303, 307, 308, 309, 532, 535, 542, 543, 552, 554.

2. Section 76.501 is amended by revising subsections (d) and (e), redesignating subsection (e)(2)(i)-(ii) as Note 5 and subsection (e)(2)(iii) as subsection (f), and moving the Notes to the end of the rule, as follows:

* * * * *

(d) No cable operator shall offer satellite master antenna television service ("SMATV"), as that service is defined in Section 76.5(a)(2), separate and apart from any franchised cable service in any portion of the franchise area served by that cable operator's cable system, either directly or indirectly through an affiliate owned, operated, controlled, or under common control with the cable operator.

(e) (1) A cable operator may directly or indirectly, through an affiliate owned, operated, controlled by, or under common control with the cable operator, offer SMATV service within its franchise area if the cable operator's SMATV system was owned, operated, controlled by or under common control with the cable operator as of October 5, 1992.

(2) A cable operator may directly or indirectly, through an affiliate owned, operated, controlled by, or under common control with the cable operator, offer service within its franchise area through SMATV facilities, provided such service is offered in accordance with the terms and conditions of a cable franchise agreement.

(f) The Commission will entertain requests to waive the restrictions in paragraphs (d) and (e) of this section when necessary to ensure that all significant portions of the franchise area are able to obtain multichannel video service. Such waiver requests should be filed in accordance with the special relief procedures set forth in Section 76.7.

Note 1:

* * * * *

Note 5: In applying the provisions of paragraphs (d) and (e), control and an attributable ownership interest shall be defined by reference to the definitions contained in Notes 1 - 4, provided however, that:

(a) The single majority shareholder provisions of Note 2(b) and the limited partner insulation provisions of Note 2(g) shall not apply; and

(b) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

3. Section 76.502 is amended by deleting section (b), renumbering the remaining sections accordingly, adding sections (d)(3) and (f), revising section (g), and making grammatical language clarifications in sections (c), (c)(2), (h) and (i), as follows:

Sec. 76.502 Three-year holding requirement. [Revised]

(a) Except as otherwise provided in this section, no cable operator may sell, assign, or otherwise transfer controlling ownership of a cable system within a three-year period following either the acquisition or initial construction of such cable system by such cable operator.

(b) For initially constructed cable systems, the three-year holding period shall be measured from the date on which service is activated to the system's first subscriber through the proposed effective date of the closing of the transaction assigning or transferring control of the cable system. The holding period for acquired systems shall be measured from the effective date of the closing of the transaction in which control of the cable system was acquired through the proposed effective date of the closing of the transaction assigning or transferring control of such cable system.

(c) A cable operator who seeks to assign or transfer control of a cable system is required to certify to the local franchise authority that the proposed assignment or transfer of control of such cable system will not violate the three-year holding requirement. Such certification shall be submitted to the franchise authority at the time the cable operator submits a request for transfer approval to the local franchise authority. If local transfer approval is not required by the terms of the franchise agreement, certification of compliance with the three-year holding requirement must be submitted to the franchise authority no later than 30 days in advance of the proposed closing date of the transfer or assignment.

(1) Receipt by the local franchise authority of a certification containing a description of the transaction and indicating that the cable system has been owned for three or more years, or that the transferor has obtained or is seeking a waiver from the Commission, or that the transaction is otherwise exempt under this section, shall create a presumption that the proposed assignment or transfer of the cable system will comply with the three-year holding requirement.

(2) A franchise authority that questions the accuracy of a certification filed pursuant to this section must notify the cable operator within 30 days of the filing of such certification, or such certification shall be deemed accepted, unless the cable operator has failed to provide any additional information reasonable requested by the franchise authority within 10 days of such request.

(d) If an assignment or transfer of control involves multiple systems and the terms of the transaction require the buyer to subsequently transfer or assign one or more such systems to one or more third parties, such subsequent transfers shall be considered part of the original transaction for purposes of measuring the three-year holding period.

(1) In order to qualify as part of the original transaction, a request for approval of the subsequent transfer must be filed with the local franchise authority within 90 days of the closing date of the original transfer and the closing date of the subsequent transfer must be no later than 90 days following the grant of transfer approval by the local franchise authority.

(2) If local transfer approval is not required by the terms of the cable franchise agreement, then a subsequent transfer must be completed within 180 days of the date of the closing of the original transaction in order to qualify as part of the original transaction.

(3) If a subsequent transfer involves transfers of multiple systems to the same party, at least one of which requires local transfer approval and at least one of which does not require local transfer approval, the subsequent transfer must then be closed within 90 days of the date the last system involved in the subsequent transfer receives franchise authority approval of the transfer.

(e) Paragraph (a) of this section shall not apply to:

(1) any assignment or transfer of control of a cable system that is not subject to Federal income tax liability under the Federal Income Tax Code;

(2) any assignment or transfer of control of a cable system required by operation of law or by any act, order or decree of any Federal agency, any State or political subdivision thereof or any franchising authority;

(3) any assignment or transfer of control to one or more purchasers, assignees or transferees controlled by, controlling, or under common control with, the seller, assignor or transferor.

(f) Paragraph (a) of this section shall not apply to any assignment or transfer of a cable system subject to paragraph (e) of this section.

(g) The Commission will consider requests for waivers from the three-year holding requirement and, consistent with the public interest, will grant waivers in appropriate cases of default, foreclosure and financial distress. Waiver requests under this section should be filed in accordance with the special relief procedures set forth in Section 76.7. Waivers granted by the Commission will not become effective, however, unless local franchise authority approval of a transfer is obtained when such approval is required by the terms of the franchise agreement or state or local law.

(1) The Commission will look favorably upon waiver requests involving multiple system operators or transfers of multiple systems if at least two-thirds of the subscribers of the system being transferred are served by systems owned by the cable operator for three-years or more.

(2) Conditioned upon 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, transfers of cable systems serving 1,000 or fewer subscribers shall be subject to a blanket Commission waiver.

(h) A cable operator may seek Commission review of a franchise authority's decision regarding the application of the three-year holding period to a particular transaction pursuant to the special relief procedures set forth in Section 76.7.

(i) A cable system operator seeking to assign or transfer a cable system it has held for three or more years must submit a completed copy of FCC Form 394 to the local franchise authority if franchise authority approval of the transfer is required by the terms of the franchise agreement.

(1) A franchise authority shall have 120 days from the date of submission of a completed FCC Form 394, together with all exhibits, and any additional information

required by the terms of the franchise agreement or applicable state or local law to act upon such transfer request.

(2) If the franchise authority fails to act upon such transfer request within 120 days, such request shall be deemed granted unless the franchise authority and the requesting party otherwise agree to an extension of time.

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