

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

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Implementation of Sections 202(f), 202(i)
and 301(i) of the Telecommunications Act
of 1996: Cable Television Antitrafficking,
Network and MMDS/SMATV Cross-
ownership Rules

CS Docket No. 96-56

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OPPOSITION TO PETITION FOR RECONSIDERATION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its opposition to the "Petition for Reconsideration or, in the alternative, Petition for a Rulemaking" ("Petition") filed by the Network Affiliated Stations Alliance ("NASA") on May 8, 1996.¹ NASA seeks reconsideration of the Commission Order eliminating the FCC's broadcast network-cable cross-ownership rule² as mandated by the Telecommunications Act of 1996 ("the 1996 Act").

NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television operators serving over 80 percent of the nation's cable television subscribers and over 100 cable program networks that now command 50 percent viewership in cable households.

¹ See Public Notice, Report No. 2137, Mimeo # 63463, June 14, 1996; 61 Fed. Reg. 120 (June 20, 1996).

² Implementation of Sections 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996, Order, FCC 96-112, released March 18, 1996 ("Order").

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I. INTRODUCTION

Section 202(f)(1) of the 1996 Act states that the “Commission shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.”³ Section 202(f)(2) provides that the Commission “shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).”⁴

In its Order of March 18, 1996, the Commission amended its rules on cable and broadcast network-cable cross-ownership rules as directed by the 1996 Act.⁵ The Commission accomplished this by deleting paragraph (b) of Section 76.501.⁶ Paragraph (b) had previously limited network-cable cross-ownership to situations not exceeding 10 percent of homes passed by cable nationwide and 50 percent of homes passed by cable within an ADI.⁷

The Commission also stated that it would monitor the response to the elimination of its network-cable cross-ownership rule to determine whether regulatory safeguards are necessary in light of the rule changes.⁸ As Congress had indicated, additional safeguards, including those needed to ensure carriage, channel position, and nondiscriminatory treatment of nonaffiliated

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

⁴ Id. (emphasis added).

⁵ Order at 1.

⁶ Id. at 4.

⁷ 47 C.F.R. § 76.501 (b), prior to amendment March 18, 1996.

⁸ Order at 2, footnote 3.

broadcast stations by a cable system owned by a network, might be required in light of the elimination of the cross-ownership rule.⁹

According to the NASA Petition, the Commission's Order must be reconsidered because Congress "directed" that the Commission adopt safeguards to protect nonaffiliated stations before it could eliminate its cross-ownership restrictions.¹⁰ The Petition also asserts that, at a minimum, the Commission should have delayed lifting of the network-cable cross-ownership ban until after a notice and comment period.¹¹ NASA asserts that the Administrative Procedure Act ("APA") required such a notice and comment period.¹² Finally, in conjunction with requesting that the Commission initiate a formal rulemaking proceeding, the NASA petition discusses proposed "safeguards" which purportedly would ensure carriage, channel positioning and other nondiscriminatory treatment of nonaffiliated stations.¹³

II. THE NASA PETITION MUST BE REJECTED

The NASA Petition must be rejected because the Commission was faithful to its legislative mandate, the FCC's action was in accord with the Administrative Procedure Act and adoption of "safeguards" is premature until the response to the change in the rules has been monitored.

NASA's assertion that Congress "directed" that the Commission adopt safeguards prior to eliminating the cross-ownership ban, besides being contrary to the plain meaning of the

⁹ Id.

¹⁰ Petition at 2-3.

¹¹ Id. at 4.

¹² Id. at 4-6.

¹³ Id. at 10-17.

statute, defies common sense. First, the FCC was not directed to adopt safeguards. The plain language of the Act says that “[t]he Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations....”¹⁴ The plain meaning of this language is that the Commission has the discretion to determine whether and when safeguards are necessary.

The only thing that Section 202(f) of the Act directed the Commission to do was to amend its regulations to remove the network-cable cross-ownership restrictions, which it did. The Commission was empowered to implement additional safeguards to ensure carriage, channel positioning and other nondiscriminatory treatment, if it found such safeguards necessary following elimination of the cross-ownership rule. The Commission can only determine whether additional safeguards are necessary after it monitors the response to the initial rule change. Accordingly, the Commission followed the plain meaning of the statute in its Order and will determine whether safeguards are necessary by monitoring the response to the change in its rules.

Second, even if the statutory language were not clear, it makes no sense to assume Congress wanted the FCC to adopt safeguards immediately in implementing the statute. The Commission’s Order in March 1996 implemented portions of the Act which was passed a month earlier, in February 1996. If Congress had believed that safeguards were necessary prior to the lifting of the network-cable cross-ownership ban, Congress would have included such safeguards in the Act itself or directed the Commission to adopt such safeguards. Instead, Congress gave the Commission a clear command to eliminate the cross-ownership restriction

¹⁴ 1996 Act, § 202(f)(2) (emphasis added).

and the authority to adopt safeguards in the future, if necessary. It is simply illogical to assume that Congress wanted the FCC to implement safeguards in March which Congress found were unwarranted in February.¹⁵

NASA also contends that even if Congress did not “direct” the Commission to adopt safeguards prior to eliminating the cross-ownership rule, the Commission was required to comply with the notice and comment provisions of the APA to determine if safeguards are required before eliminating the rule. However, the APA itself provides that where an agency finds “that notice and public procedures are impracticable, unnecessary, or contrary to the public interest,” it need not comply with the APA’s notice and comment provisions.¹⁶ The Commission so found here.¹⁷ Compliance with the notice and comment provisions of the APA was unnecessary in this case because the rule changes simply conformed the FCC’s rules to the 1996 Act. In such a case, where a regulation merely reiterates the statutory language, notice and comment procedures are not required.¹⁸

The Petition suggests, by citing International Ladies’ Garment Workers,¹⁹ that the lack of a detailed explanation for the Commission’s action in the Order renders the lifting of the ban

¹⁵ NASA’s reliance on a single ambiguous statement by Senator Hollings placed in the Congressional Record is not persuasive. Petition at 3-4. First, the statement itself is not part of the Conference Report adopting the ultimate legislation. Second, when the statutory language is clear, as is the case here, floor statements and other documents placed in the public record, are accorded little, if any, weight in determining congressional intent. See Bath Iron Works Corp. v. Director, Office of Workers’ Compensation Programs, 506 U.S. 153, 166 (1993) (where text of statute is unambiguous on point at issue, no weight given to “single reference by single Senator” during floor debate). See also 2A Sutherland, Statutory Construction, §48.13 (5th ed. 1991).

¹⁶ Administrative Procedure Act, 5 U.S.C. § 553(b)(B).

¹⁷ Order at ¶11.

¹⁸ See Komjathy v. National Transp. Safety Bd., 832 F.2d 1294, 1296-7 (D.C. Cir. 1987).

¹⁹ International Ladies’ Garment Workers’ Union v. Donovan, 722 F.2d 795 (D.C. Cir. 1983).

without safeguards void because it was arbitrary and capricious. However, that conclusion requires a tortured twisting of the holding of that case. International Ladies' Garment Workers held that an agency must engage in "reasoned decisionmaking," even in areas committed to its discretion.²⁰

That holding -- while unremarkable -- is irrelevant to this proceeding. Merely because NASA does not agree with the Commission's Order does not mean that the Commission has failed to explain why it did not use notice and comment procedures. The reason why notice and comment procedures were not used, which is plainly stated in the Order (at ¶11), is that the Commission was simply bringing its rules into conformity with the 1996 Act, and therefore notice and comment procedures were unnecessary. The Commission also recognized its obligation to revise its regulations "if necessary" by stating it would monitor the response to its rule changes to determine whether such revisions are necessary. Accordingly, the Commission did not fail to explain its actions or to comply with the direction of Congress.

NASA assumes that the Order will have a substantial impact, and leaps to the conclusion that notice and comment procedures are required.²¹ Although NASA does not use this label, it seems to be relying on the now-discredited "substantial impact" test²² to argue that notice and comment procedures were required. At one time, under the "substantial impact" test, "fundamental fairness" required use of notice and comment procedures for any rule that had a

²⁰ Id. at 821-22.

²¹ Petition at 6-7 ("The failure to conduct a formal rulemaking proceeding has a potentially devastating effect on local broadcast stations and on free, over-the-air broadcast television.")

²² See Independent Brokers-Dealers Trade Assn. v. SEC, 442 F.2d (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971); Texaco v. FPC, 412 F.2d 740 (3d Cir. 1969); and National Motor Freight Traffic Assn. v. United States, 268 F.Supp. 90 (D.D.C. 1967), *aff'd*, 393 U.S. 18 (1968).

substantial impact, even if that rule fell within a statutory exemption.²³ However, that is no longer the law. A court can no longer compel an agency to use procedures beyond those required by statute or by the Constitution on the basis of the decision's theoretical impact.²⁴

Moreover, forecasting the impact of the Order calls for pure speculation. We simply do not know whether lifting of the cross-ownership ban will have a substantial impact or not, or what material consequences (if any) it may have. Because the statute does not compel the Commission to use notice and comment procedures in this case, and there is no longer a "substantial impact" test, NASA's procedural contentions are without merit.

Finally, NASA raises the specter of anticompetitive conduct on the part of network-owned cable systems, hypothesizes that there will be a number of adverse consequences from repeal of the cross-ownership ban, and proposes a number of purported "safeguards" to remedy the problems it foresees.²⁵ It proposes that the Commission institute a formal rulemaking proceeding addressing these issues. NASA's proposal is premature at best. First, the FCC's plan to monitor the impact of elimination of the cross-ownership rule will serve the purpose of NASA's proposed rulemaking and may provide information leading to a rulemaking proceeding in the future. Monitoring of the response to the elimination of the cross-ownership rules -- and other changes in the video marketplace -- is appropriate and sufficient at this time. If, for example, the must-carry rules are overturned, consideration of additional safeguards to ensure carriage of non affiliated stations might be appropriate. However, fashioning safeguards as a

²³ See Davis and Pierce, Administrative Law Treatise, Third Edition (Little, Brown and Company: Boston, 1994), Vol. I, p. 361.

²⁴ Id. at 362, citing Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978).

²⁵ Petition at 6-17.

prophylactic measure with only conjecture as a guide to the market response to elimination of the rules is premature and unwise public policy

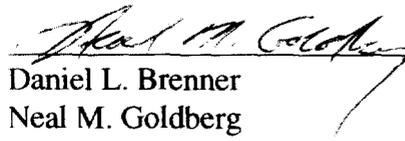
In any event, as a substantive matter, most of the purported “safeguards” proposed by NASA ignore the fact that all cable systems, whether network-owned or not, have an incentive to maximize viewer satisfaction and thereby to increase demand for their service. Ultimately, cable systems will carry program services that appeal to their subscribers. Indeed, the proposed safeguards are nothing more than preferential protectionism which are unfair to cable operators, programmers and consumers.²⁶

²⁶ In this regard, we incorporate by reference our reply comments in the Commission’s 1992 proceeding on elimination of the network-cable cross-ownership rules which addressed many of the issues raised in the NASA Petition. See Reply Comments of the National Cable Television Association, Inc., MM Docket No. 82-434, filed April 7, 1992.

CONCLUSION

For the foregoing reasons, the Commission should reject the NASA petition for reconsideration.

Respectfully submitted,



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July 2, 1996

CERTIFICATE OF SERVICE

I, Staci M. Pittman, do hereby certify that on this 2nd day of July, 1996, copies of the foregoing **“Opposition to Petition for Reconsideration”** were delivered by first-class, postage pre-paid mail upon the following:

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