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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

In the Matter of	)	DOCKET FILE COPY ORIGINAL
	)	
Implementation of Sections 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996	)	CS Docket No. 96-56
	)	
Cable Television Antitrafficking, Network Television, and MMDS/SMATV Crossownership Rules	)	

OPPOSITION OF CBS INC. TO PETITION FOR RECONSIDERATION

CBS Inc. ("CBS"), by its attorney, respectfully submits this opposition to the Petition for Reconsideration, or, in the Alternative, Petition for a Rulemaking by Network Affiliated Stations Alliance, which was filed in the above proceeding on May 8, 1996. ("NASA Petition").[1]

[1] Public notice of the filing of the NASA Petition was published by the Commission on June 14, 1996 (Report No. 2137) and in the Federal Register on June 20 (61 Fed. Reg. 31524).

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I. Introduction.

On February 8, 1996, the Congress enacted the Telecommunications Act of 1996 ("1996 Act")[2]. This legislation was intended to respond to the fundamentally changed economic and technological landscape of the telecommunications marketplace by updating an obsolete regulatory and legislative environment in ways that would encourage new and increased competition in these industries. One of the many regulatory reforms of the 1996 Act was a mandate to the Commission to repeal its restrictions on the ownership of cable systems by a television network company.[3] The NASA Petition urges the Commission to reconsider its decision implementing that repeal[4] or, in the alternative, to initiate a rulemaking proceeding immediately to consider the adoption of new regulatory "safeguards." For the reasons cited below, the reconsideration relief requested in the NASA Petition should be denied, and consideration of any new regulations should await significant marketplace experience in a deregulated environment.

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[3] 1996 Act, Section 202(f)(1). While the 1996 Act also repealed the statutory ban on crossownership of a television station and a cable system in the same market, it did not by its terms require the Commission to repeal its regulatory version of that ban. Id., Section 202(i).

[4] Order in CS Docket No. 96-56, released March 18, 1996, 61 Fed. Reg. 15387 (April 8, 1996) ("Order"). The Order also implemented provisions of the 1996 Act relating to the MMDS/SMATV cross ownership rules and the cable system antitrafficking rules.

II. The Commission's Order Repealing The Network/Cable Crossownership Rule Was Clearly Consistent With The Intent Of Congress And WithThe Administrative Procedure Act.

Section 202(f) of the 1996 Act reads as follows:

"(1) ELIMINATION OF RESTRICTIONS.- 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.

(2) SAFEGUARDS AGAINST DISCRIMINATION. - 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)." (Emphasis added)

The Commission's Order implements the unequivocal mandate of Section 202(f)(1) and repeals Section 76.501 of its Rules. At the same time, the Commission specifically acknowledged the language of Section 202 (f)(2) and states that it "will monitor the response to the rule changes ... to determine whether additional rule changes are necessary to establish the regulatory safeguards described... ."[5]

The essence of the NASA Petition's argument for reconsideration is that the Commission violated the plain language of Section 202 of the 1996 Act, as well as the Administrative Procedure Act ("APA")[6], by repealing the current restrictions on network ownership of cable systems before it completed a rulemaking proceeding to consider a laundry list of "safeguards" to protect network affiliates from hypothetical

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[5] Order at fn. 3.

[6] 5 U.S.C. §553.

anticompetitive network behavior which they presume will result from that repeal. Put another way, NASA argues that the Commission has no discretion under the 1996 Act or under the APA to gain some experience in the less regulated marketplace before it steps in to reregulate it. In CBS's view, this argument borders on the frivolous.

Section 202(f)(2) of the 1996 Act directs the Commission to adopt rules to ensure nondiscrimination in broadcast signal carriage by a network-owned cable system "if necessary."[7] This provision carries no implication that Congress intended that any such regulations -- not to mention the extraordinarily onerous regulations that NASA proposes -- must be adopted without the benefit of marketplace experience.[8] Indeed, a much more plausible argument can be made that economic regulation cannot be shown to be "necessary" without a factual record based on such experience. In sum, we believe that it is obvious from the plain language of the 1996 Act that the Congress did not direct the Commission to develop regulatory "solutions" to purely hypothetical "problems," and indeed it is a more reasonable interpretation of Congressional intent that the Commission was expected to forbear from reregulating, at least for the time being.

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[7] At one point, NASA appears to assert that the Commission was unqualifiedly required by Congress to adopt safeguards. NASA Petition at p.2. NASA also asserts that the Commission has repealed the crossownership restrictions only in a "franchise area in which a cable operator is subject to effective competition... ." Id. Both assertions, of course, are simply incorrect.

[8] The "safeguards" which NASA asks the Commission to adopt before it has any experience under the rule's repeal are draconian. For example, NASA would have the Commission regulate the amount of affiliate compensation paid in markets where a network owned a cable system. NASA Petition at p. 15.

The NASA Petition claims further that "the Order's failure to articulate any reasoned explanation for depriving the public of the opportunity to participate in a rulemaking proceeding, and its failure to list any findings that would justify such an action, renders its lifting of the ban in the absence of safeguards void" under the APA.[9] The APA certainly requires a notice and comment proceeding before the "safeguards" proposed by NASA could be adopted. The Commission may even be "required to give some explanation"[10] if it ultimately decides not to grant the NASA Petition's request for a rulemaking proceeding, although it is certainly well-settled that the Commission has extraordinarily broad discretion with regard to decisions on whether and when to commence such proceedings in response to petitions for rulemaking.[11] The APA, however, provides no conceivable support for NASA's proposition that the Commission's Order repealing the network/cable crossownership restriction is fatally flawed because the agency doesn't go to great lengths to explain why it chooses not to begin a rulemaking proceeding on its own initiative immediately, without the benefit of any experience under its deregulatory mandate. Under these circumstances, NASA's request for reconsideration should be summarily denied.

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[9] NASA Petition at p. 5.

[10] WWHT v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981).

[11] "Where, as in this case, the agency simply declines to initiate any rule making procedures,...the scope of judicial review should be extremely limited." Id at p. 817, citing Natural Resources Defense Council, Inc. v. S.E.C., 606 F.2d 1031,1045-46 (D.C. Cir. 1979) (Emphasis in original).

III. The Commission's Decision To Monitor The Marketplace Effect Of Network/Cable Crossownership Rule Repeal Was Not Only Within Its Discretion Under The Administrative Procedure Act, But Also Was Clearly Correct.

Even if the Commission, as it should, denies NASA's request for consideration, the NASA Petition urges, in the alternative, that the Commission should now commence a rulemaking proceeding to consider its laundry list of reregulatory proposals. The Commission has not issued a public notice inviting comments on that aspect of the NASA Petition[12], and CBS will not comment in any depth on the merits of those proposals here. We would note, however, that they are similar to proposals which NASA made -- and the Commission rejected -- the last time it revisited the network/cable cross ownership rule.[13]

In that 1992 proceeding, the Commission relaxed the rule, but retained some structural limits on network/cable cross ownerships.[14] At that time, the Commission said that "additional measures [such as some of those proposed then and now by NASA]

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[12] See, 47 C.F.R. 1.403 and 1.405.

[13] Report and Order in MM Docket No. 82-434, 7 FCC Rcd 6156 (1992). ("1992 Order") CBS's position on many of these proposals is contained in the March 22, 1992 Second Further Comments of CBS Inc. in that proceeding. In light of NASA's position that its specific deregulatory proposals are "necessary to avoid discriminatory practices by networks against their affiliates," it is worth noting that in the 1992 proceeding INTV (now ALTV) made the opposite argument; that is, that repeal would result in discrimination in favor of a network's affiliates. Id. at p. 6187.

[14] Network-owned cable systems were generally limited to 10% of homes passed nationally and to 50% of homes passed within any one ADI.

would essentially reimpose the cross ownership rule by removing incentives for -- or erecting substantial barriers to -- network entry... ."[15] In light of the specific Congressional mandate to open up the possibility of cable system ownership to broadcast network companies, it hardly seems appropriate for the Commission to decide -- with no marketplace experience whatsoever -- that it is "necessary" to adopt prophylactic regulations that could undermine its deregulatory action.[16]

IV. Conclusion.

The Commission's Order repealing the existing network/cable cross ownership restrictions was consistent with the clear intent of Congress as expressed in the 1992 Act. The 1992 Act's further directive to the Commission to adopt limited new rules affecting such cross ownerships "if necessary" provides no support for NASA's plea for immediate, far-ranging and onerous reregulation. The Commission should proceed with

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[15] Id., 6173-4

[16] Even without the draconian "safeguards" proposed by NASA and rejected by the Commission, the 1992 Order liberalizing the cross ownership did not work to stimulate network entry into cable system ownership, probably because the structural limitations alone made such entry impracticable.

its proposal to monitor the marketplace and assess the need for any new regulation based on experience rather than conjecture.

Respectfully submitted,

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By _____

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July 3, 1996

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CERTIFICATE OF SERVICE

I, Steven C. Higgins, hereby certify that a copy of the foregoing Opposition of CBS Inc. to Petition for Reconsideration has been served by first-class U.S. mail, postage prepaid, this 3rd day of July 1996 on the following:

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