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July 3, 1996

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Hand Deliver

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: CS Docket No. 96-56

Dear Mr. Caton:

On behalf of Capital Cities/ABC, Inc., transmitted herewith for filing with the Commission are an original and eleven copies of its Opposition to the Petition for Reconsideration, or, In the Alternative, Petition for a Rulemaking by Network Affiliated Stations Alliance in the above-referenced proceeding.

If there are any questions in connection with the foregoing, please contact the undersigned.

Very truly yours,

Roger Goodspeed

RG/ak
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
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 Cross Ownership Rules	)	

Opposition to the Petition for Reconsideration, or, In the Alternative, Petition for a Rulemaking by Network Affiliated Stations Alliance

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July 2, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
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 Cross Ownership Rules	)	

To: The Commission

Opposition to the Petition for Reconsideration, or, In the Alternative, Petition for a Rulemaking by Network Affiliated Stations Alliance

Capital Cities/ABC, Inc. ("Capital Cities/ABC"), a wholly-owned subsidiary of The Walt Disney Company, submits herewith its opposition to the Petition for Reconsideration, or, In the Alternative, Petition for a Rulemaking by Network Affiliated Stations Alliance ("NASA"), dated May 8, 1996 (the "NASA Petition"). In its Petition, NASA seeks reconsideration of the Commission's decision, made pursuant to the Telecommunications Act of 1996 (the "1996 Act"), to completely repeal the cable/broadcast networks cross-ownership restrictions or, in the alternative, asks that the Commission initiate a rulemaking proceeding to determine whether limitations should be placed on cable/broadcast network cross-ownership to preclude anti-competitive conduct that NASA suggests may result from such cross-ownership.

NASA's Petition is founded on two faulty premises: that Congress required the Commission to initiate a rulemaking proceeding to determine whether competitive safeguards are necessary after the elimination of the cable/broadcast network cross-ownership rules, and that the Commission's decision not to initiate such a rulemaking violated the Administrative Procedure Act ("APA"), 5 U.S.C. §553. As we will explain below, Congress did not require the Commission to conduct a rulemaking to determine the necessity for competitive safeguards, and the Commission's decision not to initiate a rulemaking did not violate the APA.

I. Congress Did Not Require Imposition of Safeguards or a Rulemaking to Consider Safeguards.

In section 202(f) of the 1996 Act, Congress addressed the issue of network ownership of cable systems in two respects. First, the statute unequivocally provides that the Commission "shall revise [the cable/broadcast network cross-ownership regulations] to permit a person or entity to own or control a network of broadcast stations and a cable system."[1] Second, the statute gives the Commission discretion to respond to any anti-competitive conditions that might result from repeal of the cross-ownership ban by providing that the Commission "shall revise such regulations <u>if</u> <u>necessary</u> to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations

[1] 1996 Act, section 202(f)(1).

by a cable system" owned by a broadcast network."[2] In response to the Congressional directive, the Commission eliminated the cable/broadcast network cross-ownership restrictions, and noted that it would "monitor the response to the rule changes ... to determine whether additional rule changes are necessary to establish the regulatory safeguards described in Section 202(f)(2)."[3]

NASA portrays the Commission's action as an overt failure to follow a statutory mandate to conduct a rulemaking proceeding.[4] But there was no such Congressional mandate. Section 202(f)(2) merely establishes certain market characteristics -- cable carriage, channel positioning and nondiscriminatory treatment of nonaffiliated stations -- that the Commission should consider and take action to maintain, if, in its discretion, such action appears necessary.[5]

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[2] 1996 Act, section 202(f)(2) (emphasis supplied).

[3] Order, CS Docket No. 96-56 (released March 18, 1996), par. 4 n. 3 (the "Order"). The cable/broadcast network rule had previously provided that networks could own cable systems passing no more than 10% of homes passed by cable nationwide, and no more than 50% of homes passed by cable in any ADI. See Report and Order, MM Docket No. 82-434, 7 FCC Rcd 6156, 70 RR 2d 1531 (1992).

[4] See NASA Petition at 1-2.

[5] The legislative history of the 1996 Act reinforces the plain meaning of section 202(f)(2) that whether any action is necessary to maintain competition after elimination of the cable/broadcast network cross-ownership restrictions is left to the Commission's discretion: "If necessary, the Commission is directed to revise its rules to ensure carriage, channel positioning and nondiscriminatory treatment of non-affiliated broadcast stations by cable systems affiliated with a broadcast network." H.R. Conf. Rep. No. 458, 104th Cong. 2d Sess. 163 (1996).

Notably, where Congress concluded that the Commission should commence a rulemaking proceeding, it said so unequivocally. In the same section of the 1996 Act that addresses cable/broadcast network cross-ownership, Congress directed that the "Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations" on multiple television station ownership in single markets.[6] The Commission's decision to monitor response to elimination of the cable/broadcast network cross-ownership rules before considering further regulation was within the discretion granted to the Commission under the 1996 Act.[7]

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[6] 1996 Act, section 202(c)(2).

[7] In support of its statutory argument, NASA cites a snippet of a document entitled "Telecommunications Bill Resolved Issues," entered into the Congressional Record during Senate floor debate, which states in relevant part: "Network-cable: allow networks to buy cable systems subject to FCC safeguards." NASA Petition at 3. According to NASA, that brief, synoptic passage "demonstrates the clear will of Congress that the cable/broadcast network rule would be repealed only when appropriate safeguards were in place." NASA Petition at 4 (emphasis in original). But NASA reads too much into this brief text. The Commission's Order does precisely what the passage describes: repeals the rule subject to Commission review and imposition of safeguards. In any event, the plain language of the 1996 Act with respect to cable/broadcast network cross-ownership cannot be nullified by a brief and ambiguous shred of legislative history. See Florida Public Telecommunications Ass'n. Inc. v. FCC, 54 F. 3d 857, 861 (D.C. Cir. 1995) ("We will not use contestable negative inferences from one part of the legislative history to trump the plain words of the statute."). Accord Burlington Northern R. Co. v. Oklahoma Tax Comm'n., 481 U.S. 454, 461 (1987). Finally, the "Resolved Issues" document was not intended to describe fully the terms of the 1996 Act. This is evident from the document's one-line description of the lengthy and complex new provisions regarding entry of telephone companies into the cable television business, including the new "open video system" arrangements: "Cable-telephone: allow telephone companies to provide cable service in their regions." 142 Cong. Rec. 5689 (daily ed. Feb. 1, 1996).

II. The Commission's Decision Not to Initiate a Rulemaking Proceeding Did Not Violate the APA.

NASA argues that the Commission's failure to conduct a rulemaking proceeding before repealing the cable/broadcast network cross-ownership rules violated the APA.[8] To the contrary, the Commission determined that because "these rule changes simply conform the Commission's rules to the [1996 Act], we find for good cause that compliance with the notice and comment provisions of the [APA] is unnecessary."[9]

The Commission is plainly correct that no rulemaking was required. Congress directed the Commission to eliminate the cable/broadcast network cross-ownership rule and allowed, but did not direct, the Commission to "revise" the rule to establish safeguards "if necessary."[10] Having been vested with such discretion by Congress, the agency's decision not to initiate a rulemaking proceeding was not a violation of the APA. There is no APA requirement that an agency give notice and an opportunity for comment before deciding not to initiate a rulemaking proceeding.[11] Moreover, the Commission's determination to wait and see whether any restrictions on cable/broadcast network cross-ownership proved to be "necessary" is exactly the kind of judgment on which agency

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[8] NASA Petition at 4.

[9] Order, par. 11.

[10] 1996 Act, section 202(f)(2).

[11] See WWHT, Inc. v. FCC, 656 F.2d 803, 813-14 (D.C. Cir.), cert. denied, 470 U.S. 821 (1981); Wisconsin Electric Power Co. v. Costle, 715 F.2d 323, 328 (7th Cir. 1983).

discretion should be paramount. As the court noted in WWHT, 656 F.2d at 818, the Commission possesses "broad discretionary power ... to promulgate (or not promulgate) rules."[12]

As NASA points out, the Commission conducted a full-scale rulemaking process only four years ago and accumulated a complete record including hundreds of pages of public comments.[13] Since then, the Commission has conducted an almost continuous inquiry and analysis of all phases of the television industry, receiving comments and detailed economic analyses from all sectors of the industry.[14] Plainly, the Commission's decision to monitor the

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[12] The WWHT court went on to point out that it "is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking." 656 F.2d at 818. See also Brown v. Sec'y. of Health and Human Services, 46 F.3d 102, 110-11 (1st Cir. 1995); Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1111 (D.C. Cir. 1992) ("agency's refusal to initiate a rulemaking is evaluated with a deference so broad as to make the process akin to non-reviewability"); Home Box Office, Inc. v. FCC, 587 F.2d 1248, 1252 (D.C. Cir. 1978) (in reviewing Commission decision not to promulgate rule, "we may not demand complete factual support in the record for the Commission's judgment insofar as it rested upon factual determinations that 'were primarily of a judgmental or predictive nature;' for 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency'"), quoting FCC v. Nat'l. Citizens Comm. for Broadcasting, 436 U.S. 775, 814 (1978).

[13] NASA Petition at 6; see Report and Order, MM Docket No. 82-434, 7 FCC Rcd. 6156, 70 RR 2d 1531 (1992).

[14] E.g., Second Report and Order, MM Docket No. 90-162, 8 FCC Rcd. 3282, 72 RR 2d 1044 (1993) (fin/syn proceeding); Report and Order, MM Docket No. 91-221, 10 FCC Rcd. 4538, 77 RR 2d 453 (1995) (network station ownership/secondary affiliation proceeding); Notice of Proposed Rulemaking, MM Docket Nos. 94-150, 92-51 and 87-154, 10 FCC Rcd. 3606 (1995) (ownership attribution/cross-interest policy proceeding); Notice of Proposed Rulemaking, MM Docket No. 95-90, 10 FCC Rcd. 11853 (1995) (network control of advertising rates/advertising representation proceeding); Notice of Proposed Rulemaking, MM Docket Nos. 91-22 and 87-8, 10 FCC Rcd. 3524 (1995)

effects of the repeal of the cable/broadcast network cross-ownership rule was based on the agency's extensive knowledge of the current state and direction of the television industry. As such, that decision was not a violation of the APA:

> An agency's decision not to adopt rules is entitled to great deference, and ... we see no reason why the Commission should not permit private action and the play of competitive forces to correct any lack of balance in the market that may exist. We repeat the comment in our opinion in the first Home Box Office case, in which we spoke critically of the Commission's choice to regulate rather than allow a period of unregulated experimentation in which data for informed decision-making would be generated. We refer also to the Supreme Court's observation that "'[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.'"

Home Box Office, 587 F.2d at 1256 (citations omitted).

Conclusion

The Commission's repeal of the cable/broadcast network cross-ownership rule and decision not to impose competitive safeguards did not violate the 1996 Act or the APA. NASA's petition for reconsideration or, in the alternative, for a rulemaking should accordingly be denied.

(multiple ownership proceeding); Notice of Proposed Rulemaking, MM Docket No. 95-92, 10 FCC Rcd. 19951 (1995) (network/affiliate rules proceeding); Report and Order, MM Docket No. 94-123, 11 FCC Rcd. 546, 78 RR 2d 1076 (1995) (prime time access rule proceeding); Second Annual Report, CS Docket No. 95-61, 11 FCC Rcd. 2060, 1 CR 530 (1995) (second annual report on status of competition in delivery of video programming); Report and Order and Notice of Proposed Rulemaking, CS Docket Nos. 96-46 and 87-266, FCC 96-99 (released Mar. 11, 1996) (open video system/telephone-cable cross-ownership proceeding).

Respectfully submitted,

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July 2, 1996

CERTIFICATE OF SERVICE

I, Anne Kromm, hereby certify that on this 2nd day of July, 1996, I caused a copy of the foregoing "Opposition to the Petition for Reconsideration, or, In the Alternative, Petition for a Rulemaking by Network Affiliated Stations Alliance" to be served by first-class United States mail, postage prepaid to:

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