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

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)
)
Cable Television Antitrafficking, Network Television,)
and MMDS/SMATV Cross ownership Rules)

CS Docket No. 96-56

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OPPOSITION OF TURNER BROADCASTING SYSTEM, INC.

Turner Broadcasting System, Inc. ("Turner"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby opposes the Petition for Reconsideration^{1/} filed by the Network Affiliated Stations Alliance ("NASA") in the above-captioned proceeding. Contrary to NASA's assertions, the Commission's repeal of the broadcast network/cable television cross-ownership rule was entirely consistent with Congress's intent and the Administrative Procedure Act ("APA"). Moreover, the "safeguards" proposed by NASA should be rejected because they would thwart the pro-competitive objectives of the Telecommunications Act of 1996.

I. The Commission's Decision To Defer Action On Possible Safeguards Was Consistent With Both The APA And Congress's Intent

NASA argues that the Commission's repeal of its cable/broadcast network cross-ownership provisions without providing an opportunity for public comment regarding the necessity of safeguards violated the APA and disregarded the intent of Congress.^{2/} NASA

^{1/} See Petition for Reconsideration, or, in the Alternative, Petition for a Rulemaking by Network Affiliated Stations Alliance, CS Docket No. 96-56, filed May 8, 1996 ("Petition").

^{2/} Petition at 4.

mischaracterizes the Commission's Order^{2/} and ignores the fact that Congress explicitly directed the Commission to eliminate the cross-ownership rule, while leaving to the Commission's discretion whether to promulgate safeguards.

In Section 202(f)(1) of the 1996 Act, Congress commanded the Commission to "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/} This mandate was unequivocal -- Congress did not condition the Commission's duty to repeal the cross-ownership provision on any other action. Accordingly, the Commission fulfilled its statutory obligation and eliminated subpart (b) of Section 76.501. Given Congress's direct command, adherence to the APA's notice and comment provisions was unnecessary prior to the Commission's action.

To the extent NASA believes that Section 202(f)(2), which directs the Commission to adopt certain safeguards, "if necessary," constrained the Commission's ability and obligation to repeal the cross-ownership rule, it is misguided. First, NASA's argument that the Order is "contrary to the intent of Congress" because it made the "unilateral decision" that such safeguards are currently not necessary^{4/} is incorrect as a matter of statutory interpretation. The 1996 Act does not require the Commission to promulgate safeguards against discrimination at all, let alone contemporaneously with its repeal of the cross-ownership provision. In fact, the 1996 Act only requires such safeguards "if necessary," not attaching any time limitations on

^{2/} Implementation of Section 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996; Cable Television Antitrafficking, Network Television, and MMDS/SMATV Cross-Ownership Rules, Order, CS Docket No. 96-56 (released March 18, 1996) ("Order").

^{3/} Pub. L. No. 104-104, 110 Stat. 56. § 202(f) (1996) ("1996 Act").

^{4/} Petition at 4.

when, or even whether, the Commission should act.^{5/} Moreover, contrary to NASA's assertions,^{6/} the Commission did not determine in the Order that safeguards are not currently necessary. Instead, completely within its discretion, the Commission decided to "monitor" the response to the repeal of the cross-ownership rule to determine whether existing protections are sufficient.

Second, there is no merit to NASA's claim that the Commission's decision to consider at some future time whether safeguards should be adopted affected a "substantive rule change"^{7/} that required notice and comment. The APA does not require notice and comment rulemaking in instances where the agency seeks to issue interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice^{8/}. Under the APA, "substantive rules" are distinct from interpretive rules or statements of policy.^{9/} It is well established that substantive rules create binding norms and are finally determinative of issues or rights addressed.^{10/}

^{5/} 1996 Act, § 202(f)(2).

^{6/} Petition at 4.

^{7/} Id.

^{8/} 5 U.S.C. § 553.

^{9/} Compare 5 U.S.C. § 553(b)(3)(A)-(B) with id. at § 553(d). While reviewing courts will consider how an agency characterizes its action, Mt. Diablo Hospital District v. Bowen, 860 F.2d 951, 956 (9th Cir. 1988), the meaning of an agency's action will ultimately be dependent on the underlying statute, Rochna v. National Transp. Safety Bd., 929 F.2d 13, 15 (1st Cir.), cert. denied, 502 U.S. 910 (1991). Whether an agency rule is substantive turns on the agency's intent in authorizing it, as ascertained by an examination of the provision's language, its context, and any available extrinsic evidence. Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33, 39 (D.C. Cir. 1974).

^{10/} See Pacific Gas, 506 F.2d at 38.

Substantive rules create rights, assign duties, impose obligations, and have the full force of law.^{11/}

Statements of policy and interpretive rules, by contrast, do not contain any new substance of their own but merely express the agency's understanding of a congressional statute.^{12/} Instead, in the case of policy statements, the agency merely announces motivations it will consider or tentative goals toward which it will aim in the future.^{13/}

Contrary to NASA's contention that the Commission's statement in the Order is dispositive of whether it will implement safeguards,^{14/} the plain language of the Order makes clear that the Commission had no intention of finally deciding whether to adopt safeguards against discrimination. The Commission's statement that it would monitor the future course of events "to determine whether additional rule changes are necessary"^{15/} was not a rule at all, but rather a statement of future intention to consider whether a rule was necessary. Accordingly, the Commission was not required to engage in rulemaking procedures pursuant to the APA.

^{11/} La Casa Del Convaleciente v. Sullivan, 965 F.2d 1175, 1178 (1st Cir. 1992), citing Ohio Dep't of Human Servs. v. HHS, 862 F.2d 1228, 1233 (6th Cir. 1988); Linoz v. Heckler, 800 F.2d 871, 877 (9th Cir. 1986); Guardian Fed. Sav. & Loan Ass'n v. Federal Savings & Loan Insurance Co., 589 F.2d 658, 664-65 (D.C. Cir. 1978).

^{12/} National Media Coalition v. Federal Communications Commission, 816 F.2d 785, 788 (D.C. Cir. 1987).

^{13/} Telecommunications Research and Action Center v. Federal Communications Commission, 800 F.2d 1181, 1186 (D.C. Cir. 1986); see also Batterton v. Marshall, 648 F.2d 694, 706 (D.C. Cir. 1980).

^{14/} Petition at 4.

^{15/} Order at ¶ 4 n.3.

II. NASA's Proposed Safeguards Would Undermine the Pro-Competitive Goals of the 1996 Act

While NASA acknowledges that Congress mandated elimination of the cable/broadcast network cross-ownership rule, it proposes a multitude of so-called "safeguards" that, if adopted, would render nil the Commission's action fulfilling Congress' directive. For instance, NASA's "simple solution" -- that cable/network combinations be allowed to enter a particular market only if they would provide a second or competing cable service -- would effectively block virtually all broadcast network/MSO mergers.^{16/} Although cable operators are increasingly subject to "effective competition," competing video providers plainly are not present in every community in which an MSO is franchised. Thus, under NASA's proposed rule, a cable operator that chooses to combine with a broadcast network would be forced to discontinue service on a piecemeal basis throughout the country. This clearly would not benefit the cable subscribers, the television viewers, or NASA's members.

If Congress had intended the Commission to adopt safeguards that, in effect, maintain the status quo, it would not have bothered to require the repeal of the cross-ownership rule. Indeed, the 1996 Act's legislative history specifically provides that the Commission should not make "changes in its rules which would impede the objectives" of the elimination of the cross-ownership ban.^{17/} Because an effective competition standard would prevent virtually all

^{16/} Petition at 11. NASA mistakenly asserts that the Commission has already adopted this effective competition standard for purposes of determining cable/broadcast network cross-ownership. See id. at 2.

^{17/} H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 119 (1995).

combinations of broadcast networks and cable companies, it is beyond the authority of the Commission to adopt such criteria in this context.

Moreover, when Congress wished the Commission to employ this standard, it said so explicitly. For example, with regard to the statutory MMDS/cable cross-ownership prohibition, Congress stated that the restriction would continue to apply unless the cable operator is subject to effective competition.^{18/} Similarly, Congress directed the Commission to consider effective competition in determining whether to forbear from rate regulation in a particular franchised area.^{19/} In contrast, Congress recognized that use of an effective competition standard in the context of network/cable cross-ownership would result in an effective ban of broadcast network/cable company mergers. NASA's back door attempt to reverse the repeal of the cross-ownership rule should be rejected.

There also is no basis for NASA's call for a special must-carry requirement to be applied to cable/broadcast network combinations. While we expect the Commission to consider additional safeguards if (or when) the general must-carry provision is found unconstitutional, at this point the law requires all cable operators to comply with must carry no matter their affiliation.^{20/} Accordingly, unless and until the Supreme Court strikes down the must-carry provisions of 1992 Cable Act, a separate rule would be redundant.

Presumably the Commission realized this when it did not jump the gun and exercise its stand-by authority. Presumably the Commission also realized that jumping the gun, as NASA

^{18/} 47 U.S.C. § 533(a)(3).

^{19/} Id. at § 543(a)(2).

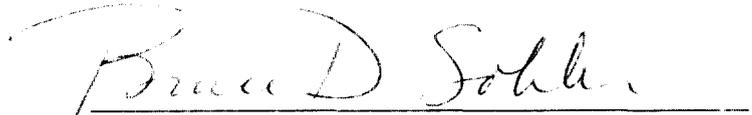
^{20/} Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994).

advocates, would only provide evidence that the general must carry regime is unconstitutionally overbroad. Although Turner is on the other side of the Commission in the Supreme Court, it recognizes that the agency's decision to stay its hand here is both sound policy and a sound litigation tactic.

CONCLUSION

For the foregoing reasons, the NASA Petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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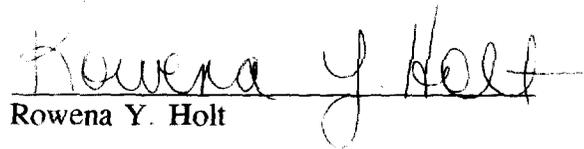
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