

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation 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

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**OPPOSITION TO PETITION FOR RECONSIDERATION, OR
IN THE ALTERNATIVE, PETITION FOR RULEMAKING BY
NETWORK AFFILIATE STATIONS ALLIANCE**

National Broadcasting Company, Inc. ("NBC"), hereby opposes the Petition for Reconsideration, or in the Alternative, Petition for Rulemaking ("Petition") of the Commission's March 18, 1996 Order in the above-referenced proceeding filed by the Network Affiliated Stations Alliance ("NASA")

I. INTRODUCTION

NASA's petition raises two separate issues. First, NASA challenges the Commission's removal of the network/cable cross ownership prohibition without first engaging in a notice and comment rulemaking. On that issue, NASA's position is simply a misinterpretation of statutory language. Section 202(f) of the Telecommunications Act of 1996 ("Telecom Act") instructed the FCC to revise its rules "to permit a person or entity to own or control a network of broadcast

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stations and a cable system"¹ The Commission was given no discretion in effecting this mandate. As a result, it was not necessary for the Commission to seek public input before implementing this directive.

Second, NASA claims as a separate issue and separate matter that the FCC should have moved foreword with a rulemaking at this time to determine whether safeguards are necessary. On that issue, the Commission was given discretion to adopt certain safeguards "if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations" by a cable/network combination.² In exercising this discretion, the agency acted reasonably and in an appropriate manner by deciding to allow a period of time to pass before determining whether any safeguards would be necessary. There is nothing in the FCC's prior experience with relaxing the network/cable cross-ownership prohibition in 1992 which indicates that any anticompetitive or discriminatory behavior, or actions contrary to the public interest, have resulted from network/cable combinations. Furthermore, NASA offered no substantive evidence of potential harm. Rather, its hyperbolic pleading, which predicts the demise of "free over-the-air" television as a result of the Order, merely rehashes the old hypothetical "parade of horrors" that NASA continuously cries will result from elimination of the network/cable cross-ownership restriction. The Commission has previously acknowledged that such speculative fears were of "questionable merit", because the strategies they allege the networks would pursue are contrary to economic logic.

¹Telecom Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Section 202(f).

²Id., Section 202(f)(2)(emphasis supplied)

NASA has simply failed to provide any rational justification for the FCC to reconsider its action, or to initiate a rulemaking directed at restricting the ability of networks and cable system owners to form lawful combinations. Accordingly, NBC respectfully submits that the Petition must be denied.

II. REPEAL OF THE NETWORK/CABLE OWNERSHIP RULE WITHOUT NOTICE AND COMMENT FULLY COMPLIES WITH THE STATUTORY MANDATE SET FORTH IN THE TELECOM ACT

NASA maintains that Section 202(f) of the Telecom Act required the FCC "to revise its regulations to allow a person or entity to own or control a network of broadcast stations and a cable system upon adoption of certain safeguards", citing Section 202(f)(1) of the Act.³ This is simply an incorrect reading of express statutory language. Section 202(f)(1) specifically requires the FCC to revise its regulations "to permit a person or entity to own or control a network of broadcast stations and a cable system." There is no mention of "safeguards" in the statutory directive.

Thus, Section 202(f)(1) accords the Commission no discretion and requires the agency to modify its rules to permit network/cable crossownership. Such specific statutory language cannot be displaced by procedural requirements otherwise mandated by the Administrative Procedure Act.⁴ Accordingly, there is no requirement that the agency engage in notice and

³Petition at 2 (emphasis added).

⁴Cf. Rafah-Rafie Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 134 (1991) (the APA does not apply where language of a subsequently adopted immigration statute specified deportation procedures).

comment rulemaking prior to elimination of the rule

III. THE TELECOM ACT LEFT TO THE FCC'S DISCRETION WHETHER TO ADOPT SAFEGUARDS IN CONNECTION WITH ELIMINATION OF THE NETWORK/CABLE OWNERSHIP RESTRICTIONS

In a separate subsection of the Telecom Act --Subsection 202(f)(2) --Congress did leave to the FCC's judgement the decision whether and when to adopt safeguards. The statutory language directs the Commission to adopt safeguards "if necessary". Clearly there is a substantial element of discretion inherent in the words "if necessary". Furthermore, if Congress had intended that the FCC conduct a rulemaking on this matter it would have been explicit in its language, as it was in other sections of the Telecom Act, most notably, Section 202(c) which specifically provides: " The Commission shall conduct a rulemaking proceeding" to determine whether to modify its television duopoly rules.⁵

Thus, it was clearly within the discretion of the Commission to determine how to proceed. As set forth below, the agency's determination to "monitor" the situation, rather than engage in rulemaking prior to elimination of the cross- ownership restriction, was a reasonable and supportable exercise of agency discretion.

⁵Telecom Act, Section 202(c)(2) (emphasis supplied). Indeed, if Congress had intended that the FCC eliminate the rule only after adopting safeguards, as suggested by NASA, the statutory provision would have been drafted in a much different manner, perhaps providing, without any separate subsections: "The Commission shall, after adopting safeguards necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations, revise section 76.501 of its regulations to permit a person or entity to own or control a network of broadcast stations and a cable system "

IV. NASA PROVIDES NO EVIDENCE DEMONSTRATING THAT THE FCC'S DECISION NOT TO ADOPT SAFEGUARDS WAS UNREASONABLE OR AN ABUSE OF DISCRETION

NASA asserts that adoption of safeguards is necessary before any network/cable combination is permitted because "[e]xperience tells us that it is very difficult to rectify a bad situation after the fact; recent Commission history confirms that view."⁶ In this case, that statement is simply not true. If a network/cable combination engages in anticompetitive or discriminatory practices, that is an "evil" which can be easily rectified. If such practices occur, the FCC can take action to prohibit them and can impose forfeitures on those who engaged in such activity. Accordingly, any "bad situation" can be corrected once identified.

In any event, NASA fails to offer any evidence of any "experience" or "Commission history" -- relevant or not -- which demonstrates that the FCC acted unreasonably or arbitrarily. Indeed, Commission "experience" in the matter of network/cable combinations indicates that the FCC was justified in determining that there is no immediate need for safeguards. In 1992, after an extensive notice and comment rulemaking proceeding, the Commission modified the absolute prohibition against network/cable cross-ownership and allowed such combinations where they did not exceed 10 percent of homes passed by cable nationwide and 50 percent of homes passed by cable within a local market or an Area of Dominant Influence. NASA has offered no evidence that any combinations that were formed following this modification have engaged in the practices it fears, or have otherwise adversely affected the public interest.

⁶Petition at 9.

Nor does NASA offer any other type of factual or objective evidence which demonstrates that the FCC erred in not considering whether safeguards are necessary now. Instead, NASA merely recycles the arguments which the FCC has previously found to be of "questionable merit" because the strategies they alleged the networks would pursue were "inconsistent with one another and contrary to the economic interests of network-cable owners."⁷ Specifically, NASA argues that a network/cable owner will favor its own affiliate at the expense of the other networks' affiliates or independent stations, while at the same time arguing that a network/cable owner will be in a position to disadvantage its own affiliates. NASA cannot seem to make up its mind as to which of these inconsistent courses of action a network/cable owner would take. Perhaps that is because neither of these scenarios makes any business sense.

For example, NASA asserts that a network/cable owner would discriminate in favor of its own affiliated stations by not carrying (or carrying in an undesirable channel position) non-affiliated local broadcast signals in an effort to increase the viewership of its own affiliate in the market. Such an action would be foolish and adverse to the network/cable owner's bottom line. As the Commission stated almost fifteen years ago, "a profit motive encourages system owners to provide the diverse programming that consumers desire and which the channel capacity of cable technology permits despite supposed conflicts which may be ascribed to particular types of owners."⁸ Moreover, the must-carry and channel positioning requirements of the 1992 Cable Act would limit the network/cable owner's ability to engage in this type of conduct, even if it were

⁷Report and Order in MM Docket 82-434, 70 RR 2d 1531, 1536 (1992).

⁸Notice of Proposed Rulemaking in CT Docket 82-434, 91 FCC 2d 76,86 (1982).

economically sound.

Nor does it make any economic sense for a network/cable owner to disadvantage its own affiliates, as NASA fears, by coercing the affiliates into making decisions with respect to compensation or program clearance by threats of refusal to carry the affiliate on the cable system, or to relegate the affiliate to the Siberia of a high channel position. Any such threats would have to be idle ones because implementing such actions would jeopardize the viability of the affiliate.⁹ It is undisputed that the maintenance of a strong network/affiliate distribution system is critical to the survival of the broadcast networks. It is what enables networks to reach the mass audience that they sell to advertisers -- what gives them uniqueness as a national advertising medium reaching every home in the U.S. As recognized by industry observers: "Strong distribution via local affiliated television stations is imperative for national broadcast networks in the ever escalating battle for viewers."¹⁰

Furthermore, NASA's claims that network/cable owners will be in a position to "exploit" their power are preposterous in today's fiercely competitive video marketplace. It is well established that the balance of power between broadcast networks and their affiliates has shifted, and that the networks are not in a position to exert undue influence over their affiliates.¹¹ A

⁹In addition, the must-carry and channel positioning requirements of the 1992 Cable Act would limit the network/cable owner's ability to carry out any such threats.

¹⁰Report on Broadcast Industry, published by Merrill Lynch, June 20, 1996 at 3.

¹¹Prime Time Access Rule, 78 RR 2d 1076 (1995); Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 3282 (1993).

recent report by Jessica Reif, Merrill Lynch's respected senior analyst of the broadcast industry, describes how and why local stations are now "in the catbird seat": "TV spectrum is getting scarce. In affiliate negotiations, the balance of power has shifted from TV networks to TV stations, as a crowd of new networks fight for distribution."¹² On May 23, 1994, the date on which Fox Television reached an agreement with New World Communications, which dropped its long-standing network affiliations with NBC, ABC and CBS in favor of Fox, the "big bang" occurred,¹³ and it was, indeed, a "new world" with regard to the network/local station relationship:

- To date, "more than 100 television stations in over 40 markets have changed affiliations and these switches continue to ripple along today".¹⁴
- The total compensation paid by NBC, ABC and CBS "rose from an estimated \$350 million in 1994 to nearly \$700 million in 1996, which is pure profit for affiliates, boosting the value of local television stations. The older three major networks initially focused their efforts on securing long-term affiliate distribution in big markets, but now new contracts and higher comp levels are beginning to boost operating margins for network affiliates in smaller markets. On the other

¹²Report on Broadcast Industry, published by Merrill Lynch, June 20, 1996 at 1.

¹³Id. at 2.

¹⁴Id.

hand, three-network operating profits *in toto* rarely ever exceeded \$600 million."¹⁵

In short, NASA's dramatic prediction that elimination of the network/cable cross-ownership restriction without adoption of safeguards "has a potentially devastating effect on local broadcast stations and on free, over-the-air broadcast television"¹⁶ is nothing more than hyperbolic rhetoric. Such unsupported assertions certainly cannot undermine the reasonableness of the Commission's decision not to initiate a rulemaking at this time on the issue of whether safeguards are necessary in the area of network/cable cross-ownership

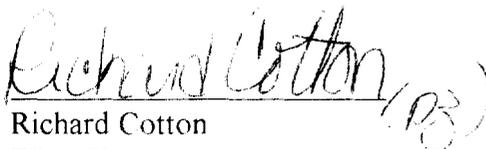
¹⁵Id. (emphasis supplied)

¹⁶Petition at 7

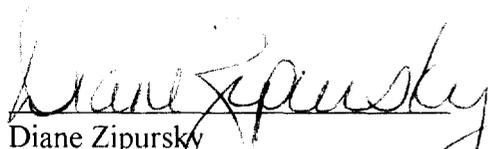
CONCLUSION

For the foregoing reasons, NBC urges the Commission to deny the Petition of NASA in its entirety.

Respectfully submitted,


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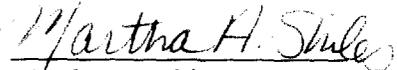
CERTIFICATE OF SERVICE

I, Martha A. Shiles, do hereby certify that on this 3rd day of July, 1996, I caused copies of the foregoing Opposition to Petition for Reconsideration, or in the Alternative, Petition for Rulemaking by Network Affiliate Stations Alliance to be served via pre-paid first-class mail on:

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