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

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In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

COMMENTS

THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC.

Paul J. Sinderbrand
Robert D. Primosch
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, NW
Washington, DC 20006
(202) 783-4141

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EXECUTIVE SUMMARY

The Wireless Cable Association International, Inc. ("WCA") applauds the Commission's proposal to liberalize the ownership attribution standards that apply to the cable/MDS cross-ownership rule. Subject to one caveat discussed herein, WCA believes that the Commission's proposal will encourage investment in the wireless cable industry, particularly by institutional investors who have invested or would like to invest in the cable industry as well. WCA also believes, however, that the Commission needs to go further to address some unintended consequences of its cross-ownership rules that are becoming very problematic for wireless cable operators.

In fact, there are *three* Commission rules which govern cross-ownership of cable and wireless cable systems: the cable/MDS cross-ownership rule (47 C.F.R. § 21.912(a)), the cable/MDS cross-leasing rule (47 C.F.R. § 21.912(b)) and the cable/ITFS cross-leasing rule (47 C.F.R. § 74.931(h)). As a result more of historical accidents than of any overriding Commission policy, each rule is different from the others, creating a confusing patchwork of regulations which imposes additional unnecessary barriers both to investment in the wireless cable industry and to the industry's usage of coaxial cable where it is most efficient to do so and where such use would have no cognizable adverse effect on competition.

Furthermore, though the cable/MDS cross-ownership rule and cable/MDS and cable/ITFS cross-leasing rules continue to serve the important purpose of preventing incumbent cable operators from "warehousing" MDS and ITFS spectrum to the detriment of their competitors, they also often preclude a wireless cable operator from serving communities that cannot receive wireless transmissions due to environmental factors, man-made obstructions or local antenna restrictions. Often it is those communities most in need of service - - rural areas not passed by the cable MSOs - - that are adversely affected. In addition, the rules often preclude a wireless cable operator from acquiring an incumbent cable operator in an area that clearly cannot sustain multiple service providers. The Commission's narrow interpretation of its waiver authority under the 1992 Cable Act has made it virtually impossible for wireless cable operators to obtain relief in these types of situations.

WCA thus submits that the Commission, through a limited "fine tuning" of its rules, can resolve these problems in a way that addresses the concerns of wireless cable operators without increasing the risk of spectrum "warehousing" by cable industry. Specifically, WCA herein recommends that the Commission (1) encourage maximum investment in the wireless cable industry by applying its proposed broadcast ownership attribution standards to the cable/MDS cross-ownership and cable/MDS and cable/ITFS cross-leasing rules, but without the proposed 33% "equity or debt plus" test; (2) conform its cable/MDS and

cable/ITFS restrictions to eliminate long standing inconsistencies between the three rules; (3) recommend that Congress adopt a limited exception to the statutory cable/MDS cross-ownership ban to allow a wireless cable operator to serve fewer than 50% of its total number of subscribers nationwide with coaxial cable that crosses a public right-of-way; and (4) recommend that Congress amend the statutory cable/MDS cross-ownership ban to include a rural exemption that would apply to any nonurbanized area of fewer than 10,000 persons, and modify the Commission's Rules to include a corresponding rural exemption for the cable/MDS and cable/ITFS cross-leasing rules.

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COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments on the *Further Notice of Proposed Rulemaking* (the "*FNPRM*") released by the Commission on November 7, 1996 with respect to the above-captioned proceedings.[1/]

[1/]FCC 96-436 (rel. Nov. 7, 1996).

I. INTRODUCTION.

Since their adoption in 1990, the cable/MDS cross-ownership rule and the cable/MDS and cable/ITFS cross-leasing rules have been and continue to be a necessary stopgap against warehousing of MDS and ITFS spectrum by incumbent cable operators.[2] Though the wireless cable industry has made significant strides since Congress subsequently codified the cable/MDS cross-ownership rule in the 1992 Cable Act (47 U.S.C. § 533(a)), most wireless cable operators still must have access to all available MDS and ITFS channels in a given market to enjoy "channel parity" with incumbent cable operators.[3] WCA thus still believes

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[2] *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing the Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410, 6417 (1990) [the *"MDS First Report and Order"*]. For purposes of these Comments, the term "MDS channels" refers both to single-channel MDS (*i.e.*, MDS channels 1, 2, 2A, H1, H2 and H3) and the multichannel multipoint or "MMDS" service (*i.e.*, channels E1-E4 and F1-F4).

[3] The Commission has recognized that wireless cable's inability to compete effectively is hampered by its current inability to transmit as many channels as its cable and DBS competition. *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 - Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, 7485 (1994) [the *"1994 Competition Report"*]; *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - - Competitive Bidding*, 9 FCC Rcd 7665, 7666-67 (1994). Notwithstanding the Commission's observation that "the use of digital compression is expected to alleviate wireless cable's channel capacity problem in the near future" (*1994 Competition Report*, 9 FCC Rcd at 7488), the fact remains that a wireless cable system cannot realize the full benefit of digital compression without access to all available MDS and ITFS channels. Indeed, even with access to all 32 or 33 MDS and ITFS channels in a given market, a wireless cable

that the basic rationale for the rules remains valid, since without them there is a substantial possibility that wireless cable might not ever become the significant near-term competition to cable envisioned by the Commission.[4]

By the same token, WCA also believes that the Commission is precisely right in observing that the current cable/MDS cross-ownership rule "severely restricts investment opportunities that are compatible with the [Commission's] goal of strengthening wireless cable and providing meaningful competition to cable operators."[5] This is particularly true with respect to institutional investors who would like to invest in both the cable and wireless cable industries. These investors are often hamstrung by the very stringent cable/MDS ownership attribution standards, which prohibit ownership interests of 5% or more in overlapping cable and wireless cable systems *regardless of whether the ownership interests are voting or non-voting*. By applying the more liberal broadcast ownership attribution standards to cable/MDS cross-ownership, the Commission will expand opportunities for investment in the wireless cable industry without compromising the underlying objective of the cable/MDS cross-ownership rule.

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system's analog channel capacity still pales in comparison to the analog channel capacity of many cable systems throughout the United States.

[4] *See, e.g., Remarks by Chairman Reed Hundt before the Wertheim-Schroder Variety Conference*, at 8 (April 4, 1995) ["[W]e are committed to introducing competition to the cable pipe . . . by letting [wireless cable] services become commercially viable."].

[5] *FNPRM* at ¶ 44.

The investment issue, however, represents just one of the problems faced by the wireless cable industry due to the statutory cable/MDS cross-ownership ban and the Commission's regulation of cable/MDS cross-ownership generally. As alluded to above, there are *three* restrictions which govern cross-ownership of cable and wireless cable systems: the statutory cable/MDS cross-ownership ban, as implemented through the cable/MDS cross-ownership rule (47 C.F.R. § 21.912(a)); the cable/MDS cross-leasing rule (47 C.F.R. § 21.912(b)); and the cable/ITFS cross-leasing rule (47 C.F.R. § 74.931(h)). Largely through inadvertence, each rule is different from the others, particularly as to the circumstances under which each rule will apply. The net result is a confusing patchwork of rules which must be conformed if there is to be any coherent regulation of cable/wireless cable cross-ownership going forward.

Moreover, the statutory cable/MDS cross-ownership ban has had the unintended effect of precluding wireless cable operators from deploying coaxial cable where it is most efficient to do so and where it would have no cognizable adverse impact on competition. For example, the ban effectively precludes a wireless cable operator from utilizing coaxial cable to provide service in communities that cannot be served by wireless transmissions due to environmental factors (*e.g.*, terrain blockage, foliage), man-made obstructions or local antenna restrictions. Ironically, if the shadowed or antenna-restricted community is already served by cable, the statutory "effective competition" exception to the rule permits a wireless cable operator to

secure a cable franchise and use coaxial cable.[6] If, however, the community is unserved by cable - - a not uncommon occurrence in rural areas - - the wireless cable operator is precluded from using coaxial cable to provide service. Ironically, wireless cable operators have had to turn down requests from rural communities to provide cable service because of the ban.

Moreover, the ban prevents a wireless cable operator from acquiring an incumbent cable system in an area that clearly cannot sustain multiple service providers. In other words, where the wireless cable operator is so successful that the cable system cannot survive, the rule bars the cable operator from recouping any part of its investment by selling out to the wireless cable operator.[7]

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[6] 47 U.S.C. § 533(a)(3).

[7] These anomalies are brought into even sharper focus by comparing the Commission's enforcement of the cable/MDS cross-ownership rule with its enforcement of the cable/SMATV cross-ownership rule, which Congress also codified in the 1992 Cable Act. Specifically, the Commission has interpreted the statutory cable/SMATV cross-ownership ban (47 U.S.C. § 533(a)) in a manner which allows cable/SMATV cross-ownership within the cable operator's franchised service area provided that the SMATV system is operated in accordance with the terms and conditions of the cable operator's franchise agreement. *In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 4654, 4658-67 (1995). WCA acknowledges that the Commission's interpretation arises in large part from Congress' use of the words "separate and apart," a phrase which does not appear in the statutory cable/MDS cross-ownership ban. Nonetheless, given the absence of any logical basis for dissimilar treatment of wireless cable and SMATV operators in the cross-ownership context, the Commission's more flexible approach to regulation of cable/SMATV cross-ownership highlights the need for a corresponding relaxation of the cable/MDS cross-ownership rule to the extent permitted by the 1992 Cable Act.

Accordingly, as discussed in greater detail herein, WCA recommends that the Commission take the following actions to address the problems identified above:

- apply its proposed broadcast ownership attribution criteria to the cable/MDS cross-ownership and cable/MDS and cable/ITFS cross-leasing rules, but without the proposed 33% "equity or debt plus" test;

- conform its cable/MDS and cable/ITFS restrictions to eliminate the long standing inconsistencies between the three rules;

- recommend that Congress adopt a limited exception to the statutory cable/MDS cross-ownership ban to allow a wireless cable operator to serve fewer than 50% of its total subscribers nationwide via coaxial cable that crosses a public right-of-way.

- recommend that Congress amend the statutory cable/MDS cross-ownership ban to include a rural exemption for any nonurbanized area of fewer than 10,000 persons, and adopt a corresponding rural exemption for the cable/MDS and cable/ITFS cross-leasing rules; and

II. DISCUSSION.

A. The Commission Should Apply its Proposed Broadcast Ownership Criteria to the Cable/MDS Cross-Ownership and Cable/MDS and Cable/ITFS Cross-Leasing Rules, but Without the Proposed 33% "Equity or Debt Plus" Test.

WCA agrees with the Commission's observation that the current ownership attribution standards for cable/MDS cross-ownership have become too restrictive, and that there now is "no reason to have different attribution criteria for broadcasting and MDS."[8] Thus, for the reasons set forth below, WCA supports the Commission's proposal to apply its modified

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[8] *FNPRM* at ¶ 44.

broadcast ownership attribution standards to the cable/MDS cross-ownership rule, but without the Commission's proposed 33% "equity or debt plus" test.

Because the cable/MDS ownership attribution standards currently prohibit relatively small voting *or* non-voting interests and even properly insulated limited partnership interests, they chill potential investment in the wireless cable industry by institutional investors or venture capital firms who have already invested in or would like to invest in the cable industry.[9] For example, Blackstone Management Associates recently was required to obtain a temporary waiver of the cable/MDS cross-ownership and cable/ITFS cross-leasing rules in order to acquire a limited partnership interest in a joint cable venture with Time Warner *and* retain its 15% ownership interest in wireless cable operator People's Choice TV Corp.[10] The Commission required Blackstone to divest some of its interests in the joint cable venture within 12 months, even though the number of subscribers at issue and the size of the prohibited cable/MDS overlap were relatively small when compared to the entire

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[9]As noted by the Commission, in the cable/MDS context a prohibited cross-ownership is created by a 5% or greater voting or non-voting stock interest (with the benchmark raised to 10% for certain "passive investors" such as bank trust departments, insurance companies and mutual funds). The 5% rule also applies to limited partnership interests even where the limited partner is insulated from the cable operator's or MDS licensee's day-to-day affairs. Unlike the Commission's attribution standards for broadcast ownership, the cable/MDS ownership attribution standards do not include a "single majority stockholder" exception, meaning that all minority voting stock interests of 5% or greater are attributable even if a single majority shareholder owns more than 50% of the voting stock. *See FNPRM* at ¶ 43, *citing* 47 C.F.R. § 21.912, note 1(A).

[10]*Letter to Blackstone Management Associates II, L.L.C. from Roy J. Stewart, Chief, Mass Media Bureau, dated April 10, 1996 (1800E1-AL)* [the "*Blackstone Letter*"].

transaction.[11] Yet as the Commission has already recognized in the broadcast context, an investor such as Blackstone cannot exercise managerial and/or operational control over cable and wireless cable systems in the same market. Accordingly, it makes little sense to require divestiture of overlapping cable and wireless cable properties under these circumstances.

The Commission can alleviate this problem by applying its proposed broadcast ownership attribution criteria uniformly to the cable/MDS cross-ownership and cable/MDS and cable/ITFS cross-leasing rules.[12] Not only would the attribution benchmark for voting stock be raised from 5% to 10% (and from 10% to 20% for "passive investors" such as bank trust departments, insurance companies and mutual funds), but non-voting stock and properly insulated limited partnership interests would be non-attributable, as would minority voting stock interests of any size where there is a single majority shareholder. To maximize opportunities for investment in the wireless cable industry, however, the Commission should *not* apply its proposed 33% "equity or debt plus" broadcast attribution standard to the cable/MDS cross-ownership rule.[13] As noted above, the Commission adopted the cable/MDS

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[11] *Id.* at 3-4.

[12] Unlike the cable/MDS cross-ownership and cable/MDS cross-leasing rules, the cable/ITFS cross-leasing rule does not include a supplemental note defining the ownership attribution standards that apply to the rule. *See* 47 C.F.R. §§ 74.931(h)-(i). To eliminate any potential confusion, WCA recommends that the Commission add a supplemental note to Section 74.931(h) clarifying that all ownership attribution standards for the cable/MDS cross-ownership and cable/MDS cross-leasing rules apply equally to the cable/ITFS cross-leasing rule.

[13] *FNPRM* at ¶¶ 9-25.

cross-ownership rule not to preserve diversity of broadcast programming, but to ensure that cable operators would not preclude competition by "warehousing" MDS spectrum. Furthermore, the Commission has otherwise offered no rationale for its apparent suggestion that cable/MDS cross-ownership becomes anticompetitive when an investor holds a 33.1% passive ownership interest in overlapping cable and wireless cable properties. Simply put, the Commission should not put any sort of artificial cap on simultaneous investment in the cable and wireless cable industries absent any indicia that the investor holds voting control.

B. The Commission Should Make Recommendations to Congress and Amend Its Rules As Necessary to Eliminate Long Standing Inconsistencies Between the Cable/MDS Cross-Ownership and Cable/MDS and Cable/ITFS Cross-Leasing Rules.

To pinpoint the difficulties arising from the present construction of the cable/MDS cross-ownership and cable/MDS and cable/ITFS cross-leasing rules, WCA offers the following brief summary of each rule as currently written:

- **The Cable/MDS Cross-Ownership Rule (47 C.F.R. § 21.912(a))**: This rule, which Congress codified in the 1992 Cable Act (47 U.S.C. § 533(a)), prevents a single entity from holding an attributable ownership interest in a cable system and an MDS licensee where the cable system's actual service area overlaps with the MDS licensee's protected service area, which for incumbent MDS licensees is the 35-mile radius around the MDS transmitter. By virtue of the Telecommunications Act of 1996 (the "1996 Telecom Act"), the rule does not apply where the cable system is already subject to "effective competition" (for example, where the cable system has low penetration or is already subject to a substantial overbuild).[14] Where the "effective competition" exemption does not apply, the Commission has read the 1992 Cable Act to allow a permanent waiver of the rule *only* where necessary to

[14] 47 U.S.C. § 533(a)(3); 47 C.F.R. § 21.912(e)(3).

ensure that all viewers in the cable operator's franchise area are able to receive multichannel video programming.[15]

- **The Cable/MDS Cross-Leasing Rule (47 C.F.R. § 21.912(b)):** This rule, which is *not* codified in the 1992 Cable Act, is similar to the cable/MDS cross-ownership rule except that it prohibits cross-ownership of cable systems and MDS channel lessees as opposed to MDS channel licensees. However, unlike the cable/MDS cross-ownership rule, there is no specific statutory exemption from the cable/MDS cross-leasing rule where effective competition is present. Moreover, because the 1992 Cable Act does not specifically apply to the cable/MDS cross-leasing rule, the Commission may waive the rule upon a more general showing of "good cause."[16]

- **The Cable/ITFS Cross-Leasing Rule (47 C.F.R. § 74.931(h)):** This rule, also not codified in the 1992 Cable Act, prevents an entity with an attributable interest in a cable operator from having an attributable interest in the lessee of excess channel capacity from an ITFS licensee if the ITFS transmitter is within 20 miles of the cable operator's franchise area. The cable/ITFS cross-leasing rule applies even where the overlap occurs in areas where the cable operator is *not* providing service, but does not apply to rural areas of fewer than 2,500 people. Also, the cable/ITFS cross-leasing rule does not apply where the cable operator is already subject to an overbuild; however, there is no requirement that the overbuild serve as "effective competition." Like the cable/MDS cross-leasing rule, the cable/ITFS rule may be waived upon a more general showing of "good cause."

The above summary demonstrates that the differences between the three rules are considerable. For example, the cable/ITFS cross-leasing rule includes a rural exemption, but the cable/MDS cross-ownership and cable/MDS cross-leasing rules do not. The cable/ITFS cross-leasing rule does not apply where there is any sort of cable overbuild; the cable/MDS cross-ownership rule does not apply where the overbuild qualifies as "effective competition";

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[15] *See, e.g., Blackstone Letter* at 3.

[16] 47 C.F.R. § 21.19.

the cable/MDS cross-leasing rule applies whether an overbuild exists or not. The cable/ITFS cross-leasing rule uses a 20-mile test to measure prohibited overlap; the cable/MDS cross-ownership and cable/MDS cross-leasing rules use the 35-mile MDS protected service area where incumbents are involved. The cable/ITFS cross-leasing rule applies in areas where the cable operator is not providing service; the cable/MDS cross-ownership and cable/MDS cross-leasing rules apply only within the cable operator's actual service area. Finally, the cable/ITFS and cable/MDS cross-leasing rules may be waived upon a showing of good cause, while the cable/MDS cross-ownership rule may be waived only where necessary to ensure that all subscribers within the cable system's franchise area receive multichannel video service.

Because a wireless cable system usually uses any combination of licensed or leased MDS channels and leased ITFS channels, the Commission must eliminate the above-described inconsistencies between the three rules to ensure coherent regulation of cable/wireless cable cross-ownership going forward. Accordingly, to harmonize the rules in accordance with all applicable statutory restrictions, WCA recommends that the Commission take the following actions:

- As discussed in Section II(D) *infra*, recommend that Congress amend the statutory cable/MDS cross-ownership ban to include a rural exemption, and adopt a corresponding rural exemption for the cable/MDS and cable/ITFS cross-leasing rules;

- Amend the cable/ITFS cross-leasing rule to apply only to areas inside the cable operator's *actual service* area;

- Amend the cable/ITFS cross-leasing rule to define the "prohibited overlap" area as the 35-mile radius around the ITFS transmitter;[17]

- Amend the "overbuild exemption" to the cable/ITFS cross-leasing rule so that it applies only where the overbuild qualifies as effective competition; amend the cable/MDS cross-leasing rule if necessary to clarify that the rule also does not apply where there is effective competition; and

- Recommend that Congress amend the statutory cable/MDS cross-ownership ban to allow the Commission to waive the cable/MDS cross-ownership rule upon a showing of "good cause."

C. The Commission Should Recommend That Congress Adopt a Limited Exception to the Statutory Cable/MDS Cross-Ownership Ban to Allow A Wireless Cable Operator to Serve Fewer Than 50% of its Total Subscribers Nationwide With Coaxial Cable That Crosses a Public Right-of-Way.

The statutory cable/MDS cross-ownership ban prohibits any "cable operator" from holding an attributable interest in an MDS licensee within its own service area.[18] Recent developments in the wireless cable industry indicate that the statutory ban, as currently written, has become outdated and needs to be modified to accommodate market realities.

In both urban and rural areas there have been and will continue to be instances where wireless cable operators must use hard wire to serve customers in residential developments, trailer parks and other private enclaves where antennas are not feasible due to terrain factors,

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[17]In recognition of the fact that wireless cable operators usually colocate ITFS channels with MDS channels, the Commission has amended its rules to provide ITFS receive sites with interference protection up to 35 miles from the ITFS transmitter. 47 C.F.R. 74.903(a)(5).

[18]47 U.S.C. § 533(a).

foliage and/or man-made obstructions, or where use of outdoor antennas is otherwise restricted.[12] In other cases, small communities have invited wireless cable operators to provide traditional cable service in areas that are terrain-blocked and thus cannot receive wireless transmissions.

WCA is also aware of instances in which the wireless cable operator seeks to "feed" programming to an existing cable headend, which then delivers that programming to subscribers via existing cable drops into the home. In this type of configuration, the subscribers belong to the wireless cable operator; the cable portion functions merely as a *de facto* passive repeater that exists solely to facilitate delivery of the wireless cable operator's programming to those subscribers through preinstalled cable plant. This arrangement is particularly efficient in smaller markets, since it (1) allows for continued usage of existing cable plant for its remaining useful life and (2) spares the wireless cable operator the expense of installing wireless cable antennas for subscribers who are already equipped to receive the wireless cable operator's programming via coaxial cable.

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[12] As noted by the wireless cable industry in its Joint Petition for Partial Reconsideration with respect to the Commission's antenna preemption *Report and Order*, the Commission's determination that certain provisions of the BOCA model building code are enforceable may in turn lead to greater local preemption of wireless cable antennas, insofar as the BOCA code is more burdensome than necessary to achieve any safety objective and otherwise discriminates against wireless cable antennas. See Joint Petition for Reconsideration filed on behalf of The Wireless Cable Association International, Inc. *et al.*, re: IB Docket No. 95-59 and CS Docket No. 96-83, at 8-18 (October 4, 1996).

Under a strict reading of the statutory cable/MDS cross-ownership ban, each of the examples cited above would be prohibited by virtue of the fact that the rules preclude a "cable operator" from holding an attributable interest in an MDS licensee within the cable operator's service area. In other words, reading the ban literally, a wireless cable operator that uses coaxial cable to serve even just a few subscribers arguably becomes a "cable operator" and thereby violates the statutory cross-ownership ban to the extent that the wireless cable operator is also the licensee of MDS channels.

WCA therefore asks the Commission to resolve this problem by recommending that Congress adopt a limited exception to the statutory cable/MDS cross-ownership ban to allow a wireless cable operator to serve fewer than 50% of its total number of subscribers nationwide with coaxial cable that crosses a public right-of-way.[20] For purposes of calculating whether a wireless cable operator is serving more than 50% of its total subscribers nationwide via coaxial cable crossing a public right-or-way (or, conversely, whether a cable operator is serving more than 50% of its subscribers nationwide via MDS channels), the Commission should count *all* subscribers served by the parent company, its subsidiaries and affiliates. WCA submits that a 50% standard is appropriate in this instance because it will

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[20] WCA emphasizes that it is proposing the 50% exception solely for purposes of the statutory cable/MDS cross-ownership ban, and that the exception be applied on an "operator" basis rather than to any individual system. Furthermore, WCA is *not* proposing that the Commission ask Congress to change the statutory definition of a "cable system" or otherwise redefine the circumstances under which a cable or wireless cable operator must obtain a franchise or comply with other requirements of the 1984 Cable Act (as amended) and the Commission's cable regulations where its use of coaxial cable crosses a public right-of-way.

give wireless cable operators sufficient flexibility to use coaxial cable where necessary to reach *all* of their subscribers, without creating an incidental violation of the statutory cable/MDS cross-ownership ban.[21]

D. The Commission Should Recommend That Congress Amend the Statutory Cable/MDS Cross-Ownership Ban to Include a Rural Exemption.

The Commission has long recognized that the most effective way to ensure that underserved areas receive multichannel video service is to adopt a blanket "rural exemption" in lieu of a case-by-case waiver approach. In the cable-telco context, the Commission has observed that:

> [A]n exemption for rural areas is important to ensure that such areas have an opportunity to enjoy the same benefits associated with broadband services which urban areas are already experiencing or are more likely to experience sooner. Many small telephone companies, not familiar with our waiver procedures, may be discouraged from implementing broadband services in rural areas by the mere presence of the Commission's [cable-telco] prohibition. Furthermore, the expense of acquiring legal, engineering and other assistance to obtain a waiver may be an additional impediment. In a rural area where the profitability of providing broadband services may be slim, these considerations may be real barriers to initiation of new cable service.[22]

The Commission later applied this reasoning to cable/MDS cross-ownership, and accordingly adopted a rural exemption from the cable/MDS cross-ownership and the cable/MDS and cable/ITFS cross-leasing rules which tracked the rural exemption already

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[21] WCA further requests that, upon amendment of the statute, the Commission adopt a similar exception to the cable/MDS and cable/ITFS cross-leasing rules.

[22] *Telephone Co. CATV Cross-Ownership*, 88 F.C.C.2d 564, 572 (1981).

adopted for the cable-telco cross-ownership rule.[23] In so doing, the Commission observed that "We expect that this rural exception will speed the introduction of multichannel service to customers in sparsely populated areas without appreciably reducing realistic and desired opportunities for wireless cable operators to introduce service competitive with existing cable service."[24]

Congress eventually codified the Commission's cable/MDS cross-ownership rule in the 1992 Cable Act, but without a rural exemption.[25] Instead, the statute provided that the Commission "may waive [the cable/MDS cross-ownership ban] to the extent the Commission determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming."[26] Congress did not, however, express any opposition to the Commission's rural exemption or otherwise suggest that a rural exemption would be inconsistent with Congressional intent. In this regard, Congress simply stated that the

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[23] *Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 6 FCC Rcd 6792, 6799 (1991) [the *"MDS Second Report and Order"*]; *MDS First Report and Order*, 5 FCC Rcd at 6417. At that time, the cable-telco rural exemption, and consequently the cable/MDS and cable/ITFS rural exemptions, applied to nonurbanized areas of fewer than 2,500 persons. *See* 47 C.F.R. §§ 63.58(a)(1), (2) and (3), 21.912(d)(1)-(3) and 74.931(e) (1991).

[24] *MDS Second Report and Order*, 6 FCC Rcd at 6799.

[25] 47 U.S.C. § 533(b)(1) (1992).

[26] Id.

cable/MDS cross-ownership rule may be waived "if necessary to ensure that the community receives video service."[27]

The problem, unfortunately, is that the Commission has adopted a very narrow reading of its statutory waiver authority that effectively renders permanent cable/MDS cross-ownership waivers extremely difficult to secure. In WCA's view, the Commission's interpretation has its roots in the *1993 Report and Order* implementing the statutory cable/MDS cross-ownership ban.[28] There, notwithstanding its recognition that "there may still some instances in which a rural exception is necessary," the Commission eliminated its rural exemption from the cable/MDS cross-ownership rule, apparently on the theory that the Commission would create a *de facto* rural exemption by waiving the rule on a case-by-case basis.[29]

In subsequent cases, however, the Commission has ruled that it has no authority to waive the rule permanently on any basis other than that specified in the statute, meaning that

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[27] S.Rep. No. 102-862, 102d Cong., 1st Sess. at 47 (1991). It appears Congress anticipated that the statutory waiver language would enable cable operators to use wireless cable technology to provide "fill in" service within their franchise areas; it does not appear that Congress anticipated that a waiver would also be required where a wireless cable operator uses coaxial cable to do the same thing. Id. at 81 ("[The statute] gives the FCC the authority to grant waivers of the prohibition where necessary to ensure that residents in the *cable* community receive the *cable operator's* programming.") (emphasis added).

[28] *In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection Competition Act of 1992*, 8 FCC Rcd 6828 (1993) [the "*1993 Report and Order*"].

[29] *1993 Report and Order*, 8 FCC Rcd at 6844.

a wireless cable operator cannot obtain a permanent waiver of the rule unless it can demonstrate that the area in question would not receive multichannel video programming in the absence of a waiver.[30] Given the ubiquitous availability of DBS (a phenomenon which postdates the 1992 Cable Act), it is virtually impossible to demonstrate that a permanent waiver of the cable/MDS cross-ownership rule is necessary for any area to secure access to multichannel video programming. As a result, such waivers in effect are unavailable, even in rural areas. Even more anomalous is the fact that the cable-ITFS cross-leasing rule, which Congress did not address in the 1992 Cable Act, *still includes a rural exemption.*[31]

Given that the overall purpose of the statutory cable/MDS cross-ownership ban was to establish wireless cable as substantial near-term competition to the cable industry, Congress certainly could not have intended to establish a waiver process that effectively denies wireless cable operators comparable opportunities to provide residents of rural areas with the same multichannel video programming service currently enjoyed by residents of more populated areas of the United States.[32] Congress has already accommodated rural areas in the 1996 Telecom Act, creating limited exceptions to the cable-telco buyout prohibition for the benefit

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[30] *See Letter to Novner Enterprises, Inc. from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, dated October 17, 1996 (1800E6)*, at 4 [the "*Novner Letter*"]; *Blackstone Letter* at 3.

[31] 47 C.F.R. § 74.931(i).

[32] *See, e.g., ASTV v. FCC*, 46 F.3d 1173, 1178 (D.C. Cir. 1995), *quoting Fort Stewart Schools v. FLRA*, 495 U.S. 641, 645 (1990) [inquiry as to Congressional intent must continue to "the language and design of the statute as a whole."].

of rural areas and/or smaller telephone companies where enforcement of the prohibition would not otherwise have any cognizable effect on competition.[33] In view of the problems inherent to the cable/MDS waiver process, WCA submits that it would be entirely appropriate for the Commission to once again take its cue from the cable-telco arena and recommend that Congress adopt a rural exemption for the cable/MDS cross-ownership rule that could also be applied to the cable/MDS cross-leasing rule and the cable/ITFS cross-leasing rules.

Accordingly, WCA requests that the Commission ask Congress to amend the statutory cable/MDS cross-ownership ban to include a rural exemption that would allow a wireless cable operator to construct or acquire a cable system or otherwise utilize coaxial cable in any nonurbanized area of fewer than 10,000 persons, as determined by the Bureau of the Census. This is the liberalized cable-telco rural exemption which the Commission initially proposed in 1992 and which Congress subsequently rendered moot by eliminating the cable-telco cross-ownership ban in the 1996 Telecom Act.[34] As already recognized by the Commission, the 10,000 person benchmark is an administratively simple standard and is likely to expand significantly the number of rural areas where cable service can be offered for the first time on an economically reasonable basis.[35] Finally, the expanded rural exemption proposed

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[33] 47 U.S.C. §§ 572(c)(4)-(5).

[34] *In the Matter of Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 5781, 5851-57 (1992) [*the "Video Dialtone Second R&O"*]; 1996 Telecom Act, § 302(b)(1).

[35] *Video Dialtone Second R&O*, 7 FCC Rcd at 5857.

herein will unburden the Commission's staff of many potential cable/MDS and cable/ITFS waiver requests, and will provide wireless cable operators with some badly needed certainty as to when and under what circumstances coaxial cable may be used in conjunction with a wireless cable system.

III. CONCLUSION.

WCA believes that the Commission's *FNPRM* represents a critical first step toward reevaluation and modification of the cable/MDS cross-ownership rule. Clearly, the time has come to facilitate greater investment in the wireless cable industry by applying the Commission's relaxed broadcast ownership attribution standards to all of the rules governing cross-ownership of cable and wireless cable systems, but *without* the Commission's proposed 33% "equity or debt plus" test.

WCA also believes, however, that the Commission should expand the scope of the *FNPRM* to eliminate unnecessary operational burdens on the wireless cable industry arising from inconsistencies in the Commission's regulatory scheme and the inability of wireless cable operators to utilize coaxial cable where it is necessary or more efficient to do so. For the reasons stated above, WCA submits that the Commission can achieve this by making the above-described recommendations to Congress and adopting rule modifications to (1) conform the cable/MDS cross-ownership and cable/MDS and cable ITFS cross-leasing rules; (2) allow a wireless cable operator to serve fewer than 50% of its total subscribers nationwide

via coaxial cable that crosses a public right-of-way; and (3) reestablish a uniform rural exemption for cable/wireless cable cross-ownership.

Respectfully submitted,

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By: _____
Paul J. Sinderbrand
Robert D. Primosch

Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Sixth Floor
Washington, D.C. 20006
(202) 783-4141

Of Counsel:

Andrew Kreig, Esq.
Acting President and General Counsel
The Wireless Cable Association International, Inc.
1140 Connecticut Avenue, NW
Suite 810
Washington, DC 20036

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