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

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In the Matter of	)	
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1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	))))	MM Docket No. 98-35

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

Daniel L. Brenner
Diane B. Burstein
1724 Massachusetts Avenue, NW
Washington, DC 20036
(202) 775-3664

Counsel for the National Cable Television Association

July 21, 1998

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COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems, program networks, equipment suppliers, and others affiliated with or interested in the cable television industry.

INTRODUCTION AND SUMMARY

In 1996, Congress eliminated the statutory ban on the common ownership of a cable television system and a broadcast station with overlapping service areas.[1] Congress left in place the Commission's rule that prohibits such cross-ownership – a rule that had been in place for 14 years before Congress codified it in 1984. And Congress directed the Commission to initiate a biennial review of its ownership rules (including the cable-broadcast rule) to "determine whether any of such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest."[2] The instant

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1 Telecommunications Act of 1996, §202(I)(1).

2 Id., §202(h).

proceeding seeks comments on whether the more than twenty-five year ban on common ownership of a local television station and cable system is a restriction no longer needed to serve the public interest.

We believe that the time has come for the Commission to eliminate this vestige of its earlier regulatory regime. The rule no longer remains necessary to serve its original purpose – to ensure that local broadcasters do not suppress the development of cable television. Nor do the new possible rationales raised in the Notice – the potential effects on the market for delivered programming, advertising, program production, or diversity – justify retaining the ban. A blanket prohibition is neither necessary nor appropriate given the advent of robust competition in the video marketplace, both at the national and at the local level. On the other hand, continuation of the ban may adversely affect the public interest by prohibiting pro-competitive combinations that could increase the amount of diverse programming provided in a local market and lead to more efficient operations.

In short, there is no need to maintain this broad prophylactic rule to protect against harm to the public's interest in competition or diversity. Antitrust laws remain to ensure that any particular combination of broadcaster and cable system does not threaten those interests in any particular case.

ARGUMENT

I. The Concerns That Led to Imposition of a Cable/Television Station Cross-Ownership Ban No Longer Exist

The FCC's original cross-ownership ban was adopted in 1970.[3] Underlying the Commission's action was the concern that absent a rule, "an already overly concentrated broadcast industry" might "dominate" the cable industry.[4] The Commission worried that broadcasters would have the incentive to keep cable systems from providing their own "origination" programming, and that diversity would suffer. It therefore adopted a broad prohibition on local television station-cable combinations within a station's Grade B contour.[5]

This rationale has no basis in reality today. The growth of the cable television industry since 1970 has led to a wealth of program offerings unimaginable when the cross-ownership rule was adopted – a time when the FCC hoped that each cable system over a certain size would originate but a single channel of programming.[6] In 1970, there were *no* national cable television networks. Carriage of local and distant broadcast stations was the mainstay of cable offerings. Today, there are more than 170 cable networks available nationwide, and an abundance of regional and local cable program choices.[7] Cable television systems in 1970 typically presented between 6 and 12 channels; today, the average system provides over 50 channels of diverse

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3 Second Report and Order, 23 F.C.C.2d 816 (1970).

4 Id. at 820.

5 Congress codified the prohibition on cable/television station cross-ownership in the 1984 Cable Act. The legislative history explaining this action merely refers to the existing FCC rule, without any additional analysis justifying the statutory ban. See, e.g., H.R. Rep. No. 98-934, 98th Cong. 2d Sess. 56 (Aug. 1, 1984).

6 Second Report and Order, 23 FCC Rcd. at 817.

7 NCTA, Cable Television Developments (Spring 1998) at 28-125.

viewing options. Moreover, the industry itself has grown exponentially, with the number of cable systems increasing from less than 2,500 in 1970[8] to more than 11,000 in 1998.[9]

Given the current state of the cable industry, there is no question that the rule has outlived its usefulness and no longer remains necessary to serve its original purpose. Notwithstanding the Notice's statement that "this is the first time since adopting the cable/television cross-ownership rule that the Commission has reviewed the rule,"[10] the Commission has already reached that conclusion in an earlier examination of its cross-ownership rules.

In 1992, in the course of deciding whether to retain its rule prohibiting television network/cable system cross-ownership – a rule adopted at the same time and based for the most part on the same rationale as the television station/cable restriction, but was never codified by Congress – the FCC determined that the broadcast/cable cross-ownership ban was "no longer valid in light of the on-going changes in the video marketplace."[11] It therefore recommended that Congress repeal the statutory cross-ownership prohibition to allow local broadcasters to own cable systems in their service area.[12] Now that Congress has done so, the Commission should promptly move ahead to repeal its anachronistic rule.

II. The New Concerns Raised in the Notice Do Not Warrant Retaining the Cross-Ownership Ban

The FCC cannot hang its hat on its original rationale for maintaining the cross-ownership rule, and the Notice seemingly recognizes as much. Instead, the Commission asks whether

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8 Network-Cable Cross-Ownership (Reconsideration), 72 RR 2d 39, 41 (1993).

9 NCTA, Cable Television Developments (Spring 1998) at 1 (A.C. Nielsen, Cable Online Data Exchange).

10 Notice at ¶45.

11 Network-Cable Cross-Ownership, 70 RR 2d 1531, 1536 (1992).

eliminating the ban will somehow adversely affect the markets for delivered programming, advertising, and program production, and whether there are countervailing economic benefits. Finally, the FCC asks generally about the effects on diversity. As described below, there is no reason to believe that a cable/local television station combination will in any way harm the public interest.

A. The Market for Delivered Programming

The Notice asks about the effects that a broadcast station/cable combination might have on the market for delivered programming and in particular whether "changed market circumstances render our rule unnecessary."[13] While the Notice also asks whether repeal of the rule might raise "competition concerns",[14] it does not identify any – and it is difficult to image why such concerns would arise. The market for delivery of programming is significantly different, and vastly more competitive, than when this rule was first adopted, and is growing more so every day. Eliminating the cable-television cross-ownership ban will not change this movement to more competition.

The increased levels of competition are evident in the growth in the amount of programming available over-the-air since the rule's origin. The total number of television stations available to the viewing public nearly doubled – from 862 in 1970 to 1569 in 1998.[15] The average number of commercial over-the-air television stations available in the top 20

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12 Id. at 1537.

13 Notice at ¶47.

14 Id.

15 Warren Publishing, TV & Cable Factbook, Services Vol. 66 at I-45 (1998 ed.).

markets alone has risen from 5.6 to 12.7.[16] And the growth in over-the-air options will multiply further, as broadcasters have been given an additional 6 MHz of spectrum to provide digital over-the-air transmissions. This spectrum can be used not only to deliver High Definition Television, but also to provide multicast standard definition digital signals.

Just as over-the-air competition has expanded, so too has competition in the multichannel video programming arena. Unlike the situation in 1970, when cable television was virtually the sole MVPD provider, cable television's share of the multichannel video programming marketplace, which has been steadily declining, is now less than 85%.

The FCC's 1997 Competition Report details the alternative providers in the MVPD marketplace.[17] DBS service is available nationwide from multiple providers, and now serves more than 7 million customers. Satellite Master Antenna Television systems ("SMATVs") and MMDS provide competing multichannel service in many communities. Telephone companies offer competitive wired or wireless cable systems in numerous communities throughout the country.

Several other outlets for the delivery of programming have developed since the rule's origin. Home video, which did not exist in 1970, is widely available. And viewers increasingly are turning to the Internet for their news and information, as well as to watch video programming.[18]

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16 Television Digest (Warren Publishing), Television Factbook, , Services Vol. 40 at 42A (1970-71 ed.); Warren Publishing, TV & Cable Factbook, Stations Vol. 66 at A1 (1998 ed.).

17 Fourth Annual Report, CS Docket No. 97-141 (rel. Jan. 13, 1998) at App. E, Table E-1.

18 See, "Survey Finds TV Is Major Casualty of Net Surfing," New York Times, July 16, 1998, p. E3.

Given the abundance of alternative providers of video programming in any given community, there is no reason to assume that a cable system operator/television station combination would diminish competition in the local market. A cable operator purchasing a broadcast station would have every incentive to ensure its continued operation as a vigorous competitor in the market. This is particularly true because the viewers reached by any local cable system and the over-the-air service area of a broadcaster are not identical. A local station will inevitably serve many more viewers than a cable system, simply because not all people passed by a cable system subscribe.[19] And even though a cable system might be within a broadcaster's Grade B contour – in whole or in part – a local station's market in all likelihood is much greater than the area served by any particular cable system. Therefore, a cable system would not benefit from buying a television station in order to hobble that station's effectiveness as a competitor to the system.

B. Effects on the Market for Advertising

The Notice also expresses concern whether the rule is needed in order to protect the local advertising market, and seeks comment on whether "allowing joint ownership of a television station and a cable system in a local market might give the joint owner the economic power to raise its advertising rates within the local service area if, by virtue of that combination, the local market became concentrated."[20] There is no evidence that a combined cable/television station operation could skew the market in a manner that adversely affects advertising rates, and the Notice contains facts that should allay any such concerns.

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[19] Cable's current penetration rate is about 68% of all homes that it passes. Paul Kagan Associates, Marketing New Media (Mar. 16, 1998) at 4.

[20] Notice at ¶48.

Local cable advertising constitutes but a small fraction of that enjoyed by local over-the-air television stations.[21] At the same time, local cable advertising sales take place in a highly competitive environment, containing not just cable and broadcast television but radio and newspapers, among others.[22] As a result, any attempt to raise advertising rates will likely lead advertisers to look elsewhere to one of the many available alternative television stations or to other media available in every television market in the country.

In fact, rather than raising the cost of advertising, the Notice goes on to recognize that common ownership may "possibly lower the cost of advertising and/or increase the quality of service available to advertisers."[23] Such an outcome is more likely because while a commonly-owned cable system and broadcaster will not have sufficient market power to raise advertising rates, it will enjoy scale economies that enable advertisers to purchase more efficiently cable and broadcasting in a single transaction with fewer transaction costs.

C. Effect on the Program Production Market

The Notice suggests that the broadcast station/cable prohibition may "no longer [be] necessary in light of the current state of the program production market."[24] Yet it raises a concern regarding whether cable/television combinations could exercise monopsony power – i.e., could artificially restrict the price paid for programming.[25] Because the program production

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21 Id. Cable local advertising revenues were "small", according to the Notice, accounting for 2.9 percent of total local advertising in 1996, compared to local television advertising, which accounted for 30.0 percent.

22 See, e.g., McCann Erickson website for detailed expenditures of advertising dollars on different media at www.mcann.com.

23 Id. at ¶51.

24 Notice at ¶50.

25 Id.

market is, in fact, highly competitive, it is hard to see how a television/cable combination could make it less so.

A typical cable operator acquires national programming through entering into agreements with national program networks. Those networks serve millions of customers nationwide. While networks –both over-the-air and cable – may compete against each other for the rights to show certain national programming, a local cable operator and a local television station typically would not vie for those rights. In other words, at the national level, it is difficult to see how common ownership of a local system and television station could affect program production at all, and the Notice provides no reason to think this would be the case.

Even at the local level, however, competition between cable systems and stations for particular programs is the exception, not the norm. Cable operators that provide local programming often produce that programming for their own system (such as programming for local origination channels, which might consist of local news and public affairs, and other community-based events). There are less than a handful of operators nationwide who buy programming from syndicators and those operators distribute in urban markets. Even if a cable system were to purchase syndicated programming for its L.O. channels in competition with local broadcast stations, cross-ownership would only reduce by one the number of buyers in a local market – and this would not likely harm the local programming marketplace. There are numerous alternative potential purchasers of programming in every market – including the many other television stations in every DMA, as well as cable systems serving other portions of the DMA, DBS operators, MMDS system operators, and other multichannel video programming distributors in each market.

The Notice also asks whether a cable/television combination raises the threat of denying alternative providers of video programming access to the commonly-owned television station's programming.[26] Again, the Notice contains no evidence that this would occur, even in the absence of regulation. A television station's economic base hinges on access to as many viewers as possible, and losing part of its audience would hamper the station's ability to sell advertising. Withholding access to a station, therefore, is not a likely strategy.

In any event, existing regulations ensure that such a situation would not arise. FCC rules bar television stations from entering into exclusive retransmission consent agreements.[27] Other rules exempt local MVPDs, such as certain SMATV and MMDS operations, from the requirement to obtain a station's consent prior to retransmitting its signal.[28] There are, in short, multiple ways to provide local television stations that a cable system/television station combination will in no way change.

In addition to its potential impact on competing MVPDs, the Notice also raises issues about the potential impact on competing television stations. The Notice suggests that the existing channel positioning rules and must carry requirements protect against a cable company that owns a local television station discriminating in favor of its owned station.[29] And regardless of FCC rules, cable operators retain strong incentives to provide their cable customers with the television stations that they desire, on channel positions that work best for customers.

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26 Notice at ¶50.

27 47 C.F.R. §76.64(m) ("No television broadcast station shall make an agreement with one multichannel distributor for carriage, to the exclusion of other multichannel distributors.")

28 47 C.F.R. §76.64(e).

29 Notice at ¶50.

D. Other Economic Effects

The Notice recognizes that there are many efficiencies that could be realized with a commonly owned station and system: "allowing cable/television cross-ownership within a local market may permit an entity to realize economies of scale, reducing the costs of operations."[30] These include "cost-sharing in administrative and overhead expenses, sharing of personnel, joint advertising sales, and the pooling of resources for local program production (such as news and public affairs programming)."[31] These efficiencies, as the Notice admits, could lead to better programming for the public, better coverage of local issues, and possibly lower the cost of advertising and increase the quality of services available to advertisers. The Notice seeks comments on the existence and magnitude of these economies and whether they can be achieved even without common ownership, such as through joint ventures.

We agree that eliminating the ban would present opportunities to achieve cost savings and improve programming. Whether these benefits can be achieved through joint ventures, rather than ownership, in our view, misplaces the burden. The Notice provides no evidence that the tangible benefits brought about by a more efficient operation would be outweighed by the theoretical harm that common ownership could cause. Whether these positive contributions to diversity and competition could be achieved in the absence of common ownership is really besides the point. Congress' action in eliminating or relaxing numerous ownership restrictions in the 1996 Act shows that the burden is on proponents of continued restrictions to demonstrate that

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30 Id. at ¶51

31 Id.

the prohibition is still necessary,[32] notwithstanding the benefits that would flow from eliminating the rule.

E. Effects on Diversity

The Notice asks commenters to address the impact on diversity that might result from a rule change. As the Notice recognizes, the number of outlets providing video programming to consumers at the local level has increased.[33] In 1970, when the ban was adopted, viewers could choose from among the three commercial networks and a handful of independent television stations in most local markets, and cable had virtually 100 percent of the multichannel video market. But those days are long gone. At the local level, as described above, viewers and listeners face a wealth of choices for obtaining information—over the air, or through their cable, satellite dish or computer. And over-the-air television broadcasting no longer means the three networks of 1970. Fox, UPN and The WB Network have all grown up since the original ban was put in place.

Cable systems themselves provide a wider array of viewing choices than ever, and common ownership of a television station and cable system would not impact that diversity. Much of the programming carried on a cable system has no affiliation with the operator. In addition to the mandated carriage of all local broadcasters,[34] Congress required that cable operators occupy only a limited number of channels with programming in which they have an

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32 Telecommunications Act of 1996 §202(h) (directing the Commission to "determine whether any of [its ownership rules] are necessary in the public interest as the result of competition").

33 Notice at ¶52.

34 47 U.S.C. §§534, 535.

ownership interest;[35] required operators to provide channel capacity for lease by other unaffiliated entities,[36] and allowed local governments to require operators to set aside channels for community-based programming through public, educational and governmental access channels.[37] Given all this, the notion that a cable operator could impede diversity through ownership of a local television station ignores reality.

While removing the ban will not threaten competition or diversity, maintaining the ban may well deprive the viewing public of numerous benefits that a combined broadcast/cable operation could bring. One obvious example would be the ability to increase the amount of diverse local programming – a goal long sought by the Commission. A local system and a local station could work together to increase the amount of local news and public affairs programming available to viewers. Cable systems are increasingly offering channels with highly localized content.[38] This programming expertise could lead to the development of new programming that would be available through a commonly-owned television station to those viewers throughout the broadcaster's market that do not subscribe to cable.

Alternatively, a local station may possess programming expertise that could help develop new programming for the cable viewing audience. A local station may have newsgathering personnel that produce programs which can only air during limited time periods each day. Common ownership with a cable system could facilitate an increase in the amount of local news

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35 47 U.S.C. §533(f)(1)(B).

36 47 U.S.C. §532.

37 47 U.S.C. §531.

38 The Commission recently recognized, in its Digital Must Carry Notice of Proposed Rulemaking, that "broadcasting may not be the only source of local programming as cable operators have developed local news channels and public, educational, and governmental access channels, which provide highly localized content,

Footnote cont'd

available in a community by providing a 24 hour a day outlet for local news and information. It also could enable a station's newsgathering staff to provide different information targeted to smaller segments than the station's entire over-the-air viewing audience – such as the cable system's franchise area. Allowing a cable/television station combination, therefore, will more likely lead to a net *increase* in diverse local information, rather than a decrease.

CONCLUSION

The television station/cable cross-ownership rule is no longer needed to serve its motivating purpose. It has the effect of thwarting pro-competitive efficiencies, and produces no countervailing public benefits. For all the reasons stated above, the Commission should eliminate this outmoded restriction.

Respectfully submitted,

Daniel L. Brenner
Diane B. Burstein
1724 Massachusetts Avenue, NW
Washington, DC 20036
(202) 775-3664

Counsel for the National Cable Television Association

July 21, 1998

have multiplied in the past six years." Carriage of Transmissions of Digital Television Broadcast Stations, CS Docket No. 98-120 at ¶16 (rel. July 10, 1998).