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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF TIME WARNER CABLE

August 21, 1998

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SUMMARY

Time Warner Cable urges the Commission to repeal the ban on cross-ownership of co-located cable systems and television stations. Under the explicit directive of Section 202(h) of the Telecommunications Act of 1996 and the exacting constitutional test for restrictions on cable operators' speech in Turner Broadcasting v. FCC, the Commission faces an arduous task in the event it seeks to retain the ban in the instant proceeding. Specifically, the Commission must produce empirical evidence that the ban is in the public interest, even as the technological, competitive and regulatory environment of MVPD services has undergone near revolutionary change since the ban's adoption in 1970. In addition, the Commission must identify specific harms requiring Commission attention and demonstrate that the blunt instrument of an outright ban represents a direct and narrowly tailored method of addressing any such harms.

Commenters seeking retention of the ban quite simply have failed to produce any such evidence to satisfy either Section 202(h) or the constitutional requirement. These commenters illustrate the blatantly self-serving, inconsistent nature of their analysis by urging repeal of many other broadcast ownership rules even as they argue that the cable/television station cross-ownership ban should be retained. Even where certain elements of the broadcast industry conjure up imaginary horribles regarding the impact of such cross-ownership on unaffiliated stations, their faulty logic and selective ignorance of existing regulatory measures and competitive developments provide the Commission with no useful support for a retention of the ban. Therefore, to comport with the Constitution, Section 202(h) and public policy, the Commission must repeal the anachronistic cable/television station cross-ownership ban.

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REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby submits its Reply Comments in response to the Commission's Notice of Inquiry on the Biennial Review of its broadcast ownership rules.[1] As it did in its Comments in the above captioned proceeding, Time Warner urges the Commission to repeal the ban on cross-ownership of co-located cable systems and broadcast television stations.[2]

Both the demanding requirement of Section 202(h) of the Telecommunications Act of

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[1]In the Matter of 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, Notice of Inquiry, MM Docket No. 98-35 (rel. March 13, 1998) ("Notice").

[2]47 C.F.R. § 76.501(a).

1996,[3] requiring the Commission to justify those broadcast ownership rules it wishes to retain, and the necessary showing for constitutionality of restrictions on cable operators' speech articulated by the Supreme Court in Turner Broadcasting v. FCC,[4] represent significant obstacles to retention of the cable/television station cross-ownership ban. But in spite of these statutory and constitutional requirements, commenters supporting retention of the rule not only fail to provide the empirical evidence necessary for the Commission to satisfy these tests, they exhibit the patently self-serving nature of their analysis through glaring inconsistency. In fact, it is clear that in light of the emergence of vigorous competition to cable television and the web of existing specific regulations that address any possible abuses by the owner of a cable system and a television station serving the same area, the Commission can not meet its affirmative duty to show any actual problems with competition and diversity in order to satisfy its burden under Section 202(h) or Turner I. Even analyzing the most specific arguments of the ban's proponents on the impact of cross-ownership on unaffiliated stations strictly on policy grounds, no commenter makes a persuasive showing that the Commission should retain a ban that the agency itself expressly recognized as out of date in 1992. Therefore, the Commission must repeal the cable/television station cross-ownership ban.

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[3]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[4]Turner Broadcasting v. FCC, 512 U.S. 622 (1994) ("Turner I").

I. UNDER SECTION 202(h), THE COMMISSION BEARS THE BURDEN TO JUSTIFY THE CONTINUING NEED FOR THE CABLE-TELEVISION STATION CROSS-OWNERSHIP BAN.

As explained fully in Time Warner's Comments, the Commission must conduct a *de novo* review of all of its broadcast ownership rules and affirmatively find, based on empirical evidence, that those retained serve the public interest.[5] Combined with the 1996 Act's general requirement in Section 11 that the Commission review its regulations every two years and discard those no longer in the public interest,[6] and in sharp contrast to the cursory reasoning employed in adopting the ban in 1970,[7] Section 202(h) erects a high hurdle for the Commission to retain the cable/television station cross-ownership ban. Indeed, in light of Section 11, the only way to explain Section 202(h)'s presence in the 1996 Act is as a mandate for the Commission affirmatively to justify any broadcast ownership regulations it wishes to retain; otherwise, Section 202(h) would be superfluous. If the absence of empirical evidence presented by proponents of the cable/television station cross-ownership ban is any indication, there simply is no factual predicate sufficient for the Commission to retain the rules under Section 202(h) or to reverse its conclusion in 1992 that the ban is no longer necessary.[8]

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[5]*See* Comments of Time Warner Cable to Notice ("Time Warner Comments").

[6]47 U.S.C. § 161.

[7]*See* Amendment of Part 74, Subpart K, of the Commission's Rules And Regulations Relative to Community Antenna Television Systems; And Inquiry Into The Development Of Communications Technology And Services To Formulate Regulatory Policy And Rulemaking And/Or Legislative Proposals, 23 FCC 2d 816 (1970).

[8]In the Matter of Amendment of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 7 FCC Rcd 6156, at ¶ 17 (1992) ("[W]e believe that the rationale for an absolute prohibition on broadcast-cable cross-ownership is no longer valid in light of the ongoing

The few commenters specifically addressing the standard for reviewing its broadcast ownership rules under 202(h) concur that the FCC bears the burden of justifying any broadcast ownership rules it retains.[9] Tellingly, supporters of retaining the cable/television station cross-ownership ban conveniently avoid discussion of the FCC's stiff evidentiary burden and exhibit their patently inconsistent and self-serving analysis. For example, the National Association of Broadcasters argues for repeal of the newspaper/broadcast cross-ownership rule,[10] even offering a study to support its conclusion,[11] but its appeal to the Commission to retain the cable/television station cross-ownership rule is accompanied by no supporting evidence other than legislative history *from 1990*, well before the advent of DBS, MMDS and other new competitors to cable.[12] Indeed, the 1990 legislative history has been expressly superseded by Congress' action in the 1996 Act to *repeal* the statutory cross-ownership ban. Similarly, ABC argues for repeal of four broadcast ownership rules but attempts to distinguish the cable/television station cross-ownership ban with the conclusory and unsupported statement that the ban is still justified "in view of the current competitive landscape."[13] The analysis provided by UCC/BCFM emulates this unabashed inconsistency and lack of the supportive data required by Section 202(h) by recognizing the need

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changes in the video marketplace.")

[9]Newspaper Association of America Comments at 5-6, NCTA Comments at 4.

[10]NAB Comments at 7-13.

[11]*Id.* at Appendix A, Study to Determine Certain Economic Implications of Broadcasting/Newspaper Cross-Ownership.

[12]*Id.* at 14-16.

[13]ABC Comments at 29-30.

for "meaningful data that will allow [the Commission] to satisfy the Congressional directive to evaluate whether its rules continue to meet the public interest" but simultaneously providing no such data even as it argues for retention of the cable/television station cross-ownership rule.[14]

Thus, the patent inconsistency of commenters advocating the repeal of other broadcast ownership rules but arguing for retention of the cable/television station cross-ownership ban illustrates their self-serving approach. Further, these commenters provide no sufficient empirical evidence with which the Commission could possibly defend the cable/television station cross-ownership ban, as mandated by Section 202(h). Significantly, the vast majority of commenters in this proceeding, many of whom with interests in television stations, did not even address the cable/television station cross-ownership ban. Given that the statute imposes an affirmative duty in order for the ban to be retained, their silence must be interpreted as tacit acceptance and agreement that repeal is the FCC's correct course of action, or at least that many broadcasters do not feel strongly that the ban should be retained.[15] In any event, the failure of the ban's proponents to provide empirical evidence simply will not satisfy the clear directive of Section 202(h).

II. THE COMMISSION CANNOT SHOW ANY PROBLEMS WITH DIVERSITY OR COMPETITION SUFFICIENT TO RENDER THE CABLE/TELEVISION STATION CROSS-OWNERSHIP BAN CONSTITUTIONAL.

Beyond the statutory requirements of the 1996 Act, the Commission obviously must ensure that its broadcast ownership rules comport with the Constitution. In reviewing a broad

[14]UCC/BCFM Comments at 1-2.

[15]*See, e.g.,* Comments of: Paxson Communications Corp.; Gannett Co. Inc.; Telemundo Group, Inc.; Cox Broadcasting/Media General, Inc.; A.H. Belo Corp.; Hearst Corp.; Tribune Co.; Chronicle Publishing Co.; Fox TV and USA Broadcasting Co.

restriction on speech such as the cable/television station cross-ownership ban, the Commission faces a difficult task indeed if it seeks to retain the ban As a direct restriction on cable operators' speech, the ban preventing cable operators from owning television stations in their franchise area could be judged under strict constitutional scrutiny, requiring the Commission to prove that the ban advances a compelling governmental interest through an almost precise fit.[16] At a minimum, under intermediate constitutional scrutiny, the FCC has to illustrate that the restriction on speech furthers an important or substantial governmental interest and is narrowly tailored to the furtherance of that interest.[17] In Turner I, the Supreme Court elaborated on the exacting test for governmental restrictions on cable operators' speech under intermediate scrutiny:

> When the government defends a regulation on speech as a means to redress past harms, or prevent anticipated harms, it must do more than simply 'posit the existence of the disease to be cured' .... The government must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[18]

As noted in Time Warner's Comments, the Turner I test places an even more demanding burden on proponents of retaining the cable/television station cross-ownership ban than that imposed by Section 202(h). If the FCC argues that diversity and competition are the governmental interests supposedly advanced by the ban,[19] it must point to the harms to those interests posed by co-located, co-owned cable systems and broadcast television stations and how the ban alleviates these harms in a narrowly tailored and material way.

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[16] *See, e.g.,* Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

[17] U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

[18] Turner I, 512 U.S. at 664.

[19] Notice at ¶ 6.

In spite of Turner I's mandate, commenters have both failed to demonstrate the requisite actual harms to competition and diversity and to provide a sufficient explanation of how the cable/television station cross-ownership ban specifically alleviates such concerns in a direct and material way. For example, several commenters favoring retention of the ban hinge their arguments with respect to the Commission's interest in competition on an assumption that cable is a "gatekeeper" or "monopolist."[20] But instead of producing empirical evidence showing the harms to competition posed by co-owned, co-located cable systems and broadcast stations, these commenters offer only speculation about anti-competitive conduct that completely ignores existing competitive realities. As noted in NCTA's comments, cable's steadily declining share of the multichannel video programming audience is now below 85%.[21] The exponential growth of DBS and the emergence of MMDS, SMATV systems, OVS and the imminent arrival of LMDS all compete with cable for viewership, while new media such as the Internet have expanded the diversity of information and entertainment options for consumers.

At the same time, commenters' far-fetched scenarios of anti-competitive conduct by co-owned, co-located cable systems and television stations all but ignore or discount the must-carry rules, which are specifically designed to thwart any such potential discrimination.[22] As illustrated in NBC's Comments, competitive and regulatory developments already fully address any potential

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[20] *See, e.g.*, Univision Comments at 6, 15-16, Association of Local Television Station (ALTS) Comments at 37-39, NAB Comments at 14.

[21] NCTA Comments at 6.

[22] 47 U.S.C. § 534.

anti-competitive conduct by cable operators.[23] While Time Warner congratulates those enlightened television station owners such as NBC who recognize that the ban should be repealed, certain broadcasters favoring retention of the ban persist in downplaying the effectiveness of the current must-carry rules while brazenly interjecting a peripheral plea for the imposition of strict must-carry requirements in the digital context.[24] Not only is this naked attempt to bootstrap an argument in the broadcast ownership context to the ongoing digital must-carry proceeding ill-timed and out of place, it proposes to hold the explicit Congressional directive to modify or repeal the cable/television station cross-ownership rule hostage to these broadcasters' far-reaching demands in the digital context. Of course, where their interests are served by repeal or modification of other broadcast rules at issue in this proceeding, these commenters urge swift Commission action to remove these restrictions. In addition to their selective ignorance or discounting of competitive developments and existing regulatory measures, arguments propounded by these broadcasting interests with respect to the Commission's competition interest do not identify any actual harms to competition posed by co-located cable and broadcast stations sufficient to satisfy the constitutionality of the cable/television station cross-ownership ban under Turner I.

The same willful ignorance of changed competitive conditions and existing regulatory constraints, combined with a lack of evidence of specific harms, permeates those comments advocating the retention of the cable/television station cross-ownership rule on diversity

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[23]NBC Comments at 17-18.

[24]NAB Comments at 14, ALTS Comments at 39.

grounds.[25] Insofar as diversity represents a legitimate focus of the inquiry into broadcast ownership under Section 202(h),[26] or could qualify as an important or substantial interest under intermediate constitutional scrutiny,[27] a proposition which Time Warner disputes, it is clear that commenters have put forth no evidence that the current MVPD competitive environment is insufficiently diverse so as to justify such a broad intrusion on cable operators' speech. To the contrary, competitive, technological and legal developments fully address the diversity concerns underlying the adoption of the cable/television station cross-ownership ban in 1970.

Broadcasting outlets -- all of which are protected from discrimination by the must-carry rules -- have almost doubled since 1970.[28] The aforementioned new competitors to cable, such as DBS and MMDS, offer viewers more choices of diverse programming. Further, the Commission's array of behavioral rules prevents foreclosure of independent programming from

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[25]Center for Media Education, *et al.*, Comments at 28-29, UCC/BCFM Comments at 1-10, Network Affiliated Stations Alliance (NASA) Comments at 19.

[26]Time Warner reiterates that Section 202(h) of the 1996 Act by its terms restricts the Commission review of broadcast ownership rules "to determine whether any of such rules are necessary in the public interest *as the result of competition*." Section 202(h) to the 1996 Act (emphasis added).

[27]For two D.C. Circuit decisions casting doubt on the constitutionality of broadcast regulation as a tool to advance diversity, *see* Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992) and Lutheran-Church -- Missouri Synod v. FCC, 1998 U.S. App. LEXIS 7387 (D.C. Cir. 1998).

[28]In 1997, there were 1,141 commercial television stations. Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996, 9 CR 412, para. 285 (1997). In 1970, there were only 690 commercial television stations. Amendment of 47 C.F.R. 73.658(j)(1)(i) and (ii), The Syndication and Financial Interest Rules, 94 FCC 2d 1019, para. 108 (1983).

cable systems and guarantees opportunities for diverse speakers over cable.[29] In short, not only have commenters not provided the Commission sufficient evidence of harms to diversity resulting from co-owned, co-located cable systems and television stations, the great weight of the evidence shows there to be ample technological, competitive and regulatory forces at work ensuring a vigorous marketplace of ideas. Thus, commenters have demonstrated no concerns over current problems with diversity sufficient to satisfy even the intermediate scrutiny tests articulated in O'Brien and Turner I, nor to persuade the Commission to retain the cable/television station cross-ownership ban strictly on policy grounds.

Even assuming the Commission were convinced that commenters had shown sufficient actual harms to competition and diversity associated with co-owned, co-located cable systems and broadcast stations, the FCC still must show that the blanket restriction of the ban is a direct and material method for advancing its interests. Commenters offer no credible argument that the total ban on co-ownership of co-located cable systems and broadcast stations represents a "direct and material way" of alleviating any perceived harms to competition or diversity. The lack of evidence leaves the Commission with no alternative other than to repeal the cable/television station cross-ownership ban.

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[29] *See* 47 U.S.C. § 532 (leased access); *Id.* § 548, 47 C.F.R. §§ 76.1001, 1002 (program access); 47 U.S.C. 536(a), 47 C.F.R. § 76.1301 (program carriage).

III. REPEAL OF THE CABLE/TELEVISION CROSS-OWNERSHIP RULE WILL NOT LEAD TO ANTI-COMPETITIVE DISCRIMINATION AGAINST UNAFFILIATED BROADCAST STATIONS.

Maintaining the cross-ownership restriction on television license ownership obviously reduces the value of television broadcast stations by limiting the pool of potential investors. Thus, those broadcasters who argue for retaining the restriction must fear the impact of competition more than the increased value of their own stations. Indeed, their arguments must be rejected as the protectionist rumblings of certain elements of an industry attempting to retard the ongoing loss of its audience share and advertising revenues by continuing to saddle its most threatening competitor, the cable industry, with an out-of-date, ill fit, constitutionally suspect cross-ownership restriction.

Certain members of the broadcast industry argued in their comments that because local broadcast stations and cable systems compete for viewers, programming and advertising revenues, and because local broadcast stations simultaneously rely upon cable carriage to reach a majority of viewers, repeal of the cross-ownership restriction would not serve the public interest because repeal would supposedly enhance cable operators' alleged ability and incentive to engage in anti-competitive practices.[30] These broadcasters argue that if cable operators are allowed to own broadcast television stations in their service areas, they will unfairly discriminate in favor of both their own station and their cable programming services and against unaffiliated stations by manipulating carriage and channel positioning and by offering combination advertising rates. These broadcasters also argue that competing, unaffiliated broadcast stations will not be able to

[30]NASA Comments at 15-22, ALTS Comments at 37-39, Univision Communications Comments at 6-16, NAB Comments at 14-16, ABC Comments at 28-30.

fairly negotiate retransmission consent agreements and would be forced to elect must-carry, thereby diminishing their discretion and harming competition between cable and broadcasting.

Other than mere assertion and conjecture, these broadcasters simply present no compelling evidence whatsoever that a combined cable/television station operation could in anyway adversely affect competition for advertising, programming or carriage. To the contrary, as pointed out by NBC, cross-owned cable/television station operations will promote competition by allowing combined television broadcast stations and cable systems to realize unprecedented cost savings and pass these advantages along to consumers, advertisers and programmers.[31] While this concept may indeed be threatening to certain incumbent broadcast interests, the threat posed to such broadcasters by a more competitive broadcast industry is not a valid reason to maintain the cable/television cross-ownership rule.

Other than presenting vague and unconvincing assertions about competitive unfairness,[32] the broadcasters urging the retention of the ban present no valid explanation or even evidence of how competition for advertising would be harmed. To the contrary, logic and reason suggest that the combination advertising deals resulting from cross-ownership will only drive advertising rates lower and lead to increased competition for each advertising dollar. While these broadcasters' margins from their most lucrative revenue stream might indeed be reduced, advertisers themselves would undoubtedly benefit from lower rates and the increased supply of local advertising outlets. As regulations designed to enhance competition should be designed to benefit consumers and not protect traditional players from competition, these broadcasters' argument in this regard must be

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[31]NBC Comments at 19.

[32]NASA Comments at 18-20.

rejected. In any event, if there is any real evidence of abuse stemming from combination advertising, such abuses are more appropriately addressed through narrowly-tailored regulations than the blunderbuss of an outright ban.

Nor are these broadcasters' unfairness claims concerning the relative size of joint cable/television station operations a valid reasons to maintain the cross-ownership rule.[33] Despite the competitive pressure joint cable system/television stations may present to the traditional broadcasters, the efficiencies that arise from size alone are no reason to prohibit such combinations. Indeed, economies of scale inherent in such combinations have significant pro-competitive benefits. Furthermore, arguments by broadcasters opposing repeal of the ban based solely on the size of the combined entities cannot be reconciled with their arguments that they should be allowed to enter the newspaper business.[34] The concerns about scale and size are simply no different in the cable/television context than in the newspaper/television context, especially in a one newspaper town. Absent compelling evidence that size, in and of itself, is harmful to competition, a concept that economists and antitrust law has long rejected, the scale efficiencies that such combinations would produce and the benefits that would be conveyed to consumers and advertisers are every reason to encourage such combinations.

Finally, broadcasters urging the Commission to retain the ban simply can not make the case that retention of a constitutionally suspect, overbroad, out-of-date cable/television cross-ownership rule is in the public interest to address concerns about discrimination in carriage or channel positioning when those concerns are fully addressed by other regulations . As was

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[33]NASA Comments at 19-20.

[34]*See, e.g.*, ALTS Comments at 30-39, NAB Comments at 7-11.

correctly noted by NBC and NCTA, the competitive concerns underlying the cable/television cross-ownership rule no longer exist and even if they did, they are addressed in a precise, effective manner by other Commission regulations combined with traditional antitrust enforcement.[35]

Indeed, the Commission's must-carry[36] and channel positioning rules[37] prevent cable system operators from abusing their carriage status in an attempt to minimize local broadcast competition and thus nullify any concerns about carriage that may have at one time justified a cable/television cross-ownership restriction. Continued antitrust oversight combined with stern enforcement of these rules, and not a broad assault on cross-ownership, is the narrowly targeted, and thus constitutionally sound, manner to protect against such anti-competitive abuses. Because Congress and the Commission have crafted specific remedies to address each and every concern relating to carriage that was raised in the comments, these broadcasters' carriage arguments should be rejected as nothing more than an attempt by many of the traditional broadcast interests to slow the continuing erosion of its audience share by denying cable operators direct entry into the broadcasting business.[38]

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[35]NBC Comments at 17-18, NCTA Comments at 9-10.

[36]47 C.F.R. § 76.56.

[37]47 C.F.R. § 76.57.

[38]Nor is the analysis affected in any manner, as some broadcasters suggest, with regards to the broadcasters' roll out of digital television. Their concern is really whether cable operators' must carry obligations will be extended into carriage of digital signals, and, as it is already being fully addressed in the digital must carry proceeding, here is not the appropriate forum to address these concerns. *See* ALTS Comments at 30-39, NAB Comments at 7-11.

CONCLUSION

For the aforementioned reasons, Time Warner urges the Commission to repeal the cable/television station cross-ownership restriction.

Respectfully submitted,

TIME WARNER CABLE

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