NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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October 23, 2002

**EX PARTE**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, DC 20554

**Re: CS Docket No. 98-82; CS Docket No. 96-85; MM Docket No. 92-264; MM Docket No. 94-150; MM Docket No. 92-51; MM Docket No. 87-154; MB Docket No. 02-70**

Dear Ms. Dortch:

This letter is in response to a written *ex parte* submission filed October 11, 2002 in the above-captioned proceedings by Consumer Federation of America, Consumers Union, the Center for Digital Democracy and the Media Access Project ("the Consumer Groups").

The Consumer Groups contend, on the basis of recent isolated allegations of unlawful corporate conduct, that information, representations and certifications provided by cable operators and other multichannel video programming distributors ("MVPDs") in connection with the Commission's ownership rules cannot be expected to be truthful. Accordingly, they argue that the Commission should base ownership limits not on the percentage of total MVPD customers served by a single operator (a number that can allegedly be misrepresented by operators) but on the percentage of "homes passed" by a single cable operator.

They also argue that "insulation" rules, under which ownership in a cable company is not attributed to officers, directors and limited partners who represent and certify that they are not involved in the programming decisions of the company, are ineffective because the representations and certifications are sure to be false. Only "structural separation" can, in their view, be counted on to prevent supposedly insulated persons from engaging in programming activities, and therefore the insulation exemption should be eliminated.

These arguments, which disparage the integrity of all cable operators and MVPDs, are obviously intended to further the Consumer Groups' primary objective in these proceedings: To impose the lowest possible cap on ownership of cable systems. But even apart from the Consumer Groups' reckless suggestions of industry-wide willful misrepresentations, the remedies proposed by the Consumer Groups would be inappropriate and counterproductive.

*First*, the "homes passed" standard has been considered and rejected by the Commission as an appropriate standard for horizontal ownership restrictions. Section 613(f)(1)(A) of the Communications Act requires the Commission to prescribe rules "establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person." 47 U.S.C. § 533(f)(1)(A).

Initially, the Commission adopted a limit based on homes passed by a cable system as a percentage of total homes passed by cable systems nationwide. As the Commission has explained, such an approach may have been reasonable at a time when cable operators faced little or no multichannel competition: "In situations where there is only a single multichannel video provider, whether subscribership or homes passed data is used is largely a mechanical issue in terms of the market power issue. The return received by the content provider could equally be based on a share of revenues received, subscribers served, or size of the community involved depending on the contractual and economic (risk sharing) relationships involved."[1]

But with the advent of vigorous competition nationwide from DBS companies and others, "homes passed" is no longer an appropriate measure:

> As the market develops in terms of competition we believe . . . that an operator's actual number of subscribers more uniformly and accurately reflects power in the programming marketplace than does the number of homes passed. While an operator may pass a large number of homes in its franchise area, the operator could have a low penetration rate in that area due to competition from other MVPDs or other factors, thereby rendering the number of homes passed an inaccurate indicator of the operator's market power. Moreover, an operator does not purchase programming for the number of homes that it passes, but rather for its actual number of subscribers; thus, an operator's share of subscribers more accurately reflects its market power. In addition . . . [m]ore than one MVPD may pass the same homes, making it difficult to determine an MVPD's share of the MVPD market on a homes passed basis.[2]

In other words, even if it were reasonable to assume that cable operators generally misreport their subscribership – *which it is not* – there would be no reason to believe that switching to a "homes passed" standard would provide a more accurate measure of concentration and market power. To the contrary, in the current competitive marketplace, "homes passed" would be a decidedly *less* accurate standard. Were a "homes passed" standard to be used, would homes passed include both occupied and unoccupied dwelling units? Would it include college dorms and seasonal housing, or residential hotel rooms? The potential for inaccuracy would be far greater

[1] Third Report and Order, MM Docket No. 92-264, 14 FCC Rcd 19098, 19108 (1999) (footnote

[2] *Id.* at 19108-09.

than the supposed problems with using subscribers as the standard. Further, it's hard to imagine how such a previously rejected approach could survive judicial scrutiny under the stringent standards established by the D.C. Circuit when it overturned the Commission's most recent cable ownership rules.[3]

*Second*, the Commission also had a good reason for adopting an "insulation" exemption from its ownership attribution rules. As it explained, "As long as directors and officers appointed by a partial owner of a cable operator are not involved in the video-programming activities of the partially owned cable operator, the concerns of Section 613 that an MSO's programming power will be extended by its ownership interest are not implicated."[4]

It makes no sense to treat insulated persons as if they were owned and controlled a cable operator for purposes of the ownership rules; and doing so would foreclose identifiable benefits: "Permitting directors or officers who have knowledge and expertise in areas other than video programming, such as telephony or Internet, to serve with a cable company will benefit the cable company as technologies converge."[5] Similarly, eliminating the exemption for limited partners who certify that they are not involved in programming decisions would "prevent investments between companies whose combination may bring benefits to the public, such as cable broadband and telephony services and competition to the incumbent local exchange carriers or Internet."[6]

The Consumer Groups would nevertheless eliminate the insulation exemption and its accompanying benefits because "[a]s the recent rash of corporate scandals shows, directors and officers of corporations will not merely push the envelope in the name of profit, but will violate the law if they think no one is watching."[7] This cynical view is unsupported by any evidence or reason to believe that cable operators or other companies regulated by the Commission have historically ignored or flouted these or any other rules. That some corporations and corporate officers may sometimes violate the rules or break the law hardly suggests that the rules and the law are generally ineffective in constraining the behavior of the majority of law-abiding regulated entities.

Moreover, the Consumer Groups' assertion that the insulation exemption "merely requires that officers or limited partners make an *unenforceable promise* not to discuss programming decisions"[8] is false. To qualify for the exemption, officers and directors must *certify* and *document* the fact that their duties and responsibilities are wholly unrelated to video-programming activities or to a video programming subsidiary, and limited partners must *certify* that they are not materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership.[9] Such certifications are much more than "unenforceable promises,"

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[3] *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

[4] Report and Order, CS Docket No. 96-85, 14 FCC Rcd 19014, 19042 (1999).

[5] *Id.*

[6] *Id.* at 19040.

[7] *Ex Parte* Submission at 2.

[8] *Id.* at 5-6 (emphasis added).

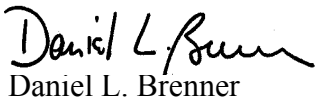
[9] 47 C.F.R. § 76.503 Note 2.

and untruthful certifications may result not only in Commission sanctions and penalties but also prosecution for perjury.[10]

It may be impossible to ensure that every certification is completely truthful and that every untruthful declaration to the Commission is detected. But the Consumer Groups' draconian proposal – which is simply to eliminate the insulation exemption – is a solution that is much worse than the alleged (and up to now non-existent) problem. The insulation exemption is necessary to ensure that the affiliation rules accurately identify the ownership and control that is relevant for purposes of the Commission's ownership rules. Eliminating the exemption would undermine the benefits of the rules and prevent productive investments and ownership affiliations. This would be a bad trade-off even if there were reason to believe that regulated entities were infrequently violating the Commission's rules.

There is, in fact, no evidence of widespread disobedience of the Commission's rules. The Consumer Groups have simply seized upon recent headlines unrelated to the Commission's ownership rules to promote their own regulatory agenda. Their unsubstantiated claims should be dismissed.

Respectfully submitted,



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[10] *See*, *e.g.*, 47 C.F.R. §§ 1.16, 1.17, 1.80.