Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 82-434

In the Matter of

Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1991; Released: December 30, 1991

Comment date: March 2, 1992
Reply comment date: March 17, 1992

By the Commission: Commissioner Quello concurring and issuing a separate statement; Commissioner Duggan issuing a separate statement.

I. INTRODUCTION

1. This *Second Further Notice of Proposed Rule Making* (*"Second FNPRM"*) invites further comment on our proposal to eliminate Section 76.501(a)(1) of our rules,[1] which prohibits common ownership of cable television systems and national television networks (the "network-cable cross-ownership rule").[2] In light of the significant changes in the video marketplace since the most recent comments in this docket were submitted in 1988, we believe it is useful to revisit this proceeding and update its record. These marketplace changes, which were closely examined in a recent Commission staff report,[3] include a continued decline in the broadcast networks' audiences and financial base and the emergence of the cable television industry as a more substantial competitive force in the production and distribution of video programming.

2. In our earlier notices in this proceeding, we invited comment on whether the network-cable cross-ownership rule may safely be eliminated and whether its repeal would promote increased efficiencies and benefits to the public. Through this *Second FNPRM,* we encourage interested parties to update the record on this issue. In addition, we recognize that parties commenting on our prior notices have raised serious questions regarding the impact of repeal on diversity and competition in the video marketplace. As a result, we believe that we should carefully consider these concerns to assess their legitimacy and to determine whether minimally intrusive regulatory safeguards are warranted to alleviate them if we decide to relax or repeal the rule. In this regard, we seek comment on certain alternative proposals aimed at addressing these concerns, and we also invite parties to propose any other safeguards or modifications that they consider appropriate.[4]

II. BACKGROUND

3. When adopting the network-cable cross-ownership ban in 1970,[5] the Commission expressed its concern that the television networks, if permitted to own cable systems at this critical stage of their development, could potentially thwart the cable industry's growth and inhibit competition. More generally, the Commission also stated that "the networks already have a predominant position nationwide through their affiliated stations in all markets, their control over network programming presented in prime time, and their share of the national television audience."[6] Although the Commission did not elaborate further on the rule's rationale, its policy concerns were illuminated in its discussion of the broadcast-cable cross-ownership rule, which was simultaneously adopted and prohibits common ownership of local television stations and cable systems that serve the same area.[7] This discussion suggests that the principal concerns underlying the network-cable rule were that: (1) the networks could restrict the amount of competing programming supplied by their cable television systems due to their incentive to maximize the audience for their own network programming; (2) cable systems owned by a network could refuse to carry the programming of rival networks, thus hindering the development of new cable networks as well as limiting network competition nationwide; and (3) cable

[1] 47 C.F.R. Section 76.501(a)(1) was originally adopted as 47 C.F.R. Section 74.1131. This rule provides that "[n]o cable television system (including all parties under common control) shall carry the signal of any television broadcasting station if such system directly or indirectly owns, operates, controls, or has an interest in... a national television network (such as ABC, CBS, or NBC)."
[2] *See Notice of Proposed Rule Making* (*"Notice"*), BC Docket No. 82-434, 91 FCC 2d 76 (1982). *See also Further Notice of Proposed Rule Making* (*"Further Notice"*), BC Docket No. 82-434, 3 FCC Rcd 5283 (1988).
[3] F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace,* FCC Office of Plans and Policy Working Paper No. 26, June 1991.
[4] We note that in response to our *Notice of Inquiry* in MM Docket No. 91-221, 6 FCC Rcd 4951 (1991), seeking comment on changes in the state of the video marketplace and the policy implications that flow from these changes, several parties have already submitted comment on the merits of the networkcable cross-ownership rule. We will consider those comments in the context of this proceeding, but also invite those parties to comment on the specific proposals for modifying the rule described below.
[5] *Second Report and Order* in Docket 18397, 23 FCC 2d 816 (1970), *recon. denied,* 39 FCC 2d 377 (1973).
[6] 23 FCC 2d at 821.
[7] 47 C.F.R. § 76.501(a)(2).*See Second Report and Order,* 23 FCC 2d at 819; 39 FCC 2d at 391. The Cable Communications Policy Act of 1984 codified the Commission's broadcast-cable cross-ownership rule but not the networkcable cross-ownership rule. *See* Pub. L. No. 98-549, 98 Stat. 2779 (1984), Section 613(a). 47 U.S.C. § 533(a).

ownership could enhance the networks' dominance as suppliers of television programming, thus limiting the diversity of voices in the video marketplace.[8]

4. Beginning in 1980, several studies questioned the necessity of the network-cable cross-ownership rule and emphasized the increasingly competitive nature of the video marketplace. These studies included reports by the Commission's Network Inquiry Special Staff ("Special Staff"),[9] the Office of Plans and Policy ("OPP"),[10] and the majority staff of the House Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce.[11] We cited these studies in our first *Notice,* issued in 1982, that proposed to eliminate the cross-ownership rule in light of the growth of the video marketplace and the development of cable television services. The comments in response to the *Notice* were mixed, with the National Association of Broadcasters ("NAB"), the Department of Justice ("DOJ"), the three national television networks, and the National Cable Television Association ("NCTA") supporting our proposal to eliminate the rule, and the Small Business Administration ("SBA") and several public interest groups opposing it.

5. In 1988, we issued a *Further Notice* to solicit additional comments on our proposal to eliminate the rule. Given the time elapsed since the *Notice,* we allowed interested parties to comment on any intervening developments or circumstances that might affect our evaluation of the network-cable crossownership rule. In particular, we noted a report by the National Telecommunications and Information Administration ("NTIA"),[12] which concluded that broadcast television networks should not be prohibited from owning local cable systems. The *Further Notice* also observed that significant statutory or regulatory changes may have altered the nature of competition between the cable and broadcasting industries, including the adoption of the 1984 Cable Act,[13] the elimination of our "must carry" rules,[14] and the reimposition of our syndicated exclusivity rules.[15] Accordingly, we sought specific comment on whether the opportunity for networks to own cable systems in markets containing their affiliated stations might adversely influence negotiations for affiliation contracts. Considering the absence of must carry, we also asked whether a network that affiliates with a local station while owning a cable system in the same market could undermine the competitive position of other broadcast facilities in that market. A summary of the comments received in response to the *Further Notice* is contained in Appendix B.

III. REQUEST FOR FURTHER COMMENT

6. The changes in the video marketplace that we detailed in our prior Notices have continued to develop. The cable industry is now a robust, independent enterprise, with systems and networks offering an increasing diversity of programming that competes directly with over-the-air broadcast services. In the midst of this steadily rising competition, the television networks face a growing need to generate additional revenues in response to declining audiences and advertising sources.[16] As discussed below, these critical developments have prompted us to revisit the issue of whether eliminating our network-cable cross-ownership rule would enhance network efficiency and generate public benefits.[17]

7. We recognize, however, that a number of commenters responding to our prior Notices have expressed concerns that repealing the current restriction could undermine competition and diversity in local and national video markets. We thus seek to explore those concerns in this proceeding to assess their validity, to analyze whether they could be satisfactorily addressed by imposing minimally intrusive regulatory safeguards, and to determine the extent to which the record supports relaxing the rule.

Rule Elimination

8. We ask commenters first to address whether, in light of the significant changes in the video marketplace, the network-cable cross-ownership rule should be eliminated. In this regard, we note that the near complete dominance of the three broadcast networks, which existed when the rule was adopted and persisted for many years, has clearly diminished and left the networks with the need to adapt to a changing economic and competitive environment. According to the recent OPP Working Paper, the networks are experiencing a significant reduction in advertising revenue, their traditional base of economic support, that will force the networks either to reduce their costs and "downsize" their operations, or to develop supplementary revenue streams.[18]

9. One potential means of both reducing costs and increasing revenues would be for the networks to enter the cable television business. The networks would appear well-equipped to compete in the cable industry, given their experience and expertise in selling national advertising, acquiring and distributing programming, producing news programming, and working with a diverse group of local affiliates. Moreover, allowing the networks into cable would enable them to take advantage of the benefits that

---

8 *See Notice,* 91 FCC 2d at 82.

9 *See New Television Networks: Entry, Jurisdiction, Ownership and Regulation,* October 1980.

10 K. Gordon, J. Levy and R. Preece, *FCC Policy on Cable Ownership* (Staff Report, FCC Office of Plans and Policy), November 1981.

11 *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry,* Committee Print 97-V, 97th Congress, 1st Session, November 3, 1981.

12 "Video Program Distribution and Cable Television: Current Policy Issues and Recommendations," NTIA Report No. 88-233, June 1988 ("NTIA Report").

13 Cable Communications Policy Act of 1984, Pub. L. No. 98-549, Section 1 *et seq.,* 98 Stat. 2779 (1984).

14 *See Quincy Cable TV Inc. v. FCC,* 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied,* 106 S. Ct. 2889 (1986); and *Century Communications v. FCC,* 835 F.2d 292 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1032 (1988).

15 *See Report and Order* in Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988).

16 *See Report and Order,* MM Docket No. 90-162, 6 FCC Rcd 3108, 3134 (1991). *See also* OPP Working Paper No. 26.

17 The potential benefits and anticompetitive consequences of vertical integration in the video marketplace are discussed more completely in the *Notice* and the studies referenced therein. *See* fn. 2, *supra.*

18 *See* fn. 3, *supra.*

accrue from vertical integration into both cable system ownership and television programming services -- benefits that we recently detailed in our July 1990 Report to Congress on the status of competition in the cable industry.[19]

10. The increased revenues that may flow from network entry into cable system ownership also could benefit affiliate stations that depend on a network's programming and economic resources. In this fashion, any efficiencies resulting from network-cable cross ownership might improve the quality and diversity of programs available to the public from affiliate television stations. We further note that independent television stations could benefit from the diversity of network fare because of their reliance upon off-network syndicated programming. Nonetheless, we recognize that these stations have raised serious concerns in the past about the possibility of repealing or relaxing the rule.

11. In addition to providing new opportunities for the television networks, permitting network-cable integration could produce efficiencies that accrue to the benefit of cable subscribers. We note that we have recently taken a series of actions in which we emphasized the need to encourage greater competition to cable television systems.[20] Clearly, the television networks are some of the most likely potential entrants into cable delivery. Accordingly, in evaluating the continuing validity of the network-cable cross-ownership restriction, we believe we should rigorously analyze the competitive effects on both broadcast and cable services that may flow from eliminating this rule. In this regard, commenters are invited to address in particular any public interest or competition concerns that may be raised if a cable multiple system operator (MSO) were to acquire a broadcast television network.

12. We stress that any repeal of the network-cable cross ownership restriction would not be designed to provide an artificial boost to the networks' competitive position. Rather, in light of the fundamental support that the networks provide to the free, over-the-air broadcast system, we seek to remove undue barriers to their continued competitive vitality. In this regard, we observe that the decline of a number of significant industries has been exacerbated by regulations that failed to keep pace with marketplace changes. We thus emphasize the value of carefully scrutinizing government rules that prevent certain sectors of an industry from entering into related activities, particularly when the industry is as dynamic as the video communications marketplace.

Alternatives for Rule Modification and Safeguards

13. In undertaking a thorough reexamination of the network-cable crossownership rule in this proceeding, we recognize that some parties have raised valid questions concerning the impact that repeal of the rule may have on competition and diversity. We thus believe that it is appropriate to consider more fully the concerns raised by various commenters in response to the *Further Notice.* As discussed in Appendix B, the commenters that opposed eliminating the network-cable cross-ownership rule contended that: (1) networks could discriminate against non-affiliates with respect to cable carriage; (2) networks would gain undue leverage over their affiliates in their contractual and program clearance negotiations; (3) networks would promote national rather than local programming and divert funds from news and public affairs programming; (4) networks might bypass their local affiliates and deliver their programming directly through their cable systems; (5) networks still dominate the video marketplace and could hamper the development of competitive cable networks; or (6) a major cable MSO could acquire a network and create an excessive concentration of media control. We seek comment on the merit and significance of these concerns in the current video marketplace. Parties may also wish to consider the extent to which other existing rules -- such as the local broadcast station-cable cross-ownership rule or our regulations limiting network control over network affiliates -- might ameliorate some of the enumerated concerns.[21] In addition, to the extent the updated record establishes that these or other concerns warrant relaxing, but not completely repealing, the rule, we seek comment on a variety of options, described below, that would permit cross-ownership of broadcast networks and cable systems subject to various constraints. Parties may consider the proposals individually or in certain combinations, and are also encouraged to present alternative suggestions.

14. *Network ownership of cable systems in "large" or "competitive" markets, including where second competitive cable systems exist.* This option, first, would allow networks to own cable systems in large markets under the theory that permitting network entry only in such markets might pose the least potential threat to diversity and competition. In exploring this option, we seek comment on the appropriate definition for "large" markets. For example, we could use market rankings such as the top 10, 25, or 50 markets. Second, with respect to the "competitive" market approach, we could permit network ownership of cable systems based upon the availability of a certain number of television broadcast signals in the community.[22] As another means of measuring the level of competition, we could also allow networks to operate cable systems where they would provide a second or "competing" cable service or, more broadly, at least a second or "competing" multichannel competitor. This provision would mitigate competitive concerns and offer procompetitive benefits because two or more multichannel competitors would seek to offer service to subscribers in the same community.[23] We also seek com-

[19] *See Report* in MM Docket No. 89-600, 5 FCC Rcd 5008-5010 (1990).

[20] *See e.g., Second Report and Order* in Gen. Docket No. 90-54, FCC 91-302, released October 25, 1991; *Order on Reconsideration* in Gen. Docket No. 90-54, FCC 91-301, released October 25, 1991; and *Further Notice of Proposed Rule Making, First Report and Order, and Second Further Notice of Inquiry,* in CC Docket No. 87-266, FCC 91-334, released November 22, 1991.

[21] *See* 47 C.F.R. § 76.501 (a)(2). *See also* 47 C. F. R § 73.658.

[22] *Compare Report and Order,* MM Docket No. 90-4, 6 FCC Rcd 4545 (1991). *Compare also Report and Order,* MM Docket No. 87-8, 6 FCC Rcd 4212 (1991).

[23] We also observe that the limited number of competing cable systems may cause this option to create only a few initial opportunities for network ownership.

ment on whether markets should satisfy both the "large" and the "competitive" conditions before we would permit network-cable cross-ownership.

15. We note that a network-owned cable system might encounter sufficient competition under these options to discourage any attempt to discriminate against local broadcasters. In addition, these options would afford an opportunity for us to monitor and evaluate the results of relaxing the rule. However, the options would restrict the networks' flexibility to enter those markets where they could realize the greatest efficiencies through cross-ownership of cable systems.

16. *Network ownership of cable systems up to a national subscriber limit.* This option would allow networks to acquire cable systems up to some national aggregate subscriber limit. Under this option, networks could take advantage of economies attainable through owning multiple cable systems, but not without some limit on their participation in the cable marketplace nationwide. We seek comment on the appropriate national subscriber limit we might use (*e.g.,* 10%, 15%, or 25% of all subscribers nationwide) if this option were adopted. We also note that we recently expressed our general opposition to limits on the horizontal growth of cable MSOs in our July 1990 Report to Congress on competition in cable television.[24] We thus seek comment on the merits of nonetheless applying such restrictions only with respect to broadcast network cross-ownership.

17. *Network ownership of cable systems subject to must carry and discrimination safeguards.* This option would allow networks to own cable systems subject to (1) mandatory carriage of all or most local stations, and (2) a prohibition of favoritism toward affiliates through carriage, channel position, and technical quality. Network ownership of cable systems subject to these safeguards arguably would meet the dual goals of capturing the benefits of network entry while directly addressing the discrimination concerns raised by local broadcast stations. In addition, the safeguards may not impose an undue burden upon networks, given that a network-owned cable system would have an incentive to provide local broadcasting services without discrimination in order to remain competitive. However, we are concerned about the prospects of tailoring new must carry rules to resolve objections raised in previous court decisions.[25] In this regard, we seek comment on a viable legal rationale for mandatory carriage of local broadcasters under such a rule. We also ask for comments on whether to (i) require network-owned cable systems to "freeze" the existing channel lineup, (ii) include on-channel protection for local signals, or (iii) adopt a non-bypass safeguard that prohibits a network from refusing to affiliate in any market where it owns a cable system and has previously affiliated with a local broadcast station.[26]

IV. CONCLUSION

18. In this *Second FNPRM,* we reexamine the network-cable cross-ownership rule and we seek further updated comments on the merits of eliminating the rule. We also offer a number of possible modifications to the existing rule in response to various concerns raised regarding possible anticompetitive practices by networks as owners of cable systems. In addition, we seek other comments or suggestions from interested parties with respect to the continued necessity of the network-cable cross-ownership rule.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

19. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Second Further Notice of Proposed Rule Making,* but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Second Further Notice of Proposed Rule Making,* including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

B. Ex Parte

20. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comment Dates

21. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **March 2, 1992,** and reply comments on or before **March 17, 1992.** To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

D. Ordering Clauses

22. Authority for this proposed Rule Making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended.

---

[24] *See* fn. 19, *supra.*

[25] *See* fn. 14, *supra.*

[26] The subject of mandatory signal carriage rules as applied on a more general basis is under review in our *Report and Order and Second Further Notice of Proposed Rule Making* in Docket 90-4, 6 FCC Rcd 4545 (1991).

For further information on this proceeding, contact James Coltharp, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. Reason for action. The proposals under consideration will modify or eliminate the existing prohibition on cross-ownership between cable television systems and national television networks. The Commission believes that, in its current form, this prohibition is no longer necessary in terms of its original purposes and that possible cost benefits attributable to cross-ownership are being needlessly forgone by continuation of the rule in its entirety.

II. Objectives. The objective of this action is to eliminate unnecessary regulation, thus permitting the marketplace to operate more freely and efficiently. In particular, networks may benefit by their ability to own cable systems, and cable systems may benefit through being owned by networks.

III. Legal basis. The proposed Rule Making action is authorized by Sections 1, 2, 3, 4(i) and (j), 303, 307, 308, 309 and 403 of the Communications Act of 1934, as amended.

IV. Reporting, recordkeeping and other compliance requirements. No recording, record keeping or reporting requirements for cable television operators are involved. Depending on the proposed action, however, it may eliminate the need for possible Commission compliance actions or waiver proceeding related to the existing rule.

V. Federal rules which overlap, duplicate or conflict with this rule. None.

VI. Description, potential impact and number of small entities affected. The proposals under consideration are not expected to have a significant impact on most small cable systems. However, to the extent that networks purchase existing small cable systems, the systems may benefit from the expertise of the network, or from the possible infusion of additional capital into the cable system. To the extent that networks choose to purchase large cable systems or that large cable systems choose to purchase networks, there should be little or no direct impact on small business entities.

VII. Any significant alternatives minimizing impact on small entities and consistent with stated objective. Several of the proposals under consideration minimize the impact on small entities.

APPENDIX B

SUMMARY OF COMMENTS TO THE FURTHER NOTICE

1. *Supporting Comments.* In response to the 1988 *Further Notice,* the networks, cable operators, and NTIA filed comments in support of eliminating the rule. These commenters emphasized the cable industry's strength in the current video marketplace as well as the benefits of vertical integration. Specifically, the three networks argued that their power has diminished since 1970, when the rule was adopted, and that they have no incentive to engage in anticompetitive behavior. They maintained that eliminating the rule would not restrict the amount or diversity of cable programming, nor would it hinder the development of new cable networks. They also asserted that permitting network ownership of cable systems would not distort network relations with local affiliates, and networks would not exclude local broadcast stations from their cable systems. According to the networks, such anticompetitive practices could cause financial losses and would encourage both competitive entry and federal intervention.

2. NCTA and other commenters claimed that the ban on network ownership of cable systems is no longer necessary because the rule already has served its purpose. They argued that the strength of the cable industry would prevent broadcast networks from hindering the further development of cable systems, and further asserted that such networks lack the financial resources to purchase enough cable systems to accumulate a market share that would raise competitive concerns. Proponents of network ownership also contended that the benefits of vertical integration -- in particular, the opportunity to avoid transaction costs in obtaining programming -- outweigh any anticompetitive risks. For instance, the investment of many cable operators in Turner Broadcasting and CSPAN has contributed to the expanding supply of cable programming. Furthermore, these commenters noted that there is no evidence in the cable industry to indicate that multiple system operators ("MSOs") favor their own programming to the exclusion of unaffiliated programming.

3. With respect to the two concerns raised in the *Further Notice* regarding the potential for anti-competitive practices, proponents of eliminating the rule argued that networks are unlikely to deny carriage to local broadcast signals because the public generally demands access to all local channels. Indeed, the local network affiliates are the most popular stations in every market. Consequently, networks engaging in a "bypassing" strategy would risk losing a large number of cable subscribers in exchange for a few additional broadcast viewers, rendering the strategy unprofitable. Similarly, these parties asserted that networks have no incentive to threaten to drop their own local affiliates in the course of affiliation negotiations. Indeed, networks rely on strong local viewership to attract national advertising, and the time and cost of cultivating affiliate relationships would make it economically unreasonable to drop a local affiliate.

4. NTIA and New York City supported our proposal to delete the networkcable cross-ownership rule, but asserted that certain safeguards are necessary to ensure that networks operating cable systems do not discriminate against competitors or reduce the level of competition or diversity in a particular market.[27] For example, NTIA proposed that the Commission establish a system for reviewing petitions challenging specific network proposals to acquire cable systems in smaller markets where (i) there is a high cable penetration rate, and (ii) the network-owned cable system would serve an area substantially equivalent to its affiliate's coverage area.[28] The Wireless Cable Association also supported removing the cross-ownership restriction, but not before the Commission adopts rules to ensure that vertical integration does not preclude the establishment of alternative video distribution methods to coaxial cable.

5. *Opposition Comments.* Opposing commenters included the Motion Picture Association of America, Inc. ("MPAA"), the three network affiliate associations ("Affiliates"), Association of Independent Television Stations, Inc. ("INTV"), Association of National Advertisers, Inc. ("ANA"), Turner Broadcasting System, Inc. ("Turner"), Group W, Fisher Broadcasting Inc. ("Fisher"), Arizona Television Company ("Arizona"), Brechner Management Company ("Brechner"), Holston Valley Broadcasting Corporation ("Holston"), and the U.S. Catholic Conference ("USCC"). These parties argued for retention of the rule based on concerns that, given the absence of must carry rules, network cable operators could refuse to carry certain broadcast and cable signals.

6. For example, the Affiliates stated that cable systems provide the final transmission path to viewer homes, and a network that controls this path currently has no government-imposed obligation to carry the signal of its local affiliate or any of its competitors. As a result, the Affiliates claimed, network-owned cable systems would have complete discretion to discriminate against local and distant stations that carry programming and advertising in competition with the networks. The Affiliates alleged that such discrimination would not only inhibit competition in the sale of local programming and advertising, but it would also restrict the diversity of programming and advertising services available to subscribers of network-owned cable systems.

7. According to Fisher, broadcast stations "live or die" based on reaching an affiliation agreement with one of the networks. If the rules were repealed, Fisher asserted, a broadcast station could not negotiate an affiliation agreement at arms-length with a network because of the persistent threat that the network's cable system could drop the station. Thus, Fisher claimed that an affiliate would have to accept any affiliation offer from a network, even at an unreasonably low payment, and attempt to survive by cutting back on budgets reserved for news and local programming.

---

[27] New York City recommended that we implement regulatory safeguards to ensure that network ownership of cable systems does not lead to unacceptable media concentration levels in a particular cable television viewing area, and stated that we should urge Congress to enact statutory must carry rules to prevent anticompetitive behavior by networks as cable operators.

[28] Under this proposal, petitioners would bear the burden of demonstrating that the proposed acquisition is not in the public interest.

8. The opponents of eliminating the rule also argued that networks could discriminate in the competition for advertising dollars, creating an inherent conflict of interest between a network and its own affiliates. According to Group W, network acquisition of cable systems would cause the networks to compete with their own affiliates for local advertising dollars, with the networks maintaining an unfair advantage due to their size and power. Although networks may argue that they have no intention of engaging in such discriminatory practices, Group W urged the Commission to act carefully and allow cross-ownership only upon a strong showing that no harm will occur.

9. Still other commenters asserted that allowing networks to own cable systems would signal the demise of free television programming currently available to virtually all American households. Arizona contended that networks owning cable systems would ultimately conclude that their interests are best served by gradually shifting their budget and best programming over to their cable systems. As a result, affiliate stations would have less funds available for local programming and news, causing many viewers that remain dependent upon free television to receive an inferior product. Arizona concluded that the Commission should retain the rule due to great potential for public harm. In an alternative scenario, MPAA warned that eliminating the rules would allow large cable MSOs to purchase a television network, although MPAA and other opponents to network ownership believed that the networks were still primarily dominant in the video market.

Concurring Statement of Commissioner James H. Quello.

In the Matter of: Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks.

Generally, I am in favor of receiving comments on important matters affecting the broadcast and cable industries, so I can support issuing this Second Further Notice of Proposed Rulemaking. However, since this Notice comes so soon after the Commission received input in the Future of Television Inquiry, some have suggested that it represents at least a tentative conclusion to relax or repeal the network-cable cross-ownership rule. My vote should not be so interpreted. While I am willing to consider proposals to change the rule, my guiding principle will be the probable effect of such action on the maintenance of free over-the-air television.

To the extent some view this Notice as the preliminary announcement of an impending change in the rules, I would caution my fellow Commissioners to ensure that any new rules are consistent with the Commission's other policies, particularly those adopted recently. This concern also is most pressing when the Commission alters some of its rules as a result of changes in the video marketplace, but not others.

Such a lack of consistency was a major reason the Court of Appeals struck down "must-carry" rules in 1985. For example, the Court found the Commission's failure to question the assumptions underlying must-carry rules to be "in sharp contrast to [its] treatment of several other components of the regulatory framework." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1442 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). In particular, the Court noted that "the Commission eliminated the distant-signal-carriage and syndicated-exclusivity rules," both of which were premised on the same regulatory interest as must-carry — "protect[ing] broadcast television from competition from the expanding cable industry." *Id.* While marketplace changes and Commission actions over the past few years have enhanced the need to reimpose some type of must-carry rules,[1] the need for consistency in Commission policy remains constant.

For this reason, it is imperative that the Commission is mindful of its overall policies as it reviews the comments in this proceeding. For example, can the Commission reconcile a majority's recent conclusion that "the networks continue to benefit from historical structural advantages"[2] with the Notice's statement that "the near complete dominance of the three broadcast networks . . . has clearly diminished"? Notice at ¶ 8. Is it consistent for the Commission to retain significant financial interest and syndication restrictions while concluding in this Notice that marketplace changes "will force the networks either to reduce their costs . . . or develop supplementary revenue streams"? *Id.*

Similarly, can the Commission justify allowing greater vertical integration through network-cable combinations in light of its 1990 conclusions that "vertically integrated MSOs have the ability to limit competition to particular programming services" and that "most cable operators have the ability to deny or unfairly place conditions on a programming service's access to the cable communities they serve"?[3] The Commission recently reaffirmed the principle that the main competition to cable television is a complement of over-the-air broadcasting signals. *Reeaxamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. 4545 (1991). Is it consistent for the Commission to permit the primary competitors in local video distribution markets to merge?

Finally, it is significant that the policy purposes underlying the network-cable restrictions are closely related to those for the more general broadcast-cable cross-ownership ban. *See* Notice at ¶ 3. Of course, the broadcast-cable restrictions have not been targeted for retirement, obviously because these rules were codified in the Cable Act. *See* Notice at ¶ 3 & n.7. But to relax or repeal one of the rules while the other remains in place might create a serious imbalance in the Commission's policies.

I ask these questions not because I have firm opinions on the probable answers but because I believe the Commission must address these issues in addition to those raised in the Notice. I also believe that presumption favors the continuation of rules that were enacted to promote diversity in local video markets. This is unlike the situation in the financial interest and syndication proceeding where I have said that changes in the media marketplace create a presumption in favor of repeal. That proceeding involved national and international markets for programming in which there are many alternative buyers. By sharp contrast, the question of cross-ownership affects local video markets, in which the cable operator has the potential to act as a bottleneck or gatekeeper. The 1990 Cable Report found that local cable operators have the *ability* to engage in anticompetitive practices; the question now facing the Commission is whether allowing cross-ownership will create an added *incentive* for them to do so.

This brings us full-circle to the question of safeguards, which are discussed prominently in the Notice. Certain of the alternatives, such as limiting cross-ownership to large markets or imposing national subscriber limits, may not address the problem of local bottlenecks. Other options, such as must carry, recently have been criticized inside the Commission,[4] raising again the question of consistency.

I will review the comments filed in this proceeding carefully and will attempt to assess what effect any rule change will have on free over-the-air television. Ultimately, it is the Commission's responsibility in the public interest to answer that question, which this proceeding squarely presents.

---

[1] As this Notice recognizes, the relative fortunes of the broadcasting and cable industries have shifted radically over the past few years. Not only have there been marketplace changes, but the Commission has reimposed certain regulations such as syndicated exclusivity rules. *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299 (1988), *aff'd United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). *See also Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. 4545, 4564-66 (1991) (issuing *Second Further Notice of Proposed Rulemaking* on whether to reimpose carriage requirements as part of effective competition standard).

[2] *Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3109 (1991), *modified*, ___ FCC Rcd. ___ (1991), *appeal pending* No. 91-2350 (7th Cir.).

[3] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, ¶ 127 (1990). Indeed, with respect to the anticompetitive practices described in the Cable Report, the Commission found that "the record in this proceeding indicates that some [cable systems] have [engaged in such tactics]."

[4] *See Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. at 4575-76 (Separate Statement of Chairman Alfred C. Sikes).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 82-434

In the Matter of

Amendment of Part 76, Subpart J,
Section 76.501 of the Commission's
Rules and Regulations to Eliminate
the Prohibition on Common Ownership
of Cable Television Systems and
National Television Networks

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1991; Released: December 30, 1991

Comment date: March 2, 1992
Reply comment date: March 17, 1992

By the Commission: Commissioner Quello concurring and issuing a separate statement; Commissioner Duggan issuing a separate statement.

I. INTRODUCTION

1. This *Second Further Notice of Proposed Rule Making* (*"Second FNPRM"*) invites further comment on our proposal to eliminate Section 76.501(a)(1) of our rules,[1] which prohibits common ownership of cable television systems and national television networks (the "network-cable cross-ownership rule").[2] In light of the significant changes in the video marketplace since the most recent comments in this docket were submitted in 1988, we believe it is useful to revisit this proceeding and update its record. These marketplace changes, which were closely examined in a recent Commission staff report,[3] include a continued decline in the broadcast networks' audiences and financial base and the emergence of the cable television industry as a more substantial competitive force in the production and distribution of video programming.

2. In our earlier notices in this proceeding, we invited comment on whether the network-cable cross-ownership rule may safely be eliminated and whether its repeal would promote increased efficiencies and benefits to the public. Through this *Second FNPRM,* we encourage interested parties to update the record on this issue. In addition, we recognize that parties commenting on our prior notices have raised serious questions regarding the impact of repeal on diversity and competition in the video marketplace. As a result, we believe that we should carefully consider these concerns to assess their legitimacy and to determine whether minimally intrusive regulatory safeguards are warranted to alleviate them if we decide to relax or repeal the rule. In this regard, we seek comment on certain alternative proposals aimed at addressing these concerns, and we also invite parties to propose any other safeguards or modifications that they consider appropriate.[4]

II. BACKGROUND

3. When adopting the network-cable cross-ownership ban in 1970,[5] the Commission expressed its concern that the television networks, if permitted to own cable systems at this critical stage of their development, could potentially thwart the cable industry's growth and inhibit competition. More generally, the Commission also stated that "the networks already have a predominant position nationwide through their affiliated stations in all markets, their control over network programming presented in prime time, and their share of the national television audience."[6] Although the Commission did not elaborate further on the rule's rationale, its policy concerns were illuminated in its discussion of the broadcast-cable cross-ownership rule, which was simultaneously adopted and prohibits common ownership of local television stations and cable systems that serve the same area.[7] This discussion suggests that the principal concerns underlying the network-cable rule were that: (1) the networks could restrict the amount of competing programming supplied by their cable television systems due to their incentive to maximize the audience for their own network programming; (2) cable systems owned by a network could refuse to carry the programming of rival networks, thus hindering the development of new cable networks as well as limiting network competition nationwide; and (3) cable

[1] 47 C.F.R. Section 76.501(a)(1) was originally adopted as 47 C.F.R. Section 74.1131. This rule provides that "[n]o cable television system (including all parties under common control) shall carry the signal of any television broadcasting station if such system directly or indirectly owns, operates, controls, or has an interest in... a national television network (such as ABC, CBS, or NBC)."

[2] *See Notice of Proposed Rule Making* (*"Notice"*), BC Docket No. 82-434, 91 FCC 2d 76 (1982). *See also Further Notice of Proposed Rule Making* (*"Further Notice"*), BC Docket No. 82-434, 3 FCC Rcd 5283 (1988).

[3] F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace,* FCC Office of Plans and Policy Working Paper No. 26, June 1991.

[4] We note that in response to our *Notice of Inquiry* in MM Docket No. 91-221, 6 FCC Rcd 4951 (1991), seeking comment on changes in the state of the video marketplace and the policy implications that flow from these changes, several parties have already submitted comment on the merits of the networkcable cross-ownership rule. We will consider those comments in the context of this proceeding, but also invite those parties to comment on the specific proposals for modifying the rule described below.

[5] *Second Report and Order* in Docket 18397, 23 FCC 2d 816 (1970), *recon. denied,* 39 FCC 2d 377 (1973).

[6] 23 FCC 2d at 821.

[7] 47 C.F.R. § 76.501(a)(2).*See Second Report and Order,* 23 FCC 2d at 819; 39 FCC 2d at 391. The Cable Communications Policy Act of 1984 codified the Commission's broadcast-cable cross-ownership rule but not the networkcable cross-ownership *rule. See* Pub. L. No. 98-549, 98 Stat. 2779 (1984), Section 613(a). 47 U.S.C. § 533(a).

ownership could enhance the networks' dominance as suppliers of television programming, thus limiting the diversity of voices in the video marketplace.[8]

4. Beginning in 1980, several studies questioned the necessity of the network-cable cross-ownership rule and emphasized the increasingly competitive nature of the video marketplace. These studies included reports by the Commission's Network Inquiry Special Staff ("Special Staff"),[9] the Office of Plans and Policy ("OPP"),[10] and the majority staff of the House Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce.[11] We cited these studies in our first *Notice,* issued in 1982, that proposed to eliminate the cross-ownership rule in light of the growth of the video marketplace and the development of cable television services. The comments in response to the *Notice* were mixed, with the National Association of Broadcasters ("NAB"), the Department of Justice ("DOJ"), the three national television networks, and the National Cable Television Association ("NCTA") supporting our proposal to eliminate the rule, and the Small Business Administration ("SBA") and several public interest groups opposing it.

5. In 1988, we issued a *Further Notice* to solicit additional comments on our proposal to eliminate the rule. Given the time elapsed since the *Notice,* we allowed interested parties to comment on any intervening developments or circumstances that might affect our evaluation of the network-cable crossownership rule. In particular, we noted a report by the National Telecommunications and Information Administration ("NTIA"),[12] which concluded that broadcast television networks should not be prohibited from owning local cable systems. The *Further Notice* also observed that significant statutory or regulatory changes may have altered the nature of competition between the cable and broadcasting industries, including the adoption of the 1984 Cable Act,[13] the elimination of our "must carry" rules,[14] and the reimposition of our syndicated exclusivity rules.[15] Accordingly, we sought specific comment on whether the opportunity for networks to own cable systems in markets containing their affiliated stations might adversely influence negotiations for affiliation contracts. Considering the absence of must carry, we also asked whether a network that affiliates with a local station while owning a cable system in the same market could undermine the competitive position of other broadcast facilities in that market. A summary of the comments received in response to the *Further Notice* is contained in Appendix B.

III. REQUEST FOR FURTHER COMMENT

6. The changes in the video marketplace that we detailed in our prior Notices have continued to develop. The cable industry is now a robust, independent enterprise, with systems and networks offering an increasing diversity of programming that competes directly with over-the-air broadcast services. In the midst of this steadily rising competition, the television networks face a growing need to generate additional revenues in response to declining audiences and advertising sources.[16] As discussed below, these critical developments have prompted us to revisit the issue of whether eliminating our network-cable cross-ownership rule would enhance network efficiency and generate public benefits.[17]

7. We recognize, however, that a number of commenters responding to our prior Notices have expressed concerns that repealing the current restriction could undermine competition and diversity in local and national video markets. We thus seek to explore those concerns in this proceeding to assess their validity, to analyze whether they could be satisfactorily addressed by imposing minimally intrusive regulatory safeguards, and to determine the extent to which the record supports relaxing the rule.

Rule Elimination

8. We ask commenters first to address whether, in light of the significant changes in the video marketplace, the network-cable cross-ownership rule should be eliminated. In this regard, we note that the near complete dominance of the three broadcast networks, which existed when the rule was adopted and persisted for many years, has clearly diminished and left the networks with the need to adapt to a changing economic and competitive environment. According to the recent OPP Working Paper, the networks are experiencing a significant reduction in advertising revenue, their traditional base of economic support, that will force the networks either to reduce their costs and "downsize" their operations, or to develop supplementary revenue streams.[18]

9. One potential means of both reducing costs and increasing revenues would be for the networks to enter the cable television business. The networks would appear well-equipped to compete in the cable industry, given their experience and expertise in selling national advertising, acquiring and distributing programming, producing news programming, and working with a diverse group of local affiliates. Moreover, allowing the networks into cable would enable them to take advantage of the benefits that

[8] *See Notice,* 91 FCC 2d at 82.

[9] *See New Television Networks: Entry, Jurisdiction, Ownership and Regulation,* October 1980.

[10] K. Gordon, J. Levy and R. Preece, *FCC Policy on Cable Ownership* (Staff Report, FCC Office of Plans and Policy), November 1981.

[11] *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry,* Committee Print 97-V, 97th Congress, 1st Session, November 3, 1981.

[12] "Video Program Distribution and Cable Television: Current Policy Issues and Recommendations," NTIA Report No. 88-233, June 1988 ("NTIA Report").

[13] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, Section 1 *et seq.,* 98 Stat. 2779 (1984).

[14] *See Quincy Cable TV Inc. v. FCC,* 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied,* 106 S. Ct. 2889 (1986); and *Century Communications v. FCC,* 835 F.2d 292 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1032 (1988).

[15] *See Report and Order* in Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988).

[16] *See Report and Order,* MM Docket No. 90-162, 6 FCC Rcd 3108, 3134 (1991). *See also* OPP Working Paper No. 26.

[17] The potential benefits and anticompetitive consequences of vertical integration in the video marketplace are discussed more completely in the *Notice* and the studies referenced therein. *See* fn. 2, *supra.*

[18] *See* fn. 3, *supra.*

accrue from vertical integration into both cable system ownership and television programming services -- benefits that we recently detailed in our July 1990 Report to Congress on the status of competition in the cable industry.[19]

10. The increased revenues that may flow from network entry into cable system ownership also could benefit affiliate stations that depend on a network's programming and economic resources. In this fashion, any efficiencies resulting from network-cable cross ownership might improve the quality and diversity of programs available to the public from affiliate television stations. We further note that independent television stations could benefit from the diversity of network fare because of their reliance upon off-network syndicated programming. Nonetheless, we recognize that these stations have raised serious concerns in the past about the possibility of repealing or relaxing the rule.

11. In addition to providing new opportunities for the television networks, permitting network-cable integration could produce efficiencies that accrue to the benefit of cable subscribers. We note that we have recently taken a series of actions in which we emphasized the need to encourage greater competition to cable television systems.[20] Clearly, the television networks are some of the most likely potential entrants into cable delivery. Accordingly, in evaluating the continuing validity of the network-cable cross-ownership restriction, we believe we should rigorously analyze the competitive effects on both broadcast and cable services that may flow from eliminating this rule. In this regard, commenters are invited to address in particular any public interest or competition concerns that may be raised if a cable multiple system operator (MSO) were to acquire a broadcast television network.

12. We stress that any repeal of the network-cable cross ownership restriction would not be designed to provide an artificial boost to the networks' competitive position. Rather, in light of the fundamental support that the networks provide to the free, over-the-air broadcast system, we seek to remove undue barriers to their continued competitive vitality. In this regard, we observe that the decline of a number of significant industries has been exacerbated by regulations that failed to keep pace with marketplace changes. We thus emphasize the value of carefully scrutinizing government rules that prevent certain sectors of an industry from entering into related activities, particularly when the industry is as dynamic as the video communications marketplace.

Alternatives for Rule Modification and Safeguards

13. In undertaking a thorough reexamination of the network-cable crossownership rule in this proceeding, we recognize that some parties have raised valid questions concerning the impact that repeal of the rule may have on competition and diversity. We thus believe that it is appropriate to consider more fully the concerns raised by various commenters in response to the *Further Notice*. As discussed in Appendix B, the commenters that opposed eliminating the network-cable cross-ownership rule contended that: (1) networks could discriminate against non-affiliates with respect to cable carriage; (2) networks would gain undue leverage over their affiliates in their contractual and program clearance negotiations; (3) networks would promote national rather than local programming and divert funds from news and public affairs programming; (4) networks might bypass their local affiliates and deliver their programming directly through their cable systems; (5) networks still dominate the video marketplace and could hamper the development of competitive cable networks; or (6) a major cable MSO could acquire a network and create an excessive concentration of media control. We seek comment on the merit and significance of these concerns in the current video marketplace. Parties may also wish to consider the extent to which other existing rules -- such as the local broadcast station-cable cross-ownership rule or our regulations limiting network control over network affiliates -- might ameliorate some of the enumerated concerns.[21] In addition, to the extent the updated record establishes that these or other concerns warrant relaxing, but not completely repealing, the rule, we seek comment on a variety of options, described below, that would permit cross-ownership of broadcast networks and cable systems subject to various constraints. Parties may consider the proposals individually or in certain combinations, and are also encouraged to present alternative suggestions.

14. *Network ownership of cable systems in "large" or "competitive" markets, including where second competitive cable systems exist.* This option, first, would allow networks to own cable systems in large markets under the theory that permitting network entry only in such markets might pose the least potential threat to diversity and competition. In exploring this option, we seek comment on the appropriate definition for "large" markets. For example, we could use market rankings such as the top 10, 25, or 50 markets. Second, with respect to the "competitive" market approach, we could permit network ownership of cable systems based upon the availability of a certain number of television broadcast signals in the community.[22] As another means of measuring the level of competition, we could also allow networks to operate cable systems where they would provide a second or "competing" cable service or, more broadly, at least a second or "competing" multichannel competitor. This provision would mitigate competitive concerns and offer procompetitive benefits because two or more multichannel competitors would seek to offer service to subscribers in the same community.[23] We also seek com-

[19] *See Report* in MM Docket No. 89-600, 5 FCC Rcd 5008-5010 (1990).

[20] *See e.g., Second Report and Order* in Gen. Docket No. 90-54, FCC 91-302, released October 25, 1991; *Order on Reconsideration* in Gen. Docket No. 90-54, FCC 91-301, released October 25, 1991; and *Further Notice of Proposed Rule Making, First Report and Order, and Second Further Notice of Inquiry,* in CC Docket No. 87-266, FCC 91-334, released November 22, 1991.

[21] *See* 47 C.F.R. § 76.501 (a)(2). *See also* 47 C. F. R § 73.658.

[22] *Compare Report and Order,* MM Docket No. 90-4, 6 FCC Rcd 4545 (1991). *Compare also Report and Order,* MM Docket No. 87-8, 6 FCC Rcd 4212 (1991).

[23] We also observe that the limited number of competing cable systems may cause this option to create only a few initial opportunities for network ownership.

ment on whether markets should satisfy both the "large" and the "competitive" conditions before we would permit network-cable cross-ownership.

15. We note that a network-owned cable system might encounter sufficient competition under these options to discourage any attempt to discriminate against local broadcasters. In addition, these options would afford an opportunity for us to monitor and evaluate the results of relaxing the rule. However, the options would restrict the networks' flexibility to enter those markets where they could realize the greatest efficiencies through cross-ownership of cable systems.

16. *Network ownership of cable systems up to a national subscriber limit.* This option would allow networks to acquire cable systems up to some national aggregate subscriber limit. Under this option, networks could take advantage of economies attainable through owning multiple cable systems, but not without some limit on their participation in the cable marketplace nationwide. We seek comment on the appropriate national subscriber limit we might use (*e.g.,* 10%, 15%, or 25% of all subscribers nationwide) if this option were adopted. We also note that we recently expressed our general opposition to limits on the horizontal growth of cable MSOs in our July 1990 Report to Congress on competition in cable television.[24] We thus seek comment on the merits of nonetheless applying such restrictions only with respect to broadcast network cross-ownership.

17. *Network ownership of cable systems subject to must carry and discrimination safeguards.* This option would allow networks to own cable systems subject to (1) mandatory carriage of all or most local stations, and (2) a prohibition of favoritism toward affiliates through carriage, channel position, and technical quality. Network ownership of cable systems subject to these safeguards arguably would meet the dual goals of capturing the benefits of network entry while directly addressing the discrimination concerns raised by local broadcast stations. In addition, the safeguards may not impose an undue burden upon networks, given that a network-owned cable system would have an incentive to provide local broadcasting services without discrimination in order to remain competitive. However, we are concerned about the prospects of tailoring new must carry rules to resolve objections raised in previous court decisions.[25] In this regard, we seek comment on a viable legal rationale for mandatory carriage of local broadcasters under such a rule. We also ask for comments on whether to (i) require network-owned cable systems to "freeze" the existing channel lineup, (ii) include on-channel protection for local signals, or (iii) adopt a non-bypass safeguard that prohibits a network from refusing to affiliate in any market where it owns a cable system and has previously affiliated with a local broadcast station.[26]

IV. CONCLUSION

18. In this *Second FNPRM,* we reexamine the network-cable cross-ownership rule and we seek further updated comments on the merits of eliminating the rule. We also offer a number of possible modifications to the existing rule in response to various concerns raised regarding possible anticompetitive practices by networks as owners of cable systems. In addition, we seek other comments or suggestions from interested parties with respect to the continued necessity of the network-cable cross-ownership rule.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

19. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Second Further Notice of Proposed Rule Making,* but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Second Further Notice of Proposed Rule Making,* including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

B. Ex Parte

20. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comment Dates

21. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **March 2, 1992,** and reply comments on or before **March 17, 1992.** To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

D. Ordering Clauses

22. Authority for this proposed Rule Making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended.

---

[24] *See* fn. 19, *supra.*

[25] *See* fn. 14, *supra.*

[26] The subject of mandatory signal carriage rules as applied on a more general basis is under review in our *Report and Order and Second Further Notice of Proposed Rule Making* in Docket 90-4, 6 FCC Rcd 4545 (1991).

For further information on this proceeding, contact James Coltharp, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. Reason for action. The proposals under consideration will modify or eliminate the existing prohibition on cross-ownership between cable television systems and national television networks. The Commission believes that, in its current form, this prohibition is no longer necessary in terms of its original purposes and that possible cost benefits attributable to cross-ownership are being needlessly forgone by continuation of the rule in its entirety.

II. Objectives. The objective of this action is to eliminate unnecessary regulation, thus permitting the marketplace to operate more freely and efficiently. In particular, networks may benefit by their ability to own cable systems, and cable systems may benefit through being owned by networks.

III. Legal basis. The proposed Rule Making action is authorized by Sections 1, 2, 3, 4(i) and (j), 303, 307, 308, 309 and 403 of the Communications Act of 1934, as amended.

IV. Reporting, recordkeeping and other compliance requirements. No recording, record keeping or reporting requirements for cable television operators are involved. Depending on the proposed action, however, it may eliminate the need for possible Commission compliance actions or waiver proceeding related to the existing rule.

V. Federal rules which overlap, duplicate or conflict with this rule. None.

VI. Description, potential impact and number of small entities affected. The proposals under consideration are not expected to have a significant impact on most small cable systems. However, to the extent that networks purchase existing small cable systems, the systems may benefit from the expertise of the network, or from the possible infusion of additional capital into the cable system. To the extent that networks choose to purchase large cable systems or that large cable systems choose to purchase networks, there should be little or no direct impact on small business entities.

VII. Any significant alternatives minimizing impact on small entities and consistent with stated objective. Several of the proposals under consideration minimize the impact on small entities.

APPENDIX B

SUMMARY OF COMMENTS TO THE FURTHER NOTICE

1. *Supporting Comments.* In response to the 1988 *Further Notice,* the networks, cable operators, and NTIA filed comments in support of eliminating the rule. These commenters emphasized the cable industry's strength in the current video marketplace as well as the benefits of vertical integration. Specifically, the three networks argued that their power has diminished since 1970, when the rule was adopted, and that they have no incentive to engage in anticompetitive behavior. They maintained that eliminating the rule would not restrict the amount or diversity of cable programming, nor would it hinder the development of new cable networks. They also asserted that permitting network ownership of cable systems would not distort network relations with local affiliates, and networks would not exclude local broadcast stations from their cable systems. According to the networks, such anticompetitive practices could cause financial losses and would encourage both competitive entry and federal intervention.

2. NCTA and other commenters claimed that the ban on network ownership of cable systems is no longer necessary because the rule already has served its purpose. They argued that the strength of the cable industry would prevent broadcast networks from hindering the further development of cable systems, and further asserted that such networks lack the financial resources to purchase enough cable systems to accumulate a market share that would raise competitive concerns. Proponents of network ownership also contended that the benefits of vertical integration -- in particular, the opportunity to avoid transaction costs in obtaining programming -- outweigh any anticompetitive risks. For instance, the investment of many cable operators in Turner Broadcasting and CSPAN has contributed to the expanding supply of cable programming. Furthermore, these commenters noted that there is no evidence in the cable industry to indicate that multiple system operators ("MSOs") favor their own programming to the exclusion of unaffiliated programming.

3. With respect to the two concerns raised in the *Further Notice* regarding the potential for anti-competitive practices, proponents of eliminating the rule argued that networks are unlikely to deny carriage to local broadcast signals because the public generally demands access to all local channels. Indeed, the local network affiliates are the most popular stations in every market. Consequently, networks engaging in a "bypassing" strategy would risk losing a large number of cable subscribers in exchange for a few additional broadcast viewers, rendering the strategy unprofitable. Similarly, these parties asserted that networks have no incentive to threaten to drop their own local affiliates in the course of affiliation negotiations. Indeed, networks rely on strong local viewership to attract national advertising, and the time and cost of cultivating affiliate relationships would make it economically unreasonable to drop a local affiliate.

4. NTIA and New York City supported our proposal to delete the networkcable cross-ownership rule, but asserted that certain safeguards are necessary to ensure that networks operating cable systems do not discriminate against competitors or reduce the level of competition or diversity in a particular market.[27] For example, NTIA proposed that the Commission establish a system for reviewing petitions challenging specific network proposals to acquire cable systems in smaller markets where (i) there is a high cable penetration rate, and (ii) the network-owned cable system would serve an area substantially equivalent to its affiliate's coverage area.[28] The Wireless Cable Association also supported removing the cross-ownership restriction, but not before the Commission adopts rules to ensure that vertical integration does not preclude the establishment of alternative video distribution methods to coaxial cable.

5. *Opposition Comments.* Opposing commenters included the Motion Picture Association of America, Inc. ("MPAA"), the three network affiliate associations ("Affiliates"), Association of Independent Television Stations, Inc. ("INTV"), Association of National Advertisers, Inc. ("ANA"), Turner Broadcasting System, Inc. ("Turner"), Group W, Fisher Broadcasting Inc. ("Fisher"), Arizona Television Company ("Arizona"), Brechner Management Company ("Brechner"), Holston Valley Broadcasting Corporation ("Holston"), and the U.S. Catholic Conference ("USCC"). These parties argued for retention of the rule based on concerns that, given the absence of must carry rules, network cable operators could refuse to carry certain broadcast and cable signals.

6. For example, the Affiliates stated that cable systems provide the final transmission path to viewer homes, and a network that controls this path currently has no government-imposed obligation to carry the signal of its local affiliate or any of its competitors. As a result, the Affiliates claimed, network-owned cable systems would have complete discretion to discriminate against local and distant stations that carry programming and advertising in competition with the networks. The Affiliates alleged that such discrimination would not only inhibit competition in the sale of local programming and advertising, but it would also restrict the diversity of programming and advertising services available to subscribers of network-owned cable systems.

7. According to Fisher, broadcast stations "live or die" based on reaching an affiliation agreement with one of the networks. If the rules were repealed, Fisher asserted, a broadcast station could not negotiate an affiliation agreement at arms-length with a network because of the persistent threat that the network's cable system could drop the station. Thus, Fisher claimed that an affiliate would have to accept any affiliation offer from a network, even at an unreasonably low payment, and attempt to survive by cutting back on budgets reserved for news and local programming.

---

[27] New York City recommended that we implement regulatory safeguards to ensure that network ownership of cable systems does not lead to unacceptable media concentration levels in a particular cable television viewing area, and stated that we should urge Congress to enact statutory must carry rules to prevent anticompetitive behavior by networks as cable operators.

[28] Under this proposal, petitioners would bear the burden of demonstrating that the proposed acquisition is not in the public interest.

8. The opponents of eliminating the rule also argued that networks could discriminate in the competition for advertising dollars, creating an inherent conflict of interest between a network and its own affiliates. According to Group W, network acquisition of cable systems would cause the networks to compete with their own affiliates for local advertising dollars, with the networks maintaining an unfair advantage due to their size and power. Although networks may argue that they have no intention of engaging in such discriminatory practices, Group W urged the Commission to act carefully and allow cross-ownership only upon a strong showing that no harm will occur.

9. Still other commenters asserted that allowing networks to own cable systems would signal the demise of free television programming currently available to virtually all American households. Arizona contended that networks owning cable systems would ultimately conclude that their interests are best served by gradually shifting their budget and best programming over to their cable systems. As a result, affiliate stations would have less funds available for local programming and news, causing many viewers that remain dependent upon free television to receive an inferior product. Arizona concluded that the Commission should retain the rule due to great potential for public harm. In an alternative scenario, MPAA warned that eliminating the rules would allow large cable MSOs to purchase a television network, although MPAA and other opponents to network ownership believed that the networks were still primarily dominant in the video market.

Concurring Statement of Commissioner James H. Quello.

In the Matter of: Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks.

Generally, I am in favor of receiving comments on important matters affecting the broadcast and cable industries, so I can support issuing this Second Further Notice of Proposed Rulemaking. However, since this Notice comes so soon after the Commission received input in the Future of Television Inquiry, some have suggested that it represents at least a tentative conclusion to relax or repeal the network-cable cross-ownership rule. My vote should not be so interpreted. While I am willing to consider proposals to change the rule, my guiding principle will be the probable effect of such action on the maintenance of free over-the-air television.

To the extent some view this Notice as the preliminary announcement of an impending change in the rules, I would caution my fellow Commissioners to ensure that any new rules are consistent with the Commission's other policies, particularly those adopted recently. This concern also is most pressing when the Commission alters some of its rules as a result of changes in the video marketplace, but not others.

Such a lack of consistency was a major reason the Court of Appeals struck down "must-carry" rules in 1985. For example, the Court found the Commission's failure to question the assumptions underlying must-carry rules to be "in sharp contrast to [its] treatment of several other components of the regulatory framework." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1442 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). In particular, the Court noted that "the Commission eliminated the distant-signal-carriage and syndicated-exclusivity rules," both of which were premised on the same regulatory interest as must-carry — "protect[ing] broadcast television from competition from the expanding cable industry." *Id.* While marketplace changes and Commission actions over the past few years have enhanced the need to reimpose some type of must-carry rules,1 the need for consistency in Commission policy remains constant.

For this reason, it is imperative that the Commission is mindful of its overall policies as it reviews the comments in this proceeding. For example, can the Commission reconcile a majority's recent conclusion that "the networks continue to benefit from historical structural advantages"2 with the Notice's statement that "the near complete dominance of the three broadcast networks . . . has clearly diminished"? Notice at ¶ 8. Is it consistent for the Commission to retain significant financial interest and syndication restrictions while concluding in this Notice that marketplace changes "will force the networks either to reduce their costs . . . or develop supplementary revenue streams"? *Id.*

Similarly, can the Commission justify allowing greater vertical integration through network-cable combinations in light of its 1990 conclusions that "vertically integrated MSOs have the ability to limit competition to particular programming services" and that "most cable operators have the ability to deny or unfairly place conditions on a programming service's access to the cable communities they serve"?3 The Commission recently reaffirmed the principle that the main competition to cable television is a complement of over-the-air broadcasting signals. *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. 4545 (1991). Is it consistent for the Commission to permit the primary competitors in local video distribution markets to merge?

Finally, it is significant that the policy purposes underlying the network-cable restrictions are closely related to those for the more general broadcast-cable cross-ownership ban. *See* Notice at ¶ 3. Of course, the broadcast-cable restrictions have not been targeted for retirement, obviously because these rules were codified in the Cable Act. *See* Notice at ¶ 3 & n.7. But to relax or repeal one of the rules while the other remains in place might create a serious imbalance in the Commission's policies.

I ask these questions not because I have firm opinions on the probable answers but because I believe the Commission must address these issues in addition to those raised in the Notice. I also believe that presumption favors the continuation of rules that were enacted to promote diversity in local video markets. This is unlike the situation in the financial interest and syndication proceeding where I have said that changes in the media marketplace create a presumption in favor of repeal. That proceeding involved national and international markets for programming in which there are many alternative buyers. By sharp contrast, the question of cross-ownership affects local video markets, in which the cable operator has the potential to act as a bottleneck or gatekeeper. The 1990 Cable Report found that local cable operators have the *ability* to engage in anticompetitive practices; the question now facing the Commission is whether allowing cross-ownership will create an added *incentive* for them to do so.

This brings us full-circle to the question of safeguards, which are discussed prominently in the Notice. Certain of the alternatives, such as limiting cross-ownership to large markets or imposing national subscriber limits, may not address the problem of local bottlenecks. Other options, such as must carry, recently have been criticized inside the Commission,[4] raising again the question of consistency.

I will review the comments filed in this proceeding carefully and will attempt to assess what effect any rule change will have on free over-the-air television. Ultimately, it is the Commission's responsibility in the public interest to answer that question, which this proceeding squarely presents.

---

[1] As this Notice recognizes, the relative fortunes of the broadcasting and cable industries have shifted radically over the past few years. Not only have there been marketplace changes, but the Commission has reimposed certain regulations such as syndicated exclusivity rules. *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299 (1988), *aff'd United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). *See also Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. 4545, 4564-66 (1991) (issuing *Second Further Notice of Proposed Rulemaking* on whether to reimpose carriage requirements as part of effective competition standard).

[2] *Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3109 (1991), *modified*, ___ FCC Rcd. ___ (1991), *appeal pending* No. 91-2350 (7th Cir.).

[3] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, ¶ 127 (1990). Indeed, with respect to the anticompetitive practices described in the Cable Report, the Commission found that "the record in this proceeding indicates that some [cable systems] have [engaged in such tactics]."

[4] *See Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd. at 4575-76 (Separate Statement of Chairman Alfred C. Sikes).

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In the Matter of Common Ownership of Cable Television Systems and National Television Networks (MM Docket No. 82-434)

As I have said before in other contexts, it is appropriate that the Commission periodically examine its rules to determine whether our oversight remains consistent with the public interest. Perhaps nowhere is this process of review more critical than in the rapidly changing world of broadcast and cable television.

I have noted several times since June 1990 that the prohibition on cross-ownership of cable systems and national television networks is, in my judgment, ripe for reexamination. The rule springs from an era when the balance of economic power in the video marketplace was decidedly different. Asking whether these restrictions continue to advance the best interests of the viewing public seems quite fitting when we consider the vastly changed industry.

Let me be clear, however, that to ask the question does not predetermine the answer. I enter this proceeding completely open to the arguments on all sides. I am interested in the possible improvements that might arise if the rule were relaxed or repealed. I am also concerned about the impact of any change on local affiliates and independent stations. I look forward to receiving comments on these issues and will pay particular heed to the discussion of safeguards that we might adopt if the rule indeed changes.