

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

In the Matter of)
)
Implementation of Sections 202(f), (202(i) and) CS Docket No. 96-56
301(i) of the Telecommunications Act of 1996)
)
)
Cable Television Antitrafficking, Network)
Television, and MMDS/SMATV Cross)
Ownership Rules)

ORDER ON RECONSIDERATION

Adopted: March 25, 1998

Released: March 27, 1998

By the Commission:

I. Introduction

1. In this *Order on Reconsideration*, we address a petition filed by Network Affiliated Stations Alliance ("NASA") with respect to the Commission's implementation of the television broadcast network and cable television cross ownership provisions of the Telecommunications Act of 1996 ("1996 Act") in the Order Implementing Sections 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996 (*"Order"*).¹ For reasons set forth below, NASA's petition is denied.²

II. Television Broadcast Network-Cable Cross Ownership

2. Section 202(f)(1) of the 1996 Act directs the Commission to "revise section 76.501 of its regulations (47 C.F.R. 76501) to permit a person or entity to own or control a network of broadcast stations and a cable system."³ Section 202(f)(2) further provides that the Commission "shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1)."⁴

3. In the March 15, 1996 *Order*, the Commission amended its cable television ownership rules under section 76.501 to conform them to changes mandated by the 1996 Act. Our rules have been modified

¹CS Docket No. 96-56, FCC 96-112 (March 15, 1996).

²The California Cable Television Association ("CCTA") has withdrawn its Petition for Reconsideration of the *Order* (received June 11, 1996).

³Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(f)(1).

⁴1996 Act, § 202(f)(2).

to allow a person or entity to own or control a network of broadcast stations and a cable system.⁵ Although the *Order* did not implement additional rule changes regarding safeguards for nonaffiliated broadcast stations, it explained that the Commission would monitor the response to the rule changes to determine whether additional rules were necessary.⁶ Because the rule changes made pursuant to the 1996 Act merely conformed the rules to the statute, the Commission determined that it had good cause for concluding that the notice and comment provisions of the Administrative Procedure Act ("APA") were not necessary.⁷

4. NASA filed a petition for reconsideration of our *Order*.⁸ NASA contends that the Commission was obligated to provide notice and an opportunity to participate in the rulemaking proceeding. Specifically, NASA argues that the Commission was required under the APA to allow parties to comment on the Commission's conclusion that it need not impose particular safeguards at this time. In addition, NASA argues that the Commission failed to explain why safeguards should not be implemented at this time.⁹ NASA's petition, expressing concern that elimination of the cable-broadcast cross ownership restriction could subject local broadcasters to anticompetitive behavior by cable-broadcast combinations, asks the Commission to reconsider its decision in the *Order*. Alternatively, NASA requests the initiation of a rulemaking proceeding in which commenters could propose the adoption of certain regulatory safeguards, including the imposition of an effective competition requirement, a system of structural protections including must-carry and channel positioning rules, and preservation of current network-affiliate rules.¹⁰

5. Several commenters oppose the NASA petition. Capital Cities/ABC, Inc. ("Capital Cities") contends that the Commission has full discretion under the 1996 Act to monitor responses to elimination of the cable-broadcast cross ownership restriction rather than conduct a rulemaking on the necessity of safeguards.¹¹ Citing provisions of the 1996 Act that direct the Commission to commence a rulemaking regarding the ownership of multiple broadcast stations in single markets, Capital Cities argues that the Congress required rulemaking proceedings in explicit terms when it intended such proceedings to occur. In this case, Congress did not impose such a mandate.¹²

6. With respect to compliance with the APA, commenters argue that the APA does not require the Commission to commence the rulemaking requested by the NASA petition. The National Cable Television Association ("NCTA") contends that compliance with the notice and comment provisions of the

⁵*Order* at ¶ 4. Specifically, the *Order* deleted former section 76.501(b) which previously set forth restrictions on cross ownership of a broadcast network and a cable system.

⁶*Id.* at n.3.

⁷*Id.* at ¶ 11, citing 5 U.S.C. § 553(b)(5).

⁸NASA represents affiliate associations of the ABC, CBS and NBC television networks, encompassing more than 600 television broadcast stations.

⁹NASA Petition at 5.

¹⁰*Id.* at 10.

¹¹Capital Cities Opposition at 4.

¹²*Id* at 4.

APA was not required because the rule changes merely conformed the Commission's rules to the 1996 Act.¹³ It also contends that Congress, had it believed that safeguards were needed prior to eliminating the network-cable cross ownership restriction, could have ordered the Commission to adopt safeguards.¹⁴ Turner Broadcasting System, Inc. argues that the APA does not require notice and comment because the Commission's decision to monitor the response to rule changes adopted in the *Order* is a statement of policy rather than a final substantive action defining rights, duties or obligations.¹⁵ Broadcast networks emphasize that Section 202(f)(2) of the 1996 Act authorizes the Commission to adopt rules ensuring nondiscrimination in broadcast signal carriage "if necessary." By the plain language of the statute, they contend, Congress directed the Commission to forbear from adopting regulations in the absence of actual experience in the aftermath of eliminating the network-cable cross-ownership restriction.¹⁶ Moreover, according to Capital Cities, the Commission is not required to comply with notice and comment procedures before deciding not to initiate a rulemaking proceeding.¹⁷

7. In its Reply, NASA argues that the Commission subverted the APA by not engaging in a formal rulemaking to determine whether safeguards are necessary. It contends that such a determination affects the substantive rights, duties and obligations of all parties affected by the cable-broadcast cross-ownership rule and subsequent repeal.¹⁸ NASA further argues that a failure to articulate specific findings regarding the necessity of safeguards renders the Commission's action arbitrary and capricious.¹⁹

III. Discussion

8. We recognize that Congress, in Section 202(f)(2) of the 1996 Act, directed the Commission to revise our rules, if necessary, to protect against possible anticompetitive behavior. Nothing in Section 202(f)(2) mandates that the Commission withhold implementing the explicit directive of the statute. Section 202(f)(1) requires the Commission to revise its rules to allow network-cable cross ownership. It does not condition the implementation of this mandate on any particular finding or Commission rulemaking. The Commission had no discretion to forgo or to postpone this legislative directive. To the extent NASA seeks reconsideration of our decision to conform our rules to the statute, its petition is denied.

9. We also reject NASA's assertion that the Commission is obligated under the APA to conduct a formal rulemaking to determine whether safeguards are necessary at this time. We note that the explicit language of Section 202(f)(2) of the 1996 Act calls for revision of our rules "if necessary" to ensure

¹³NCTA Comments at 5 (citing *Komjathy v. National Transportation Safety Board*, 832 F.2d 1294, 1296-97 (D.C. Cir. 1987).

¹⁴*Id.* at 4-5.

¹⁵Turner Broadcasting Opposition at 4.

¹⁶CBS Opposition at 4; NBC Opposition at 2; Capital Cities Opposition at 5.

¹⁷Capital Cities Opposition at 5.

¹⁸NASA Reply Comments at 4.

¹⁹*Id.*

nondiscriminatory treatment of nonaffiliated broadcast stations by cable systems. The discretion to render the determination of necessity is placed squarely with the Commission and we have determined at this point that safeguards are not needed. Congress, in passing the 1996 Act, did not conclude that safeguards were immediately necessary and, as the Commission merely conforms its rules to the new statute, we reach a similar conclusion and elect to monitor the situation rather than to launch a full proceeding on this issue at this time. Combinations between major networks and cable operators have not yet been formed, nor does the record reflect specific examples of potential problems. Accordingly, we have concluded that safeguards are not necessary at this time. We do not believe this conclusion violates the APA. Although notice and comment is required when the Commission promulgates rules that establish or impose new obligations on private parties,²⁰ our decision that safeguards are unnecessary at this time does not impose any additional obligations.

IV. Ordering Clause

10. Accordingly, the petition filed by NASA is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

²⁰See United States v. Yuzary, 55 F.3d 47, 51 (2nd Cir. 1995).