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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket 92–264; FCC 95–147]

Cable Television Act of 1992—Vertical Ownership Rules

AGENCY: Federal Communications Commission.

ACTION: Order on reconsideration.

SUMMARY: On reconsideration of the cable television vertical ownership (or channel occupancy) rules adopted in its Second Report and Order, the Federal Communications Commission (the ''Commission'') has adopted a Memorandum Opinion and Order on Reconsideration of the Second Report and Order (''Reconsideration Order''). The Reconsideration Order denies petitions for reconsideration filed by the Center for Media Education/Consumer Federation of America (collectively ''CME'') and Bell Atlantic Corporation (''Bell Atlantic''). Specifically, the Reconsideration Order: Denies CME's petition requesting that the Commission; reduce the percentage of activated channels that a cable operator may devote to video programming in which it has an attributable interest from 40% to 20%; reverse the Commission's decision to include over-the-air broadcast, public, educational, governmental (''PEG''), and leased access channels when calculating total channel capacity; reverse the Commission's decision to exempt local and regional networks from the channel occupancy limits; reverse the Commission's decision not to apply channel occupancy limits beyond a system's first 75 channels; and reverse the Commission's decision to grandfather all vertically integrated programming services being carried as of the effective date of the 1992 Cable Act. The Reconsideration Order also denies Bell Atlantic's petition asking that the Commission reconsider its decision to apply the vertical ownership limits to cable systems facing actual head-to-head competition.

EFFECTIVE DATE: April 6, 1995.

FOR FURTHER INFORMATION CONTACT: Rick Chessen, Cable Services Bureau, (202) 416–0800.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Memorandum Opinion and Order on Reconsideration of the Second Report and Order (''Reconsideration Order'') in MM Docket 92–264, adopted April 5, 1995 and released April 6, 1995. This Reconsideration Order responds to petitions for reconsideration filed in response to the Commission's Second Report and Order, 58 FR 60135 (November 15, 1993). The Second Report and Order was established pursuant to section 11(c)(2)(B) of the Cable Television Consumer Protection and Competition Act of 1992 (''1992 Cable Act''), Public Law 102–385, 106 Stat. 1460 (1992).

The complete text of this Reconsideration Order is available for inspection and copying during normal business hours in the FCC Reference Center (room 239), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Services, Inc. (''ITS, Inc.'') at (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Synopsis of the Memorandum Opinion and Order on Reconsideration of the Second Report and Order

A. Background

Pursuant to section 11(c)(2)(B) of the Cable Television Consumer Protection and Competition Act of 1992 (''1992 Cable Act''), Pub. L. 102–385, 106 Stat. 1460 (1992), the Commission's Second Report and Order, 58 FR 60135 (November 15, 1993), established cable channel occupancy rules, including the following rules relevant here: (1) Cable operators generally may devote no more than 40% of their activated channels to the carriage of programing services in which they have an attributable interest; (2) all activated channels will be included in calculating channel capacity, including broadcast, PEG and leased access channels; (3) channal occupancy limits will apply only to ''national'' programming services (i.e., local and regional programming services are exempt); (4) channel occupancy limits will apply to a maximum of 75 channels per system; (5) all vertically integrated programming services carried as of the effective date of the 1992 Cable Act (December 4, 1992) could continue to be carried; and (6) channel occupancy limits will not be eliminated in communities where actual head-to-head competition exists.

B. Petitions for Reconsideration

The Center for Media Education and the Consumer Federation of America (collectively ''CME'') filed a joint Petition for Reconsideration asking the Commission to reconsider several issues decided in the Second Report and Order. Specifically, CME asked the Commission to: (1) Reduce the channel occupancy limit from 40% to 20%; (2) require that broadcast, PEG, and leased access channels be subtracted from the number of activated channels before calculating total channel capacity; (3) eliminate the exemption for local and regional networks; (4) apply channel occupancy limits beyond a system's first 75 channels; and (5) reverse the decision to grandfather all vertically integrated programming services carried as of December 4, 1992.

After consideration of the various submissions, the Commission declines to modify the 40% channel occupancy limit. In requiring the Commission to establish ''reasonable'' channel occupancy limits, Congress directed the Commission to balance the risks of vertical integration against benefits such as the development of diverse and high quality video programming. The Commission continues to believe that the 40% limit strikes the appropriate balance between these competing objectives.

Moreover, CME may have overstated the practical effect of must-carry, PEG and leased access requirements on unaffiliated programmers' ability to obtain carriage. In the absence of record evidence on this point, the Commission examined an unscientific sampling of 25 Tele-Communications, Inc. (''TCI'') and Time Warner Entertainment Company, L.P. (''Time Warner'') cable systems (those being the most vertically integrated cable operators) in order to determine whether, in fact, broadcast, PEG and leased access channels occupied all, or nearly all, of the systems' unaffiliated programming channels. Generally, the Commission found that, even after excluding broadcast, PEG and leased access channels (and even assuming the presence of two local or regional networks), all of the systems had capacity remaining for additional unaffiliated programming.

Next, CME claims that the Commission overstated the benefits of vertical integration. As proof, CME states that the Cable News Network, Inc. (''CNN''), Black Entertainment Television, Inc. (''BET''), and Nickelodeon were successful prior to their relationship with cable operators, and that ''there has been no successful launch of an unaffiliated video programmer since the cable industry began the trend toward vertical integration.'' Whether or not CNN, BET and Nickelodeon achieved some initial independent success, there is evidence in the record that these and other programmers would have had difficulty sustaining their success had it not been for cable operator investment (see, e.g., Comments of Turner Broadcasting System, Inc., filed February 9, 1993, at 12 (at a time when TBS's ''independence was very much at stake,'' cable operators were willing to provide long-term equity under terms others were not); Opposition of Black Entertainment Television, Inc. to Comments of Viacom International, Inc., filed February 22, 1994, at 2 (''[C]able investment has been crucial to establishing BET as a viable and valuable programming service.''). Likewise, CME's assertion that there has been no successful launch of an unaffiliated programmer since vertical integration has taken hold was disputed by TBS, citing the recent successes of ESPN2, FLIX and the SciFi Channel.

Similarly, there is no evidence in the record to substantiate CME's claim that the 40% limit will deter independent investors from investing in video programming, or that independent investors are currently deterred from investing in cable programming by the Commission's channel occupancy limits.

Finally, the Commission disagrees with CME's assertion that the Senate Report ''suggested'' a 20% channel occupancy limit. The Senate Report stated: ''For example, the FCC may conclude that each MSO should control no more than 20 percent of the channels on any cable system * * *.'' Thus, the Report used the 20% figure for illustrative purposes only, while clearly acknowledging that the Commission was free to choose a different limit. This interpretation is supported by the actual wording of the statute, which simply requires the Commission to establish ''reasonable'' channel occupancy limits.

The Commission also denies CME's petition to reconsider the treatment of broadcast, PEG and leased access channels. CME correctly notes that the channel occupancy limits are intended to keep cable operators from filling every available channel with their own programming. But from this premise, CME draws the conclusion that channel occupancy limits must therefore be intended to give ''independent commercial programmers a chance to get on the wire.'' The statute, however, does not distinguish between ''independent'' unaffiliated programmers and other types of unaffiliated programmers. Section 11 simply ensures that subscribers will have access to some kind of unaffiliated programming on a prescribed number of channels. CME does not dispute that broadcast, PEG and leased access channels are ''unaffiliated'' with cable operators, or that the 1992 Cable Act requires cable operators to reserve channel space for such unaffiliated programming. Thus, the Commission reaffirms its holding in the Second Report and Order that it would be unreasonable to subtract such channels before calculating the system's channel capacity, since they provide the type of diverse, unaffiliated programming contemplated by the 1992 Cable Act. Further, as the Commission noted in the Second Report and Order, it would be unfair to penalize those cable operators who carried the widest array of broadcast, PEG and leased access channels by decreasing the number of channels available for affiliated programming.

Moreover, there is no evidence in the record that ''independent'' commercial programmers (i.e., those with no cable ownership interests at all) are unable to obtain carriage because of the Commission's treatment of broadcast, PEG and leased access channels. To the contrary, in the Commission's sampling of 25 TCI and Time Warner cable systems described above, the Commission found that all of the systems carried some ''independent'' unaffiliated programmers, with most systems carrying between 7 and 11 such channels.

In addition, although the Senate Report's sample calculation excluded broadcast and access channels in calculating channel capacity, CME's reliance on it as an expression of Congressional intent is misplaced. As the Commission stated in the Second Report and Order:

> The Senate Report language (* * *) appears to be included merely as an example to illustrate how the Commission may decide to calculate channel occupancy limits and therefore does not prohibit the Commission from adopting an alternative approach if it finds such an approach to be reasonable to promote the legislative objectives. In any event, this language is not included in the statute itself.

Finally, the Commission does not believe that it is weakening Congress' statutory scheme by considering the impact of other provisions of the 1992 Cable Act in establishing channel occupancy limits. Section 11 expressly gives the Commission broad discretion to fashion ''reasonable'' channel occupancy limits. In the Commission's view, establishing ''reasonable'' limits requires it to consider all factors bearing on the dangers or benefits of vertical integration. Thus, for instance, the Commission believes that not only should it take into account the impact of broadcast, PEG and leased access channels, but also the impact of sections 12 and 19 in deterring the type of discriminatory conduct that may be caused by vertical integration. Only by considering the whole of Congress' scheme can the Commission determine the level of vertical structural limits that are ''reasonable.''

The Commission also denies CME's petition to reconsider the exception for local and regional programming. CME's approach overlooks Congress' direction that the Commission consider the benefits as well as the dangers of vertical integration in establishing ''reasonable'' channel occupancy limits. As the Commission stated in the Second Report and Order, the exception for local and regional networks was ''an important means of encouraging continued MSO investment in the development of local cable programming, which is responsive to the needs and tastes of local audiences and serves Congress' objectives of promoting localism.'' (Second Report and Order at ¶ 78.) CME does not challenge the value of local and regional programming, or the Commission's conclusion that given the cost and limited appeal of such programming, an exception may be necessary to encourage continued MSO investment. The Commission continues to believe that consideration of these benefits of vertical integration more accurately reflects Congressional intent, and fully justifies the exception.

On reconsideration, the Commission also declines CME's invitation to eliminate the 75-channel cap. There is no evidence in the record to support CME's claim that ''there is a strong likelihood that all of the newly available channels will be filled by services affiliated with the MSO.'' Indeed, the Commission notes that in its informal survey of 25 TCI and Time Warner cable systems, none of the systems were approaching the current 40% channel occupancy limit for affiliated programming. However, even if there were some basis for CME's prediction, the Commission still believes that the vast expansion of channel capacity may obviate the need for a rigid occupancy limit. As the Commission noted in the Second Report and Order, although information on how multichannel video distributors will use the additional capacity ''is necessarily somewhat speculative,'' the record indicates that the capacity will likely be used to deliver targeted ''niche'' video programming services aimed at correspondingly smaller audience sizes, such as pay-per-view and ''multiplexed'' channels. (Second Report and Order at ¶¶ 83–84.) Occupancy limits in these circumstances do not parallel occupancy limits for more restricted capacity systems where most services are distributed on discrete channels to a significant portion of a system's subscribership. Accordingly, the occupancy limits can be relaxed.

In sum, the Commission continues to believe that the introduction of advanced technologies such as signal compression and fiber optics will reduce the need for structural occupancy limits in order to ensure programming diversity and access for unaffiliated programmers. Nevertheless, as the Commission noted in the Second Report and Order, the 75-channel cap will be subject to periodic review and will be eliminated if developments warrant.

The Commission also denies CME's request to reconsider its decision to grandfather all vertically integrated programming services carried as of December 4, 1992 (the effective date of the 1992 Cable Act). The Commission still believes, as it held in the Second Report and Order, that the public interest would be disserved by requiring cable operators to delete vertically integrated programming services to comply with the channel occupancy caps. The Commission continues to believe that grandfathering existing arrangements will limit consumer confusion and the disruption of existing programming relationships, and is consistent with Congress' direction that our channel occupancy limits ''take particular account of the market structure, ownership patterns, and other relationships of the cable television industry.'' (Communications Act, section 613(f)(2)(C).)

The Commission also rejects CME's contention that the decision to grandfather existing vertical arrangements ''has rendered impotent'' the intent of Congress to limit excessive vertical integration. First, the Commission reiterates that Congress directed it to establish ''reasonable'' channel occupancy limits based on competing interests; if Congress wished to require the divestiture of existing channels it could have done so. More importantly, the Commission did not grandfather non-compliance in perpetuity. Rather, the Second Report and Order provided that when a grandfathered cable system adds channel capacity, it cannot add an affiliated programming service until its system is in full compliance with the Commission's channel occupancy rules. Thus, the difference is more one of timing than of ultimate objectives. While CME suggests immediate divestiture of existing services to bring systems into compliance, the Commission's approach is to grandfather existing services and remedy non-compliance prospectively. The Commission continues to believe that its approach better reflects the various interests at stake, and thus better reflects Congress' intent.

Bell Atlantic filed a Petition for Limited Reconsideration requesting that the Commission reconsider its decision to apply the channel occupancy limits to cable systems that face actual head-to-head competition. On reconsideration, the Commission declines to modify its decision to enforce channel occupancy limits in systems which face actual head-to-head competition. With respect to Bell Atlantic's argument that channel occupancy limits are even less necessary in markets where competition exists and one of the competitors is a video dialtone service, the Commission cannot find, at this time, that video dialtone will completely eliminate the problems caused by vertical integration. Under video dialtone, a telephone company must provide sufficient capacity to serve multiple video programmers, and must expand capacity as demand increases to the extent technically feasible and economically reasonable. At this point, there are only eight commercially licensed video dialtone services in the country. None of these systems is yet operational; until that time, it is unclear whether a video dialtone system will fully address the concerns raised by channel occupancy limits. In addition, the practical effect of several recent court cases is that certain telephone companies may now provide their own programming to subscribers in their service areas. Thus, the Commission does not believe that video dialtone in its current state can provide sufficient justification to reconsider the decision to enforce channel occupancy limits in systems which face actual head-to-head competition.

The remaining arguments raised by Bell Atlantic's Petition have already been considered and rejected in the Second Report and Order. In the Second Report and Order, the Commission concluded that it should not eliminate channel occupancy limits in communities where effective competition exists because the Commission found that the effective competition standard was not adopted for this specific purpose and because it is not clear that the presence of effective competition for any cable system will address all of the relevant concerns that Congress expressed in enacting section 11 of the 1992 Cable Act. For example, the Commission noted that if a competing multichannel distributor is also vertically integrated, without channel occupancy limits, unaffiliated programming services may continue to be denied access from either outlet, thus frustrating the diversity and competition objectives of the 1992 Act.

Finally, the Commission also agrees that the statutory exemption from regulation for cable systems subject to effective competition is very limited: Congress explicitly stated in the statute that, in systems which faced effective competition, rate regulation would not be necessary. Thus, it is reasonable to assume that had Congress intended for all cable regulations to be eliminated where systems became subject to actual head-to-head competition, this statutory exemption would have been drafted much more broadly. Nowhere in either the language of section 11 or its legislative history does it state that the presence of actual head-to-head competition will render the channel occupancy limits unnecessary.

The Commission therefore concludes that there is insufficient evidence in the record before it to warrant elimination or modification of the channel occupancy limits in systems that face actual head-to-head competition. However, as the Commission indicated in the Second Report and Order, it remains aware that Congress has indicated that a primary objective of the 1992 Act was to rely on the marketplace to the maximum extent possible, and that the legislation was intended to protect consumer interests in the receipt of cable service where cable television systems are not subject to effective competition. Thus, as competition develops and the Commission gains more experience with the rules, the Commission will further analyze its rules and the industry as a whole to see whether vertical ownership limits should be phased out.

Administrative Matters

Regulatory Flexibility Act Analysis

Pursuant to sections 601–602 of the Regulatory Flexibility Act, Public Law 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq*. (1981), the Commission's final analysis is as follows:

Need and Purpose for Action: This action is being taken to address petitions for reconsideration of the channel occupancy rules adopted by the Commission to implement section 11(c) of the 1992 Cable Act.

Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: There were no comments received in response to the Initial Regulatory Flexibility Analysis.

Significant Alternatives Considered: We have analyzed the comments submitted in light of our statutory directives and have, to the extent possible, minimized the regulatory burden on entities covered by the ownership provisions of the 1992 Cable Act.

Ordering Clauses

Accordingly, *it is hereby ordered* That pursuant to the authority in sections 1, 4 and 613 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, and 533, the petitions for reconsideration filed in this proceeding by the Center for Media Education/ Consumer Federation of America and Bell Atlantic Corporation are denied.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 95–10719 Filed 5–1–95; 8:45 am]

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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 502, 506, 513, and 552

[APD 2800.12A, CHGE 62]

RIN 3090–AF60

General Services Administration Acquisition Regulation; Miscellaneous Changes

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Final rule.

SUMMARY: The General Services Administration Acquisition Regulation (GSAR) is amended to make miscellaneous changes by providing uniform procedures for contracting under the regulatory system.

EFFECTIVE DATE: May 8, 1995.

FOR FURTHER INFORMATION CONTACT: Paul Lynch, Office of GSA Acquisition Policy, (202) 501–1224.

SUPPLEMENTARY INFORMATION:

A. Background

The rule amends section 502.101 to revise the definitions of ''Agency competition advocate,'' ''Contracting activity competition advocate,'' and ''Head of the contracting activity'' to reflect current GSA organizational changes; to revise section 506.304 to delete reference to ''concurrence by legal counsel'' which is no longer required; to revise section 513.106 to make use of the GSA Form 2010, Small Purchase Tabulation Source List/ Abstract optional rather than mandatory and to indicate that the form does not apply to purchases under $2,500; and to revise section 552.225–72 to insert the words ''Basin country'' after ''Caribbean'' in paragraph (a)(1) to correct an inadvertent omission of the words in GSAR Change 59.

B. Public Comments

This rule was not published in the **Federal Register** for Public comment because it is not a significant revision as defined in FAR 1.501–1.

C. Executive Order 12866

The rule was not submitted to the Office of Management and Budget because it is not a significant rule as defined in Executive Order 12866, Regulatory Planning and Review.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply because this rule is not a significant revision as defined in FAR 1.501–1.

E. Paperwork Reduction Act

This rule does not impose any information collection or recordkeeping requirements that require the approval of OMB under 44 U.S.C. 3501, et seq. Therefore, the requirements of the Paperwork Reduction Act do not apply.

List of Subjects in 48 CFR Parts 502, 506, 513 and 552

Government procurement, Reporting and recordkeeping requirements.

Accordingly, 48 CFR Parts 502, 506, 513 and 552 are amended as follows:

1. The authority citation for 48 CFR Parts 502, 506, 513 and 552 continues to read as follows:

Authority: 40 U.S.C. 486(c).

PART 502—DEFINITION OF WORDS AND TERMS

2. Section 502.101 is amended by revising the definitions for ''Agency competition advocate,'' ''Contracting activity competition advocate'' and ''Head of the contracting activity'' to read as follows:

502.101 Definitions.

Agency competition advocate means the GSA Competition Advocate located in the Office of Acquisition Policy.

* * * * *

Contracting activity competition advocate means the individual designated in writing by the head of the contracting activity. This authority may not be redelegated. The HCA must ensure that the designated competition advocate is not assigned any duty or responsibility that is inconsistent with the advocacy function. The identity of the designated official shall be communicated to procuring staff and the Senior procurement executive.

* * * * *

Head of the contracting activity means the Associate Administrator for Acquisition Policy, Commissioners of the Federal Supply Service (FSS), Information Technology Service (ITS), Public Buildings Service (PBS), or Regional Administrators. The Associate Administrator for Acquisition Policy serves as the HCA for Central Office contracting activity outside of FSS, ITS and PBS.

* * * * *

PART 506—COMPETITION REQUIREMENTS

3. Section 506.304 is amended by revising the introductory text to read as follows:

506.304 Approval of the justification.

The justification (except for contracts awarded under FAR 6.302–7) must be approved by:

* * * * *

PART 513—SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES

3. Section 513.106 is amended by revising paragraph (c)(2) to read as follows:

513.106 Competition and price reasonableness.

* * * * *

(c) * * *

(2) The GSA Form 2010, Small Purchases Tabulation Source List/ Abstract, or an automated equivalent which provides substantially the same documentation, must be used to document written and oral quotations (except small purchases $2,500 or less).

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 552.225–72 is amended by revising paragraph (a)(1) of the clause to read as follows:

552.225–72 Eligible Products from Nondesignated Countries—Waiver.

* * * * *

(a) * * *

(1) No responsive bid or technically acceptable offer from a responsible offeror is received offering U.S. or designated country end products, Caribbean Basin country end products, Canadian or Mexican end products