FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket No. 92–264; FCC 98–138]

Horizontal Ownership Limits

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In the *Second Memorandum Opinion and Order on Reconsideration* (*Second Order on Reconsideration*), the Commission maintains the current 30% cable television horizontal ownership limit and generally denies the motion to lift the voluntary stay on enforcement of that limit. However, the Commission lifts the stay and announces the effective date for information reporting requirements. A companion *Further Notice of Proposed Rulemaking* seeks comment on possible revisions of the horizontal ownership rules and the method by which horizontal ownership is calculated.

DATES: Section 76.503(c) published at 58 FR 60141 (November 15, 1993) is effective August 13, 1998.

FOR FURTHER INFORMATION CONTACT: John Norton, Cable Services Bureau, (202) 418–7200.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Second Order on Reconsideration*, MM Docket No. 98–138, adopted June 23, 1998, and released June 26, 1998. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. 20554, and may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 1231 20th Street, NW, Washington, D.C. 20036.

Synopsis of the Second Order on Reconsideration

1. This *Second Order on Reconsideration* addresses petitions for reconsideration of the Second Report and Order in MM Docket No. 92–264, 58 FR 60135, November 15, 1993 (''*Second Report and Order*''). Among other things, the *Second Report and Order* promulgated rules pursuant to section 613 of the Communications Act (47 U.S.C. § 533(f)(1)(A)), which requires the Commission to ''prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such a person, or in which such a person has an attributable interest'' (''horizontal ownership rules''). Section 613(f)(2) directs that, in addition to other public interest concerns, the Commission must consider and balance seven particular public interest objectives in establishing the horizontal ownership rules: (1) To ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer; (2) to ensure that cable operators do not favor affiliated video programmers in determining carriage and do not unreasonably restrict the flow of video programming of affiliated video programmers to other video distributors; (3) to take account of the market structure, ownership patterns, and other relationships of the cable industry, including the market power of the local franchise, joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests; (4) to take into account any efficiencies and other benefits that might be gained through increased ownership or control; (5) to make rules and regulations that reflect the dynamic nature of the communications marketplace; (6) to impose no limitations that prevent cable operators from serving previously unserved rural areas; and (7) to impose no limitations that will impair the development of diverse and high quality programming. The Commission's horizontal ownership rules established in the *Second Report and Order* provide that ''no person or entity shall be permitted to reach more than 30% of all homes passed nationwide through cable systems owned by such person or entity or in which such person or entity holds an attributable interest.''

2. In the *Second Report and Order*, the Commission voluntarily stayed the effective date of the horizontal ownership rules pending final judicial resolution of the District Court decision in *Daniels Cablevision, Inc.* v. *United States* (835 F. Supp. 1, 10 (D.D.C. 1993), aff'd in part, rev'd in part, *Time Warner Entertainment Co., L.P.* v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996)) which held that the underlying statute violates the First Amendment. The *Daniels* court stayed further court proceedings, including determination and imposition of relief for the plaintiffs, pending appeal. On December 15, 1993, petitions for reconsideration of the stayed rules and a motion to lift the administrative stay were filed with the Commission. The following month, the stayed rules were challenged in *Time arner Entertainment Co., L.P.* v. *FCC* (No. 94–1035 (D.C. Cir. 1994)). In August 1996, the D.C. Circuit Court consolidated the *Daniels* appeal regarding the facial validity of the statute and the *Time Warner* challenge to the Commission's rules, and determined to hold court proceedings in abeyance while the Commission reconsidered the horizontal ownership rules (*Time Warner Entertainment Co., L.P.* v. *FCC*, 93 F.3d 957, 979–80 (D.C. Cir. 1996)).

3. The *Second Order on Reconsideration* disposes of both the reconsideration petitions, which seek to lower the 30% horizontal ownership limit and revise the calculation factors, and the motion to lift the voluntary stay on enforcement of the horizontal ownership rules. In the *Second Order on Reconsideration*, the Commission maintains the current 30% horizontal ownership limit and denied the motion to lift the voluntary stay on enforcement of that limit. We note that, while the most established programmers can obtain favorable terms from even large cable multiple system operators (''MSOs''), the cable horizontal ownership rules remain necessary to prevent MSOs from exercising market power against new, independent, and less prominent programmers. In order to facilitate monitoring of cable ownership interests, the Commission lifts the voluntary stay insofar as it applies to the information reporting requirements of 47 CFR 76.503(c). Prior to acquiring attributable interests in any additional cable systems, a person holding an attributable interest in cable systems reaching 20% or more of homes passed nationwide by cable will be required to notify the Commission of the incremental change the acquisition makes in terms of the 30% of homes passed standard, i.e. specifying the ownership in terms of homes passed before and after the acquisition is complete.

4. The arguments raised against the Commission's 30% limit fall into five broad categories—consideration of diversity issues; alteration of the status quo; divestiture by Tele-Communications, Inc. (''TCI''); current levels of horizontal concentration; and impact of other statutes and rules.

5. With respect to diversity of ownership, the *Second Report and Order* finds that the 30% horizontal ownership limit provides considerable protection for diversity concerns. As required by section 613, the Commission balances those diversity concerns with many other public interest factors, some of which support the growth of cable MSOs. In the *Second Order on Reconsideration*, the Commission finds that it properly

concluded that a 30% limit is generally appropriate to prevent the largest MSOs from gaining excessive leverage, and also ensures that the majority of MSOs continue to expand and obtain the economies of scale necessary to encourage investment in new video programming services and the deployment of advanced cable technologies.

6. In addition, petitioners contended that Congress sought to change the status quo in the 1992 Cable Act because existing levels of horizontal concentration were too high, and that the 30% horizontal ownership limit is too high because it does not alter the status quo. In the *Second Order on Reconsideration,* the Commission finds that the statute does not direct the Commission to alter the status quo by ordering divestiture by any cable MSO. Instead, Congress required that the Commission set ''reasonable limits'' and left the parameters of what ''reasonable limits'' would be to Commission discretion. The statute and the legislative history make clear that the Commission was not required to alter current industry structure, but to consider the potential public interest concerns associated with the industry structure. In the *Second Order on Reconsideration,* the Commission finds that it fully considered such interests.

7. Petitioners also asserted that the *Second Report and Order* was too concerned about avoiding divestiture by TCI and was not focused on consumer welfare. In the *Second Order on Reconsideration,* the Commission finds that inquiry into the impact divestiture would have upon subscribers, programmers and industry investment are legitimate public interest objectives that the Commission is entitled to consider. We also noted that, in both *First Report and Further Notice* and the *Second Report and Order,* the Commission considered arguments for low limits that would require divestiture. The Commission expressly confronted the divestiture issue and determined that, in the absence of definitive evidence that existing levels of ownership are sufficient to impede the entry of new video programmers or have an adverse effect on diversity, existing arrangements should not be disrupted. In the *Second Order on Reconsideration,* we find that the Commission properly considered whether the substantial structural change that divestiture would entail was warranted. The Commission based its final decision in the *Second Report and Order* not solely on a determination to avoid divestiture, as petitioners suggested, but, more importantly, upon the public interest requirements of section 613.

8. With respect to current levels of horizontal concentration, petitioners asserted that the *Second Report and Order* did not sufficiently address the evidence that existing levels of horizontal concentration are too high and that TCI, the largest MSO, already uses its market power to disadvantage competing program services. All other cable operators filing comments strenuously opposed the argument that current levels of horizontal concentration are ''too high'' and cited the benefits of horizontal concentration, including MSOs' ability to achieve economies of scale in research and development of transmission and distribution technology, savings in administrative costs such as billing operations, advertising, marketing, and management, and reduction in the costs of negotiating with programmers.

9. The Commission found in the *Second Report and Order* that 30% was an appropriate horizontal ownership limit ''in the absence of definitive evidence that existing levels of ownership are sufficient to impede the entry of new video programmers or have an adverse affect on diversity . . .'' The *Second Report and Order* concluded that a 30% limit was ''appropriate to prevent the nation's largest MSOs from gaining enhanced leverage from increased horizontal concentration,'' and is ''reasonable to prevent the types of anti-competitive conduct which concerned Congress, particularly when coupled with the behavioral restrictions contained in [the program access and program carriage provisions] * * *.'' In the *Second Order on Reconsideration,* the Commission finds that no one has proffered any new evidence that requires the Commission to alter this finding, and that the 30% limit complies with the intent of Congress and satisfies the criteria specified in section 613.

10. In the *Second Order on Reconsideration,* the Commission finds that the 30% limit adequately constrains the extent to which either a large cable MSO acting unilaterally or a group of cable MSOs acting in concert could exercise market power in the purchase of programming to reduce the diversity of programming or to coerce nonaffiliated programmers into denying programming to alternative MVPDs. In addition, the 30% ceiling limits the extent to which large cable MSOs can merge and result in one or two MSOs controlling local cable markets nationwide, thereby helping to preserve opportunities for entry by overbuilders or other MVPDs and reduce the likelihood that large MSOs can coordinate their behavior by mutually forbearing from overbuilding each other's service territories. The Commission found that the 30% limit also reduces the likelihood of coordinated activity between large cable MSOs in areas such as program purchasing and equipment purchasing. Accordingly, in the *Second Order on Reconsideration,* the Commission finds that the 30% limit simultaneously guards against the potential anticompetitive effects of horizontal concentration and allows cable MSOs to realize the benefits of clustering in order to gain efficiencies related to economies of scale and scope in administration, deployment of new technologies and services, extension into previously unserved territories, etc.

11. In the *Second Order on Reconsideration,* the Commission also concludes that the gradual but continuous growth and expansion in both cable-affiliated and independent programming sources and programming networks over the past several years tends to suggest that current levels of horizontal concentration have not significantly hampered new video programmers' entry, and that the Commission's 30% limit properly struck a reasonable balance between concentration and diversity concerns.

12. With respect to the impact of other statutory provisions and rules, one petitioner argued that the Commission's reliance in the *Second Report and Order* upon existing statutes and regulations to support the 30% ownership limit was improper. In the *Second Order on Reconsideration,* the Commission finds that the *Second Report and Order* properly considered the impact of other statutes and regulations, given the requirements of Section 613 that the Commission examine the marketplace as it currently operates. The Commission finds that statutes and rules such as the program access, program carriage, channel occupancy limits, and must-carry requirements all affect the way the cable television industry currently operates and have a profound effect on current industry structure and performance. In the *Second Order on Reconsideration,* the Commission finds that, because these provisions have real and substantive impact upon the market, the Commission properly considered the impact of these provisions in alleviating some of the public interest and anticompetitive concerns about horizontal concentration.

13. In addition to requesting the lowering of the 30% ownership limit, petitioners proposed that the

Commission revise the calculation factors. One petitioner argued that the 30% limit should include households served by a telephone company that is affiliated with an MSO. In the *Second Order on Reconsideration,* the Commission finds that, where the use of a telephone company's lines is limited to the provision of local exchange services, the telephone company does not operate as a ''cable system'' and its telephone subscribers should not be counted toward the number of subscribers served by an MSO affiliated with the telephone company. Likewise, the Commission states that the cable horizontal ownership limit does not apply to subscribers of a telephone company that offers multichannel video programming distribution service solely through means other than a ''cable system.'' However, the *Second Order on Reconsideration* emphasizes that telephone companies offering MVPD service through cable systems are subject to the cable horizontal ownership limits.

14. One petitioner argued that homes in franchise areas facing ''effective competition'' should not be included in calculating the 30% limit because horizontal ownership limits are only required to combat the local monopoly and ''gatekeeper'' power of cable systems, so that the justification for these limits disappear where local distribution markets are competitive. Rejecting this argument in the *Second Order on Reconsideration,* the Commission finds that, had Congress intended to eliminate all cable regulations where the ''effective competition'' standard applicable to rate deregulation is satisfied, the ''effective competition'' exemption would have been drawn much more broadly. The Commission observes that the ''effective competition'' standard determines when there is sufficient local competition to prevent an incumbent cable operator from exercising market power in setting local rates for cable services sold to local subscribers. In contrast, the horizontal ownership limit was designed to ensure that no cable MSO acquires a sufficiently large share of subscribers nationwide to exercise undue market power at the national level in its purchase of programming from networks, which generally sell their programming nationwide. The *Second Order on Reconsideration* concludes that the ''effective competition'' exemption is expressly limited to cable rate regulation and is not sufficient to address all the concerns expressed by Congress in enacting Section 613.

15. In the *Second Order on Reconsideration,* a petitioner also requested that the Commission tighten its attribution rules by eliminating the single majority shareholder exception, which provides that minority interests will not be attributed where a single shareholder owns more than 50% of the outstanding voting stock. The petitioner argued that this exception to the attribution rules is ''unduly mechanistic'' and ignores the minority shareholder's ''ability to influence the actual operation of the property'' even when a majority shareholder is present.

16. In the *Second Order on Reconsideration,* the Commission finds that there was not enough evidence in this docket to justify eliminating the single majority shareholder exception. The single majority shareholder provision of the rules is currently under review in the broadcast context in MM Docket Nos. 94–150, 92–51 and 87–154. In that proceeding, the Commission sought comment on the nature of ''influence'' and ''control'' and the connection between equity ownership and such influence and control. The Commission is also issuing a *Notice of Proposed Rulemaking* seeking comment on whether and how the cable attribution rules, including the single majority shareholder exception, should be revised. In the *Second Order on Reconsideration,* the Commission notes that its determination regarding the cable attribution rules applies to both the horizontal ownership rules and channel occupancy limits.

17. A motion also was filed with the Commission to lift the Commission's voluntary stay on enforcement of the cable horizontal ownership rules. In the *Second Report and Order,* the Commission had voluntarily stayed the effective date of these rules pending final judicial resolution of the District Court decision in *Daniels* that the underlying statute violates the First Amendment. While the *Daniels* Court had stayed further District Court proceedings pending interlocutory appeal of its judgment, it had not enjoined the Commission from adopting and enforcing horizontal ownership rules under the statute. In August 1996, the D.C. Circuit Court consolidated the *Daniels* appeal regarding the facial validity of the statute and the *Time Warner* challenge to the Commission's rules, and determined to hold court proceedings in abeyance while the Commission reconsidered the horizontal rules.

18. In the *Second Order on Reconsideration,* the Commission retains the voluntary stay of the 30% horizontal ownership limit at this time, in light of the continuing pendency of the judicial proceedings relating to the underlying provision. In order to facilitate monitoring of MSOs' ownership interests, the Commission lifts the stay insofar as it applies to the information submission provisions of 47 CFR 76.503(c) that are applicable when any person or entity holding an attributable interest in cable systems reaching 20% or more of homes passed nationwide acquires additional cable systems. The existing rules require a certification that no violation of the 30% limit will occur as a result of such acquisition. In the *Second Order on Reconsideration,* the Commission finds that, in light of the continuation of the stay, the certification should only specify the incremental change the acquisition makes in terms of the 30% of household passed standard, i.e. specifying the ownership in terms of homes passed before and after the acquisition is complete. The *Second Order on Reconsideration* also states that affected parties will be required to come into compliance with the horizontal ownership rules within 60 days of the appellate court's issue of a mandate upholding section 613(f)(1)(a) and the rules, unless the Commission determines as part of this ongoing proceeding to lift the stay at an earlier date. Interested parties, including in particular parties that are now entering into business arrangements that would violate the rules but for the existence of the stay, should be well aware of the existence of the rules and thus have a full opportunity to be prepared to comply with them.

Ordering Clauses

19. Accordingly, it is ordered that the petitions for reconsideration filed in this proceeding are denied.

20. It is further ordered that the Motion to Lift Stay filed December 15, 1993 by the Center for Media Education and Consumer Federation of America is granted as to the Commission's voluntary stay on enforcement of 47 CFR 76.503(c), and is denied as to the Commission's voluntary stay on enforcement of 47 CFR 76.503(a), (b), (d), (e) and (f).

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98–18037 Filed 7–13–98; 8:45 am]

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