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DEC - 7. 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of the)
Cable Television Consumer)
Protection and Competition)
Act of 1992)
)
Indecent Programming and Other Types)
of Materials on Cable Access Channels)

MM Docket No. 92-258

COMMENTS OF THE COMMUNITY ANTENNA TELEVISION
ASSOCIATION, INC.

Community Antenna Television
Association, Inc.
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December 7, 1992

Director of Consumer Affairs
LISA R. GIBSON
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COMMENTS OF THE COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.

The Community Antenna Television Association, Inc., ("CATA"), is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 60 million cable television subscribers. CATA files these "Comments" on behalf of its members who will be directly affected by the Commission's action.

INTRODUCTION

This proceeding is in response to the mandate of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), that the Commission adopt rules and regulations implementing the provisions of that section. Essentially, Section 10 is intended to restrict the availability of programming deemed to be indecent or obscene on cable television access channels. First, it permits cable operators to voluntarily prohibit indecent programming on leased channels on their systems. Second, it requires the Commission to adopt rules

that will limit access by children to indecent programming on leased channels by requiring operators to place all indecent programming on a single channel whose reception is blocked except upon a written request for it by the subscriber. Third, it permits operators to prohibit the use of public, educational, and government access channels ("PEG channels") for programming that contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Finally, Section 10 removes the operator's statutory immunity from liability for obscene material on any access channel.

CATA submits that the provisions of Section 10 of the Cable Act are both unconstitutional and from a practical viewpoint, unworkable. Nevertheless, we understand that the Commission must attempt to carry out its mandate and we offer comments of a constructive nature designed to help the Commission make the best of a bad predicament.

I. THE INDECENCY AND OBSCENITY PROVISIONS ARE UNCONSTITUTIONAL AND UNWORKABLE

CATA would be more than remiss if it did not preface its "Comments" by firmly asserting that the provisions of Section 10 of the Cable Act are an unconstitutional infringement on the rights of cable operators, their subscribers and access programmers. We will not go through the legal rationale supporting our allegation in this proceeding because it already is well stated in the court challenge to the Cable Act filed by Time Warner (Time Warner Entertainment Company v. FCC) in U.S. District Court, where the issue will be decided. Suffice it to

say that these provisions restrict the editorial control over the content and packaging of the cable operator's product and constitute a taking of the operator's property without just compensation in violation of the Constitution. The provisions of Section 10 put cable operators in the untenable position of requiring them to do what the government cannot do by acting as censors of programming. We will await the outcome of the Time Warner challenge to settle this issue.

From a more practical point of view, especially for smaller cable systems, which constitute a significant portion of CATA's membership, the indecency and obscenity provisions are unworkable. As proposed, the rules for both leased access and PEG access channels put the burden of determining whether a program violates the statute on the operator with respect to systems that choose to adopt a policy restricting the specified "indecent" or "illegal" programming respectfully. This virtually eliminates any live access programming as operators concerned about their liability will need to review each program before allowing it on the access channel.

Moreover, the provisions will require an inordinate commitment of manpower to review all access programming. It is the system operator who must review every program before it is carried on a leased access channel to determine whether it is "indecent," and every program before it is carried on a PEG access channel to determine whether it contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Smaller systems will be

particularly hard hit because of their limited personnel. It is not unusual for these systems to have a small staff performing a variety of duties often in a number of communities, at one time. The end result we suggest, is a disincentive for operators to adopt policies restricting indecent programming on leased and PEG access channels.

Other practical problems exist with respect to the requirement that all indecent programming on leased access channels be put on a single, "blocked" channel. What happens if the channel becomes filled? How many additional channels must the operator make available? If none, which programmer's programs are to be carried? And what if the programs certified by the programmer as "indecent" really are not, but instead constitute an effort by an individual or group to prevent the carriage of any "indecent" programming by occupying all the time on the only channel available for that purpose?

The numerous constitutional and practical concerns serve to underscore the necessity of leaving control of access channels in the hands of the cable operator.

II. SUGGESTIONS FOR MAKING THE REGULATORY SCHEME MORE MANAGEABLE

CATA recognizes that the Commission is required to implement the provisions of Section 10 of the Cable Act despite their unconstitutional and unwieldy nature. Therefore, it offers the following constructive suggestions that should help make the regulatory scheme more manageable.

- A. Operators should be given a "safety zone" within which they will not be held liable for the carriage of indecent or obscene programming.

CATA suggests that the model used for the single blocked channel, i.e., where the burden is on the programmer to notify the operator when a program is deemed to be indecent, be extended to cover other leased and PEG channels in situations where the operator has adopted a restrictive policy as contemplated by the statute. If an operator chooses to adopt a restrictive policy, he should be allowed to require and rely upon certifications from programmers that their programs do not violate the policy. If the operator adopts and follows an established procedure of requiring certifications from programmers, he will fall within a "safety zone" protecting him from liability for carriage of indecent programs on the leased channels or the prohibited programming on the PEG channels. The certifications would demonstrate compliance by the operator with the restrictive policy.

Using this approach, the Commission will protect the operator from the unintended situation where he is more vulnerable to liability for having adopted a policy against carriage of indecent or "illegal" programming than he if had not adopted one. The liability should be the same in both situations. If an operator adopts a policy to prohibit all indecent programming on leased channels for instance, as is permitted under the proposed regulations, he assumes liability for any indecent programming that is carried. On the other hand, operators who choose not to adopt a restrictive policy for leased

access channels and instead provide only the single blocked channel, escape liability because they are permitted to rely solely on the word of the programmer with regard to whether a program is indecent. The Cable Act places the burden on the programmer who must tell the operator which programs are indecent.

CATA suggests that the same model be used in determining liability for carriage of obscene programming as well. If the operator can demonstrate an established procedure of requiring certifications that programming is not obscene, he should be entitled to the protection of the "safe zone" and not be held liable. At the very least, it should entitle the operator to a presumption that he did not have the requisite element of intent to be liable for carriage of obscene programming.

B. "Indecency" should be defined in the context of cable television.

Access to programming on cable television is unique and distinguishable from other media. Cable only delivers programming selected by the subscriber and only upon request and payment of a monthly fee. Even after delivery the subscriber continues to maintain a high degree of control over the availability of the programming. Lockboxes may be secured (and in fact, must be provided by the operator upon request) that enable subscribers to control program viewing. And the newly created leased access channel of "indecent" programming will be "blocked" and available only upon written request from the subscriber.

Cable programming is not omnipresent like a television or

radio signal. It is not likely to be stumbled upon by unwary viewers. It must be invited into the subscriber's home and specific programs as well as whole channels of programs, can be specifically uninvited. Thus, the term "indecent" should be defined narrowly when used in the context of programming on cable television systems.

- C. Costs incurred in complying with these provisions must be accounted for in determining the system's basic service rates.

Section 3 of the Cable Act sets out requirements that will be used for determining reasonable and therefore, lawful rates to be charged for basic cable service. That section specifically provides that the rates must account for among other things, the system's costs and PEG obligations. The Commission should make clear both in this proceeding and in its forthcoming one adopting rate regulation requirements, that costs incurred by system operators in complying with the indecency and obscenity provisions of Section 10 are to be accounted for in setting the basic service rate.

As we noted above, the new requirements will impose burdensome administrative obligations on many systems necessitating employment of additional personnel as they may be required to pre-screen all access programming before allowing it to be carried. Systems that choose to carry indecent leased access programming will have the expense of purchasing and installing "blocking" equipment as well as the administrative cost of tracking subscriber requests for the channel. The Commission should make clear that these costs are to be accounted

for in determining reasonable basic service rates.

D. Cable operators need at least 60 days notice that programming will be "indecent."

The provisions of Section 10 require suppliers of leased access programming to notify the cable operator when a program is indecent and therefore required to be carried on the designated single blocked channel. A period of at least 60 days is essential.

Ample lead time is needed to collect, prepare and disseminate information about the time and channel location of programming to be carried on the system. Usually this is done through the preparation and distribution of printed program guides, bill stuffers and other publications such as newspapers and their supplements where a 60 day turnaround time is commonly needed. In addition, both administrative and technical processes are required for shifting and inserting programming among channels on the system. These are not always simple, "throw the switch" processes especially for smaller less technically sophisticated systems where they will have to be performed "by hand" among other duties by existing personnel.

CONCLUSION

The Community Antenna Television Association, Inc., believes that the indecency and obscenity provisions of Section 10 of the Cable Act not only are unconstitutional, but also unworkable. To the degree they are implemented, following legal challenge, they must be designed to be sensitive to the various difficulties,

costs and jeopardy they impose on system operators, and particularly smaller operators. We offer the above proposals as constructive suggestions for making the best of a bad situation.

Respectfully submitted,

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