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

In re:)
)
Implementation of Section 10 of the)
Cable Consumer Protection and) MM Docket No.
Competition Act of 1992) 92-258
)
Indecent Programming and Other Types)
of Materials on Cable Access Channels)

To the Commission:

COMMENTS OF COX CABLE COMMUNICATIONS,
A DIVISION OF COX COMMUNICATIONS, INC.

Cox Cable Communications, a division of Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits its Comments in response to the Commission's proposal to adopt regulations implementing Section 10 of the Cable Consumer Protection and Competition Act of 1992 (the "Cable Act") concerning indecent programming and other types of materials on cable access channels.^{1/}

Introduction

Section 10 of the Cable Act requires the Commission to enact regulations limiting the access of children to indecent programming that cable operators have not voluntarily prohibited from their leased access channels. A cable operator must place all indecent

^{1/} Notice of Proposed Rulemaking, MM Docket No. 92-258, FCC 92-498 (November 10, 1992) ("NPRM").

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SUMMARY OF ARGUMENT

The Commission, in implementing the regulations required by Section 10 of the Cable Act, must minimize the unconstitutional impact of this provision on constitutionally protected speech. The Commission's rules must insulate cable operators from liability for not censoring protected speech. The Commission should also recognize that cable operators need flexibility in complying with this law.

The Commission's rules should reaffirm that operators cannot have any liability, based on programming content, for indecent material carried on access channels. The Commission should clearly establish that an operator may face liability only for not requesting or for ignoring a programmer certification that the programming is indecent. To minimize the constitutional infirmities of Section 10, a cable operator must be allowed to rely completely on a

programmer's certification that its programming is not indecent.

The Commission's rules should also establish a flexible and practical framework in order for cable operators to comply with Section 10. Operators should be allowed to pass along some of the costs to blocked access channel subscribers. In addition, operators should be permitted to use a variety of technical means to block access to the channel.

Finally, the Commission should establish that cable operators similarly can rely on a PEG programmer's certification that a program does not contain prohibited material to eliminate operator liability.

programming on a single leased access channel and block the channel unless a subscriber requests access. Section 10 also requires programmers to inform cable operators if their programs would be indecent by Commission standards.

The Commission must also enact regulations to enable cable operators to prohibit the use of public, educational and governmental ("PEG") channels for any programming that contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct. Finally, Section 10 eliminates an operator's immunity for carrying obscene material on leased or PEG access channels.

Cox submits that the mandatory provisions of Section 10 of the Cable Act are unconstitutional. While this is not a determination that Congress has authorized the Commission to make, the Commission, in implementing this provision, must minimize the unconstitutional impact of this provision on constitutionally protected speech. To do so, the Commission's rules must insulate cable operators from liability for not censoring protected speech. The Commission should also recognize that cable operators need flexibility in complying with this law.

I. Cable Operators Subject to the Commission's Mandatory Rules Must Be Immune From All Liability For Indecent Programming and Can Rely on Programmer Certifications.

A. The 1984 Act Still Provides Operators with Total Content Based Immunity for Indecent Material on Access Channels.

Section 638 of the Cable Communications Policy Act of 1984 (the "1984 Act") already provides a cable operator with total content based immunity for indecent programming carried on leased or PEG access channels.^{2/} This provision has not been modified by Section 10 of the Cable Act. The Commission's rules should recognize and reaffirm that operators cannot have any liability for indecent material carried on access channels based on programming content. Under the Cable Act, an operator may have liability, but only on non-content related grounds. Specifically, under Section 10, an operator may face liability only for transmitting indecent programming on an unblocked channel if the operator does not request or ignores a programmer certification that programming is indecent.

B. Programmer Certification That a Program is Not Indecent Must Completely Immunize the Cable Operator if the Program is Carried on an Unblocked Channel.

The rules must establish that a cable operator is not required to investigate or question a program's content after receiving programmer certification. While cable

^{2/} 47 U.S.C. § 558.

operators are not currently liable for transmitting programming with indecent content on leased or PEG access channels, a programmer's certification that programming is not indecent must serve as a complete defense to non-content related liability, that is, liability for an operator's transmission of indecent programming on an unblocked channel. Good faith reliance on certification should also create a heavy presumption in favor of the operator in cases where it unknowingly transmits obscene programming.

Through Section 10, Congress has impermissibly "deputized" cable operators to act as censors of constitutionally protected speech. Placing the initial notice requirement on programmers does not cure the constitutional infirmity of this provision. The Commission's rules must take the next step and limit an operator's control obligations solely to reviewing and acting in good faith on a programmer's certification and not requiring an operator to review the programming itself. Once an operator performs these obligations, it cannot face even limited liability for failing to shift the programming to the blocked access channel.

As noted in the previous subsection, an operator can have liability for indecent programming only if the operator transmits it over an unblocked channel -- either because the operator failed to seek certification or ignored

certification that the material is indecent. The liability here is not for the indecent content of the program, but for the mistake in channel selection. This sort of mistake will generally be the result of technical or procedural error at the system, a minor mistake that should merit a small fine at worst.

Cable operators cannot be required to engage in any evaluation process to determine if a program is indecent.^{3/} A simple form, for example, on which a programmer checks "Contains Indecent Material" must fulfill the obligations imposed by Section 10.^{4/} The Commission should also establish that other methods are acceptable if

^{3/} As the Commission fully understands, such judgments are extremely difficult to make under the best of circumstances. In this situation, the difficulties are even greater. In this thorny area of the law, it would be unreasonable to expect quick, accurate judgments from non-lawyers at the system level or even from MSO lawyers, at great distance from individual systems, who are not familiar with local community standards. Moreover, Section 612 of the 1984 Act makes it clear that cable operators cannot exercise editorial control over "or in any other way consider the content of such programming," except to establish prices. (emphasis added).

^{4/} The Commission's rules should establish that when a programmer has a long-term leased access arrangement with an operator that covers multiple programs, the operator can rely on a blanket certification, rather than requiring individual certifications for each program. The programmer would certify that its programming is not indecent and that he would notify the operator prior to submitting indecent material.

they fulfill the basic informational requirements of Section 10.^{5/}

Cable operators asked to transmit live programming must also be able to rely without liability on a programmer's certificate. An operator obviously has no effective control over live programming, and cannot be held accountable for it. Yet a provider of live programming will not always be able or willing to state whether a live program contains indecent material. Operators must be entitled to insist on such a certificate to insure their immunity and to refrain from carrying any live programming not covered by an appropriate programmer certification.

The Commission must establish at least limited jurisdiction over programmers under Section 10. Because the initial notice obligation is on the programmer, the Commission must be able to enforce the disclosure requirement through fines or other administrative remedies. Otherwise, cable operators will be caught between the

^{5/} As Section 10 makes clear, this notification requirement is program specific. Therefore, a programmer's prior history or reputation as an indecent programmer should not alter the effect of its certificate as to later programming.

Commission and unwilling, unaware or deceitful programmers.^{6/}

Cable operators must be able to require at least thirty day advance certification from programmers. Because programming may need to be shifted from one channel or time slot to another, sufficient time must be given to change program guides, alert subscribers and franchising authorities, and accommodate subscribers who want access to the blocked channel.

Cable operators should not be required to keep file copies of programmer certifications for more than three or four months. With the potential for hundreds or more access programs per month, systems need to be able to dispose of this material. The Commission should require parties complaining about access programming to do so reasonably promptly -- within sixty days after transmission of the programming (simultaneously sending the operator a copy of the complaint by certified mail). Operators should not be required to maintain a huge evidentiary archive regarding access programs, and parties should be barred from bringing stale claims because the programming may no longer

^{6/} The Commission should recognize that indecent program providers may have incentives not to certify that their programming is indecent. For example, a programmer told that its show cannot air for six months because the blocked channel is full may simply resubmit the program with a new title and certify to the operator that it is not indecent or obscene.

exist or be available, because memories fade and because personnel changes over time.^{7/}

The Commission should also establish that cable operators acting in good faith compliance with Section 10 are immune from suit by programmers for claims such as breach of contract or tortious interference. Existing contracts between programmers and cable operators or programmers and advertisers will presumably be superseded by the new laws. As the government is compelling operators to act, it would put operators in an untenable position to subject them to liability to third parties for their efforts to comply with the new laws.

C. The Anti-Censorship Provisions of the 1984 Act Prohibit Cable Operators Operating Under the Mandatory Rules from Forcing Programming Onto a Blocked Channel Unless Identified as Indecent by the Programmer.

The Commission's rules must clearly acknowledge that a cable operator subject to the mandatory rules cannot not unilaterally force a program onto a blocked channel unless it is identified by the programmer as indecent. Section 612 of the 1984 Act prohibits a cable operator from exercising "any editorial control over any video

^{7/} The Commission must bear in mind that the only complaint that could be filed against a cable operator would be for failure to place indecent programming on the blocked channel. Section 638 of the Communications Act protects operators from complaints regarding indecent content on leased or PEG access channels.

programming" provided over a leased access channel.^{8/} While this provision appears to be limited by the voluntary policy provision of Section 10(a) of the Cable Act, it does not appear to have been modified by the new mandatory provisions of Section 10(b). Because of this still-existing obligation under the 1984 Act, a cable operator cannot be forced to look beyond the face of a programmer's certificate.

II. The Regulations Must Provide Flexibility for Cable Operators with Respect to Technical, Access, and Subscriber Issues.

Section 10 of the Cable Act does not address many operational, access, or subscriber questions. The Commission, therefore, should take the opportunity to clarify cable operators' obligations to subscribers and programmers.

A. Cable Operators Should Not Have to Block More Channel Capacity than is Necessary to Carry Identified Indecent Programming.

Cable operators should not have to create a blocked access channel unless and until a programmer submits indecent programming. Many communities may never require this channel, or may not require it on a full-time basis. The regulations should permit a reasonable amount of time, such as 180 days, for an operator to undertake the steps necessary to create a blocked access channel following receipt of its first identified indecent program.

^{8/} 47 U.S.C. § 532(c)(2).

Operators should be allowed, to the extent that it is technically feasible, to block the channel only when necessary to block indecent material. Otherwise, an entire leased access channel may be dedicated solely to carrying the occasional indecent program.

Conversely, cable operators cannot be forced to guarantee access to every programmer. For example, an operator may lease its blocked access channel to a full or part-time adult programming service. Consequently, other indecent program providers may not have access or ready access to the channel. Section 10(b) of the Cable Act makes it quite clear that operators are to put indecent programming "on a single channel." (emphasis added). Even if the channel is not leased to one service on a continuing basis, if there is an overabundance of indecent programming, the operator should have no obligation to carry the programming except as time becomes reasonably available.

B. Cable Operators Should Not Have to Bear a Substantial Cost in Order to Comply With The Proposed Regulations.

Cable operators should not shoulder a disproportionate share of the cost of acting as "stand-in" censors for the government. The Commission should partially alleviate this burden by allowing some costs to be passed on to blocked channel subscribers and also by allowing

flexibility as to the technology used to achieve the blocking.

Any method that is effective to block or distort the picture on a leased access channel should satisfy the operator's obligation to provide a "blocked" channel. The government should not narrowly prescribe a required method of blocking, but should permit operators to use any effective method. This will allow operators to use different approaches as technology changes and advances, and recognizes that different solutions will be appropriate for different systems.

Moreover, cable operators should be under no obligation to market (other than providing subscribers with simple notice) the blocked access channel. The Cable Act states only that subscribers must request access to the blocked channel in writing. It does not require that the cable operator play a role in encouraging that request.

Cable operators should be able to charge subscribers requesting access a reasonable amount for the equipment and other costs necessary to receive or unblock the channel. Similarly, once a subscriber requests access, an operator should have no obligation to remove or deactivate the access device unless and until a written request is made by the subscriber or the account is closed.

C. Disputes Under the Mandatory Provisions of Section 10 Should be Resolved by the Commission.

As discussed above, an operator cannot be liable for content-based indecency claims, and may face liability only for a procedural or technical failure to shift identified indecent programming to a blocked channel, pursuant to Commission rules. The Commission is, therefore, the appropriate forum to hear complaints from subscribers and franchise authorities that an operator has failed to follow the Commission's rules. The Commission, not state or local courts or franchising authorities, will be in the best position to interpret its own rules.

Knowingly transmitting obscene material is the only content-based claim for which a cable operator can be held liable. Claims by subscribers or franchise authorities that an operator transmitted obscene materials should also be evaluated by the Commission. As discussed above, a certificate that a program is not obscene, while not necessarily dispositive, should create a heavy presumption against liability for an operator.^{9/} Because the procedural certification requirements will be subject to the

^{9/} The 1984 Act and the Cable Act present operators with a Hobson's Choice. Under the 1984 Act, operators cannot exercise editorial control over access channel programming. Under the new law, however, cable operators are placed in the untenable position of not being able to exercise editorial control over access programming content, but of being responsible for it nonetheless.

Commission's regulations, the Commission will be the most appropriate forum to hear subscriber and franchise obscenity complaints.

Disputes between programmers and cable operators over access to a blocked channel should also be resolved by the Commission. As an agency charged with responsibility for both cable systems and access programming, the Commission is in the best position to interpret a cable operator's obligations to programmers under Section 10.

III. Cable Operators Must Similarly Be Immune From Liability for Programming on PEG Channels if They Rely on Programmer Certification.

The Cable Act directs the Commission to promulgate regulations that enable a cable operator to prohibit programming containing obscene material, sexually explicit conduct or material soliciting or promoting unlawful conduct on PEG channels. In contrast, Section 611 of the 1984 Act prohibits a cable operator from exercising any editorial control over PEG channels other than for obscenity.^{10/}

These inconsistent directives, and the effect they have on the First Amendment, require that cable operators be immunized from liability upon receipt of a PEG programmer's certification. A simple affirmative statement by a programmer that a program does not contain "material soliciting or promoting unlawful conduct" must be sufficient

^{10/} 47 U.S.C. § 531(e).

to eliminate all cable operator liability. Otherwise, operators may be unwilling to carry constitutionally protected speech. In keeping with the permissive nature of the PEG provision, operators must be given the flexibility to determine the extent to which they will monitor programming for such material. A rigid definition of "material soliciting or promoting unlawful conduct" is probably impossible to achieve in this context.^{11/}

Conclusion

The Commission's primary obligation in this rulemaking is to minimize the unconstitutional elements of Section 10 by immunizing cable operators from liability if they comply in good faith with its provisions. While Congress has impermissibly imposed censorship duties on cable operators, the Commission must minimize the chilling effect of these provisions. Cable operators simply cannot be required by the government to investigate, evaluate and control constitutionally protected speech. The Commission

^{11/} However, in the interest of reducing uncertainty in the area of constitutionally protected speech, the Commission should clarify that it interprets "sexually explicit conduct" to have the same meaning as "indecent program material." Senate drafters of this provision appear to have intended the phrases to be synonymous. NPRM at 6, n.11.

must also take the opportunity to clarify a cable operator's obligations to its subscribers and programmers with regard to indecent programming on access channels.

Respectfully submitted,

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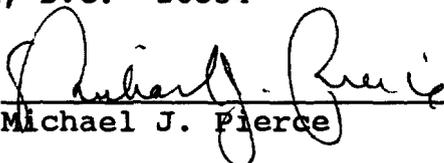
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December 7, 1992

CERTIFICATE OF SERVICE

This will certify that an original and nine copies of the foregoing Comments were delivered by hand this 7th day of December, 1992, to the following:

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Michael J. Pierce

December 7, 1992