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

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

REPLY COMMENTS
OF THE NATIONAL CABLE TELEVISION ASSOCIATION

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 1

I. ALLOWING CABLE OPERATORS TO RESTRICT CERTAIN ACCESS PROGRAMMING PROMOTES EDITORIAL DISCRETION AND REDUCES, RATHER THAN INCREASES, THE FIRST AMENDMENT INFRINGEMENTS INHERENT IN ACCESS REQUIREMENTS 4

II. THE COMMISSION'S RULES SHOULD LIMIT THE BURDENS AND RISKS ASSOCIATED WITH MANDATORY ACCESS CHANNELS 9

CONCLUSION 12

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The National Cable Television Association, Inc. ("NCTA") hereby submits the following reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The Cable Consumer Protection and Competition Act of 1992 (the "Act") changed certain fundamental policies with respect to the provision of access channels -- both public, educational and governmental ("PEG") access channels and leased access channels -- on cable television systems. Under previously existing law, cable operators were expressly prohibited from editing, restricting or determining the content of access programming. Those who provided programming on access channels were legally responsible for that programming with respect to, for example, defamation or obscenity. The cable operator, on the other hand, was immune from any such liability.

The new law continues to allow franchising authorities to impose PEG access requirements, and it continues to require the provision of leased access channels. For the most part, cable operators are still prohibited from editing the content of access programming. But the new law affords cable operators a limited amount of editorial discretion with respect to certain types of programming on access channels.

Specifically, the Act permits cable operators to prohibit PEG access programming that contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."[1/] And it permits operators to prohibit leased access programming that they "reasonably believe[] describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."[2/]

At the same time, however, the Act imposes new responsibilities and liabilities on cable operators. While they are allowed to prohibit obscene material, they are no longer immune from liability under obscenity laws if they actually carry such material. Furthermore, if they carry material on leased access channels that is "indecent", they must carry it on a separate channel, which is made available only to those subscribers that affirmatively request it.

1/ Act, Sec. 10(c).

2/ Id., Sec. 10(a).

As NCTA pointed out in its initial comments, these changes to existing law only serve to highlight the First Amendment problems that are inherent in the Act's public and leased access provisions. To require cable operators to carry material -- indecent or otherwise -- that they might otherwise choose not to carry fundamentally interferes with the protected exercise of editorial discretion. But granting cable operators discretion to prohibit only certain types of programming that the government views as "indecent" or unfit for carriage raises First Amendment problems, too. To single out some non-obscene programming as "indecent" and therefore subject to discriminatory treatment is to engage in constitutionally suspect content regulation. The law continues to burden cable operators with restrictions on their editorial discretion, but now it also imposes a form of content regulation on providers of access programming.

A number of commenting parties, primarily representing access programmers, are quite sensitive to the First Amendment implications of governmental efforts to restrict "indecent" programming on cable television. But these parties are, at the same time, wholly oblivious to the First Amendment implications of forcing cable operators to carry such programming. Their solution -- forcing cable operators to carry such programming, but also forcing them to provide all subscribers who do not want to watch such programming with lockboxes or other blocking devices --only exacerbates the unconstitutional burdens of access requirements.

Many other parties, including cable operators, understand both the constitutional and practical burdens imposed by the new law, and their comments provide useful suggestions for seeking to minimize the problems of an inherently problematic framework. Those parties understand that cable operators cannot reasonably be made liable for obscenity on access channels and be forced to carry certain programming in a uniquely burdensome manner without also having the option of not carrying such programming at all and the ability to rely on certifications by access programmers regarding the content of their programming.

I. ALLOWING CABLE OPERATORS TO RESTRICT CERTAIN ACCESS PROGRAMMING PROMOTES EDITORIAL DISCRETION AND REDUCES, RATHER THAN INCREASES, THE FIRST AMENDMENT INFRINGEMENTS INHERENT IN ACCESS REQUIREMENTS.

In our initial comments, we recognized that, insofar as it seeks to restrict "indecent" programming, the 1992 Act raises some troublesome First Amendment issues. As we pointed out, the Act

> allows operators to deny access to some speech -- but only to speech that the government defines as objectionable. And if the operator chooses, in any event, to carry such speech on leased access channels, the Act requires that the operator take affirmative steps to limit access to constitutionally protected speech.[3/]

Efforts by the government to restrict "indecent" but non-obscene programming on cable television have generally been invalidated

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3/ NCTA Comments at 4-5 (emphasis in original).

by the federal courts -- at least in those instances where the cable operator, in the exercise of its editorial discretion, would otherwise choose to carry such programming.[4/]

Commenting parties representing access programmers are particularly concerned about this singling out of "indecent" programming in the Act. Thus, the Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way ("Alliance Parties") seek to demonstrate at considerable length that

> the purpose and effect of Section 10 of the Act is to establish a system of censorship that violates the first amendment rights of those who wish to cablecast on PEG and leased access channels and those who wish to view the censored programming.[5/]

But, as NCTA pointed out, there is another side to the First Amendment coin in this case -- a side to which these parties are completely oblivious. They assume that, having expropriated several channels on a cable operator's system for PEG and leased access use, the government has created a "public forum" and cannot seek to censor or restrict particular content on those channels. But they ignore the fact that the expropriation of such channels in the first place has serious First Amendment

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4/ See, e.g., Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), aff'd. mem., 480 U.S. 926 (1987); Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Home Box Office v. Wilkinson, 531 F.Supp. 986 (C.D. Utah 1982); Community Television of Utah, Inc. v. Roy City, 555 F.Supp 1164 (N.D. Utah 1982).

5/ Alliance Comments at 27.

implications. Courts have, indeed, struck down regulation of indecent programming on cable television -- but they have held that mandatory access requirements are unconstitutional as well.[6/]

Forcing cable operators to carry programming that they and/or their subscribers may find offensive -- restricting, even with respect to only a few channels, their editorial discretion -- seriously infringes freedom of speech. First, forcing any speaker or medium of communications to communicate speech with which he disagrees, finds offensive or would otherwise prefer not to communicate is, in itself, constitutionally suspect.[7/] The problem is compounded to the extent that cable subscribers believe, however wrongly, that the cable operator has endorsed or selected the programming.[8/] In that case, the cable operator is not only forced to disseminate content with which he may disagree or which he finds offensive; he is also forced to become identified with and held responsible for such content. Finally,

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6/ See, e.g., FCC v. Midwest Video Corp., 571 F.2d 1025 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979); Group W Cable, Inc. v. City of Santa Cruz, 669 F.Supp. 954 (N.D. Cal. 1987); Century Federal, Inc. v. City of Palo Alto, 710 F.Supp. 1556 (N.D. Cal. 1987).

7/ See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977).

8/ At least one access programmer, the Denver Area Educational Telecommunications Consortium, Inc. ("DAETEC") acknowledges "that viewers are often unaware that the cable company cannot control the content of programs on leased access channels" and "often believe that the cable company is responsible for programs that offend them." DAETEC Comments at 4, 7.

the cable operator's ability to reach subscribers may be impaired to the extent that potential subscribers may choose not to receive cable service in order not to receive access programming that they find offensive.

Once the First Amendment implications of forcing cable operators to set aside access channels are taken into account, it is no longer as obvious as the Alliance Parties suggest that the new Act's provisions -- which give cable operators a modicum of discretion to reject some type of access programming -- restrict rather than enhance First Amendment rights. What is clear is that if the Act did not give cable operators the right to prohibit certain "indecent" programming altogether, its additional provisions requiring separate blocked channels for indecent programming and making cable operators liable for obscene access programming would make the already suspect access requirements even more intolerable and at odds with First Amendment principles.

If it is impermissible to expropriate channels for access use, it is even worse to require, in addition, that cable operators bear the burden of creating a separate channel for indecent programming and of implementing some method of restricting access to that channel to those who affirmatively select it. And it would be particularly offensive to require cable operators to carry "indecent" programming while prohibiting them from carrying "obscene" programming. An operator who guessed wrong -- who wrongly believed that programming was only indecent but not obscene and therefore felt compelled to carry

it, or who wrongly believed that programming was obscene and therefore refused to carry it -- would face liability, either for carrying obscene programming or for refusing to carry non-obscene programming.

Faced with the new separate channel requirements and the loss of immunity from obscenity liability, cable operators must -- as the Act provides -- be permitted to prohibit altogether any programming that, if carried, would trigger these additional risks and burdens. In this context, allowing cable operators to prohibit "indecent" programming on access channels is not the same as flatly prohibiting or restricting the cable operator's discretion to carry such programming. Singling out indecent speech for special treatment on cable television raises serious First Amendment concerns. But limiting such special treatment to mandatory access channels -- where the effect of such special treatment restores at least a limited amount of editorial discretion to the cable operator with respect to those channels -- has a countervailing beneficial effect on free expression. And where the effect is to enable cable operators to avoid even more burdensome access requirements, <u>not</u> allowing cable operators to prohibit indecent speech on access channels would result in even more severe First Amendment harm than is already inflicted by the existing mandatory access requirements.

Thus, the arguments by the Alliance Parties that the new restrictions on indecent programming are "underinclusive" because they apply only to access channels and not to channels within the

editorial control of the cable operator[9/] is misconceived. Once the government compels a cable operator to carry the programming of others, there may be good -- and compelling -- reasons to allow the cable operator discretion not to carry certain programming that viewers may find offensive. The same interests do not exist where the cable operator's discretion has not, in the first instance, been removed.

In sum, we share the concerns of the Alliance Parties and other access programmers that restrictions on indecent programming on cable, in general, are constitutionally suspect. But mandatory access requirements are themselves constitutionally problematic, and restrictions that limit the adverse impact of such requirements may enhance rather than infringe First Amendment rights.

II. THE COMMISSION'S RULES SHOULD LIMIT THE BURDENS AND RISKS ASSOCIATED WITH MANDATORY ACCESS CHANNELS.

As noted in the previous sections, the new Act, while giving cable operators limited discretion to prohibit certain programming on access channels, also imposes new burdens and risks on operators who choose to carry "indecent" programming. While the ability to prohibit such programming can to some extent mitigate these burdens and risks, the Commission should also implement the new requirements in a manner that minimizes the

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9/ See Alliance Comments at 49-53.

burdens and risks on those operators who choose not to prohibit such programming. The new affirmative burdens only add to the adverse impact of mandatory access channels on First Amendment rights, and should be imposed in the least restrictive manner.

In our initial comments, we identified several steps that the Commission should take to limit the burdens and risks imposed on cable operators. The comments of a number of cable operators identify similar concerns and similar steps. While there is no need to reiterate the proposals of the parties at length, several general principles emerge from the comments, with which we agree:

1. Cable operators should be allowed to prohibit any programming that, if carried, would have to be placed on a separate, blocked channel. Therefore, the definition of "indecent" programming -- the programming that has to be placed on a separate channel -- should be no broader than the programming that, under the Act, cable operators may prohibit.[10/]

2. Cable operators should not be required to determine for themselves whether a particular access program is "indecent" and must be placed on a separate channel. Although they should be permitted to determine for themselves whether programming is obscene or indecent, their only obligation under the Act is to place programming that has been identified by the programmer as indecent on a separate, blocked channel.[11/]

3. Cable operators should be permitted to require, as a pre-condition of carriage, that access programmers certify whether or not their programming is indecent or obscene in order to determine whether and how to carry

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10/ See, e.g., NCTA Comments at 6-8, Time Warner Comments at 6-9.

11/ See, e.g., NCTA Comments at 8; Cox Cable Comments at 8; Acton Corp. et al. Comments at 7.

such programming[12/] -- and should be permitted to rely on such certification to avoid liability for carrying indecent programming on an unblocked access channel or for carrying obscene programming.[13/]

4. Cable operators should be given maximum flexibility in determining the method for blocking leased access channels for indecent programming[14/] and in determining how best to notify subscribers of the availability of such blocked channels.[15/]

5. Access programmers should be required to give ample advance notice -- at least 45 to 60 days -- prior to showing indecent programming that would require placement on a separate, blocked channel.[16/] And subscribers should be required to give at least 30 days' notice of a request to receive -- or no longer to receive -- a blocked access channel.[17/]

12/ See, e.g., NCTA Comments at 8-9; TCI Comments at 6-9; Intermedia Partners Comments at 14; New York State Commission on Cable Television at 6-7; Acton Corp. et al. Comments at 7.

13/ See, e.g., NCTA Comments at 11-13; TCI Comments at 10-12; Cox Cable Comments at 3-8, 13-14; New York State Commission on Cable Television at 8; Blade Communications, et al. Comments at 13.

14/ See, e.g., NCTA Comments at 13-14; TCI Comments at 12-16; Cox Cable Comments at 9; Time Warner Comments at 9-14; Intermedia Partners Comments at 20-21; Blade Communications, et at. Comments at 10.

15/ See, e.g., TCI Comments at 16-18;

16/ See, e.g., NCTA Comments at 10; Continental Cablevision, Inc. Comments at 15; Time Warner Comments at 18; Blade Communications, et al. Comments at 10-11; Community Antenna Television Association Comments at 8.

17/ See, e.g., Continental Cablevision, Inc. Comments at 17;

CONCLUSION

For the foregoing reasons -- and, in particular, to minimize undue burdens, risks and constraints on protected speech -- the Commission should adopt rules regarding indecent and obscene programming on access channels that are consistent with the principles and proposals set forth in NCTA's comments and reply comments.

Respectfully submitted,

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