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December 21, 1992

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**BY HAND**

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Indecency Programming on Cable Access Channels, MM Docket No. 92-258

Dear Ms. Searcy:

Please find enclosed on behalf of the National Association of Telecommunications Officers and Advisors, et. al., an original and 10 copies of Reply Comments of the National Association of Telecommunications Officers and Advisors, et. al. filed as part of the Commission's indecency programming on cable access channels proceeding in MM Docket No. 92-258.

Any questions regarding the submission should be referred to the undersigned.

Sincerely,

William E. Cook, Jr.

William E. Cook, Jr.

Enclosures

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

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| In the Matter of<br><br>Implementation of the Cable Television Consumer Protection and Competition Act of 1992<br><br>Indecent Programming on Cable Access Channels | MM Docket No. 92-258 |

TO: The Commission

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS, NATIONAL LEAGUE OF
CITIES, UNITED STATES CONFERENCE OF MAYORS,
AND THE NATIONAL ASSOCIATION OF COUNTIES,

The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, "Local Governments") submit these reply comments in the above-captioned proceeding.

## I. INTRODUCTION

The Federal Communications Commission ("Commission") has proposed a reasonable method of implementing Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").

In general, the rules strike an appropriate balance between Congress' desire that cable operators be permitted to limit certain programming on access channels, and provisions in the Cable Communications Policy Act of 1984 ("1984 Cable Act") that prohibit cable operators from exercising editorial control over public, educational and governmental ("PEG" ) access and leased access channels. See 47 U.S.C. 531(e) and 532(c)(2).

Local Governments recommended in their initial comments, however, that the Commission take into account the unique role of PEG channels in permitting members of the public and others to provide important programming in the public interest and encouraging the free flow of information among all segments of the community. In particular, Local Governments recommended that the Commission allow PEG providers to: (1) make blanket, rather than program-by-program, certifications; and (2) certify that they have exercised reasonable efforts to ensure that their programs will not contain obscene or otherwise proscribed material. Finally, Local Governments recommended that disputes between cable operators and programmers be resolved in the first instance by the judicial system.

Local Governments urge the Commission not to adopt proposals by commenters that would upset the careful balance between the 1984 and 1992 Cable Acts, and would

increase the administrative and financial burdens on local governments, subscribers and PEG and leased access programmers. In particular, Local Governments urge the Commission not to adopt proposals that would: (1) grant cable operators editorial control over the content of PEG and leased access programming; (2) impose the cost of complying with the Commission's rules on programmers or subscribers; (3) unduly burden members of the public and others that desire to distribute programming over access channels; and (4) restrict the ability of local governments to regulate the programming on PEG channels, and regulate obscene or indecent programming.

## II. DISCUSSION

### A. Cable Operators Should Bear the Costs of Complying with Section 10 of the 1992 Cable Act

Cable operators should bear the costs of complying with Section 10 of the 1992 Cable Act. Nothing in Section 10 suggests that such costs should be passed directly on to cable subscribers, or imposed on leased or PEG access users or subscribers.[1]

The 1984 and 1992 Cable Acts impose a number of obligations on cable operators, including customer service

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[1] See, e.g., Comments of Tele-Communications Inc. at 5, Cox Cable Communications at 10-11, Continental Cablevision, Inc. at 10-11, and the Community Antenna Television Association, Inc. at 7.

standards, technical standards, equal employment opportunity reporting requirements, and other requirements. Nothing in these provisions suggests that a cable operator should be able to directly pass on compliance costs to cable subscribers. Section 623 of the 1992 Cable Act identifies the categories of costs that must be included in establishing rates; the cost of complying with Section 10 is not identified as a recoverable cost.

The absence of language in the 1992 Cable Act permitting a cable operator to "pass through" compliance costs onto programmers or subscribers makes clear that Congress intended for a cable operator to bear such costs, just as it must bear the costs of complying with other provisions in the 1984 and 1992 Cable Acts.

### B. Cable Operators Are Prohibited from Pre-Screening Programming

The Commission should not adopt regulations allowing cable operators to pre-screen or monitor the content of access programming to determine if it is indecent or obscene.[2] The 1984 Cable Act explicitly prohibits cable operators from pre-screening or monitoring programming to ensure that it does not contain such material. See 47 U.S.C. 531 ("a cable operator shall not

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[2] See, e.g., Comments of the National Cable Television Association at 9.

exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section); 47 U.S.C. 532 ("a cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming"). Moreover, pre-screening by cable operators pursuant to regulations established by the Commission would have serious first amendment implications.

The certification process proposed by the Commission, along with immunizing a cable operator from penalties the Commission might impose for violations of its rules, should provide cable operators sufficient assurance that prohibited programming will not be carried on their cable systems and that, if such programming is inadvertently carried, the Commission will not penalize cable operators that in "good faith" complied with the Commission's regulations.

### C. The Commission Does Not Have the Authority to Preempt Local Laws and Franchise Agreements

The Commission should not preempt state and local obscenity and indecency laws, franchise provisions, and provisions in contracts between cable operators and public access organizations that are "inconsistent" with the

Commission's rules or address the same issues addressed by the Commission's rules.[3]

Congress did not grant the Commission the authority to preempt state and local laws, and franchise and contract provisions, in this area and there is no language in the 1992 Cable Act's legislative history to suggest that this was Congress' intent. Congress could have included a preemption provision in the 1992 Cable Act if Congress had intended for the Commission to preempt state and local regulation in this area. In the absence of such language in the 1992 Cable Act, the Commission should not interfere with the operation of state and local laws and bargained-for franchise and contract provisions. Questions regarding whether a state or local law or franchise provision is preempted by federal law will more appropriately be decided by a court on a case-by-case basis.

### D. Local Governments and Programmers Should Not Be Required to Provide Indemnification to Cable Operators

The Commission should not require local governments and cable programmers to provide indemnification, indemnification insurance, a bond, letter of credit or similar protection, to cable operators as a condition of

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[3] See, e.g., Comments of Continental Cablevision, Inc. at 6-8, the National Cable Television Association at 12, and Time Warner Entertainment Company, L.P. at 28.

carriage on access channels.[4] Moreover, local governments should not be required to indemnify cable operators for lawsuits challenging a cable operator's decision not to carry programming that a local government deemed obscene or indecent.[5]

The imposition of an indemnification requirement on local governments would undercut the purpose of -- and may violate -- the damages immunity provision in Section 24 of the 1992 Cable Act. Section 24 demonstrates Congress' intent to grant local governments immunity from monetary damages, costs and attorneys fees in legal challenges to their authority to regulate cable systems. The Commission should not allow cable operators to recover such damages, costs and fees indirectly by imposing on local governments an indemnification requirement.

Moreover, the 1992 Cable Act does not authorize the Commission to impose an indemnification requirement on either local governments or access programmers. In addition, an indemnification requirement would be inconsistent with state constitutions and statutes that

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[4] See, e.g., Comments of Blade Communications, Inc., et. al. at 12, the National Cable Television Association at 15, and Time Warner Entertainment Company, L.P. at 19 and 23.

[5] See, e.g., Comments of Time Warner Entertainment Company, L.P. at 27.

prohibit the imposition of open-ended indemnification requirements on local governments. See, e.g., 31 U.S.C. 1341 (limits indemnification obligations of the federal government and the District of Columbia).

Finally, indemnification requirements would have a "chilling effect" on the number of programmers that could use PEG or leased access channels, and on the regulation of such channels by local governments. Congress enacted leased and PEG access channel provisions in 1984 to promote its goal of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. 521(4). Congress reaffirmed this purpose in the 1992 Cable Act by: (1) authorizing franchising authorities to deny a franchise request if an applicant does not plan to provide "adequate" PEG channels, facilities or support, 47 U.S.C. 541(a) (as amended by the 1992 Cable Act); and (2) requiring the Commission to establish reasonable rates, terms and conditions of leased access. 47 U.S.C. 532(c) (as amended by the 1992 Cable Act). The Commission would undermine these Congressional policies and mandates if it enacted regulations that would unduly inhibit a programmer's use of such channels. Such a requirement may not be a "reasonable" obligation to impose on programmers, see, e.g., 47 U.S.C. 532(c)(2)(ii) (as amended by the 1992

Cable Act) -- particularly on users of PEG channels who may not have the resources to provide indemnification to a private cable operator.

### E. Courts Should Resolve Disputes Between Cable Operators and Programmers

Several commenters suggested that either the Commission[6] or local governments[7] resolve disputes between cable operators and programmers. Others have suggested that a cable operator's decision on whether a program should be carried should be final and not subject to review.[8]

Local Governments oppose suggestions that a cable operator's actions not be reviewable. However, Local Governments believe that neither the Commission nor a local government should resolve such disputes. As stated in our initial comments, Local Governments believe that such disputes should be resolved by the courts, which ultimately must decide the constitutional issues that Section 10 may raise. Dispute resolution by either the Commission or local governments would merely delay a decision by a court on these important issues.

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[6] See, e.g., Comments of Cox Cable Communications at 12.

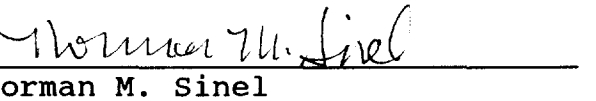
[7] See, e.g., Comments of Time Warner Entertainment Company, L.P. at 24-25.

[8] See, e.g., Comments of Tele-Communications Inc. at 18.

## III. CONCLUSION

Local Governments believe that the Commission's approach is sound with respect to implementing Section 10 of the 1992 Act. The Commission should not implement suggestions by commenters that would undermine this approach. In particular, Local Governments urge the Commission not to adopt regulations that: (1) grant cable operators the authority to pre-screen access programming; (2) impose the cost of complying with the Commission's rules on programmers or subscribers; (3) impose undue burdens on programmers; and (4) restrict the ability of local governments to regulate PEG channels and enforce laws and franchise provisions regulating indecent or obscene programming. Moreover, Local Governments believe that disputes between cable operators and programmers should be resolved in the first instance by the judicial system.

Respectfully submitted,



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