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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

COMMENTS OF CONTINENTAL CABLEVISION, INC.

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SUMMARY OF COMMENTS OF CONTINENTAL CABLEVISION, INC.

In regulating basic service, it is important for the Commission to understand that cable television is financially quite distinct from telephony. Cable is financially organized for long term cash flow, system growth, and capital appreciation, not for the immediate, steady earnings and dividend payouts that characterize LECs. For instance, Continental's annual reinvestment in property, plant and equipment exceeds the amount of cash generated from operations and cannot be financed out of current subscriber revenues. Cable companies have costlier debt than LECs, 80% beta factors, rarely pay dividends, often have noncompensatory rates during early franchise years, and usually take a long time to recover their investment and to reward investors. These clear market indicators all demonstrate that cable television has its own unique financial characteristics and should not be regulated through conventional utility rate base/rate of return regulation. Cable's long term orientation has been of major benefit to ratepayers, and should not be discarded. Quite apart from the well-known drawbacks of conventional utility ratemaking, the differences between cable and telephone prevent the wholesale application of utility rate models to cable television. A detailed economic case is presented in the Appendices to our Comments.

Nor do price caps adequately address cable's financial structure. Cable is not a declining cost industry, nor does it have a substantial cost-based pricing history from which appropriate price caps might be drawn.

Continental recommends adoption of a benchmark system based on carefully selected "competitive" markets and other criteria, with a right to pass through new costs imposed by franchising authorities through franchise fees, PEG access support, taxes, and similar line-itemized charges. Using 1984 or 1986 base prices does not recognize the artificial price freezes then in force or the substantial capital costs since incurred in system upgrades, consolidations, and acquisitions.

While cost of service regulation is not desirable as a broad regulatory tool, it must remain available as a safety valve against confiscation. We offer a detailed critique of the cost of service standards set forth in the NPRM.

We also set forth a detailed equipment cost model developed by Economics and Technology, Inc. which may be used in conjunction with benchmarks to determine a "cost cap" for equipment required to be priced at cost. The model is flexible enough to accommodate equipment priced with services and equipment which is priced on an unbundled basis. We believe, however, that cable operators should be permitted to offer packages of equipment and service as part of accepted marketing practice. Maintenance contracts should be treated as unregulated. Jurisdiction over equipment should be commensurate with the service for which it is necessary. Thus, equipment needed for basic would be subject to local regulation; equipment needed for tiers would be subject to "bad actor" regulation; equipment needed for premium services would be deregulated. Any operator who provides converters and remotes on an unbundled basis should be permitted to price them free of regulation with respect to any level of service with which competitive third party equipment is compatible.

The standards for tier complaints must be set considerably higher than those for basic. Congress rejected any form of comprehensive regulation of the satellite tier. Benchmarks must be set high enough so that the pricing freedom which has created the diversity of satellite cable programming may continue, subject only to complaint against those few who abuse that freedom. Discount packaging of tiers and pay should have no jurisdictional consequence, or consumers will lose the substantial advantages which discounting has provided.

The structure of rates and rate changes needs clarification. There is only one level of basic service under the 1992 Act which is subject to local regulation. Pay, PPV, and non-video services may be sold without basic. This permits consumer choice and establishes parity with MMDS without violating the protectionist purpose of the "mandatory buy through" provision. Launching new low cost "broadcast basic" levels should not be regarded as evasive, or as a negative option to those customers who do not elect to downgrade to the new service. Franchise provisions which seek to force more satellite networks on to basic should be preempted. Affiliation agreements with penalties against lifeline basic should be made subject to renegotiation.

The "uniform rate structure" required by the Act does not require uniform rates in every community served from a common headend. Such an interpretation ignores the community-unit definition contained in statute and dramatic differences in franchise costs. It also undermines the bedrock concept of local franchising. It would penalize operators for achieving the efficiencies of interconnecting communities by fiber. It would also prevent an operator from responding fairly to competitive conditions arising in only one community which happens to be served with others from a common headend. The Act also permits the grandfathering and establishment of different rates for multiple subscribers (such as MDUs), which require customized commercial arrangements quite different from individual service contracts.

A cable operator's right to line itemize franchise fees and similar franchise related assessments must be comparable to practices followed by widely-accepted utility bills. Burying franchise fees within a "total" for cable service prevents the political accountability intended by Congress.

The adjustment to a new regulatory regime should be phased in with an interim period and with rules permitting revenue neutral adjustments, such as shifting prices between service and equipment and basic and tier.

Detailed procedural suggestions are also submitted. Effective competition should be defined, measured, and reported so that affected parties will have ready access to the necessary service area and penetration information necessary to regulate on a community unit basis. Certification requests should be preceded by a brief pre-filing notice, and the validity of the certification should be subject to early challenge before energy is devoted to the rate case itself. Basic rate adjustments should be implemented on 30 days notice, subject to refund. This will preserve the right of an operator to retain lawful increases in a world where franchising authorities have political incentives to say "no" and have been immunized from liability for damages.

Tier complaints should also be preceded by pre-filing notice, and accompanied by certain minimum information. Commission staff could process the information and provide an opportunity for response if the filing presented a prima facie case of violation of the benchmark.

Maximum leased access channel prices should be established to prevent the migration of satellite programmers to leased access channels. Billing and collection services should be deregulated, as with LECs.

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Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)))))	MM Docket No. 92-266

COMMENTS OF CONTINENTAL CABLEVISION, INC.

INTRODUCTION

Continental Cablevision submits these Comments on the rate regulations the Commission has proposed in this proceeding.

Continental is the third largest multiple cable system operator in the United States. It serves nearly 2.9 million basic subscribers in 600 communities in 16 states, or roughly 5.5% of the nation's cable television households.

I. GENERAL [¶4-5]

Despite thousands of words of official legislative history and even more in floor debate, still there is little to evidence a Congressional intent to decrease existing cable rates. That is why the Act "found" monthly rate increases of 29% since rate deregulation, but made no findings on underlying cost increases. Likewise, GAO disclaimed any implication that its surveys reflected any information on cost.[1/] Congress left it to

1/ From 1984 through 1990, Continental experienced increases in operating expenses per subscriber of almost 43%. During the same period, Continental's capital expenditures averaged more than $125 million a year.

the FCC to determine whether cable rate increases were out-of-line with cable cost increases, subjecting cable to regulatory supervision pending development of market discipline from competing video purveyors.

The fundamental goals which serve as the common denominator of the Act's rate provisions are:

(1) to induce (indeed, compel) the creation of a new option of a leaner "basic" service, freed of the costs incident to satellite cable networks.

(2) to place cable networks in optional tiers, which subscribers might buy around if they prefer only the a la carte offerings on a cable system.

(3) to limit application of the full scheme of rate regulation to basic, in order to assure an affordable basic service.

(4) to apply a complaint process to discipline the "bad actors" who would abuse the freedom over tier pricing under which satellite cable programming has otherwise flourished.

(5) to also serve the general statutory goals to expedite resolution of complaints; to reduce administrative burdens; to minimize unnecessary regulation; and to rely on marketplace forces to the maximum extent.

It is within the FCC's discretion to fashion substantive limits within statutory goals and guidelines. But the Commission must permit relatively free price adjustments on satellite tiers, in order to promote the development of non-broadcast programming -- a goal it has pursued since the 1974 Clarification and the 1983 Community Cable (Nevada) decision, and with which Congress expresses no disagreement. Diversity is not expected to emerge from the blossoming of new broadcast outlets carried on cable. Broadcast Television in a Multichannel Marketplace, 6 F.C.C.Rcd. 3996, 4097 (1991). Choice will emerge from alternative networks, which will be carried on and financed by satellite tier revenues.

II. EFFECTIVE COMPETITION

A. Multichannel Video Programming Service "Offerings" Should Be Measured By the Number of Homes "Serviceable" By Any Service Provider [¶8]

Within the cable industry, the phrase "homes passed" means the number of homes a particular cable system has the technical capability to serve immediately if a potential customer places an order to commence service. Put another way, it is the number of serviceable homes passed by activated cable plant. Cable operators routinely report such statistics in FCC Form 325, Schedule 1 (Community Unit Data). To implement the second and third tests of the effective competition standard, the Commission should extend this type of measurement method to all other non-cable multichannel video programming distributors. As detailed below, such reports could be implemented with relatively minor administrative effort.

The Commission should implement an annual service area home count reporting requirement for all multichannel video programming distributors. In certain situations, this measurement could be incorporated into existing annual reporting forms required of several multichannel video programming services. For example, in the wireless cable service, the wireless cable service provider should submit measurements with its annual FCC Form 430's of the aggregate number of households (each separately billed or billable customer) that it technologically could serve. In order to be consistent and to effectuate the terms of the statute, the "homes passed" measurement for non-cable multichannel video programming service providers should also be broken down by homes within a cable operator franchise area. If this information is not obtainable, then a more neutral measurement area could be used such as homes passed in each zip code. In the latter case the Commission should permit zip code areas to approximate franchise area for the purpose of defining effective competition. (In the event the wireless cable operator is purely a lessee and does not hold any of the relevant licenses, the licensee should be required to obtain the relevant information.)

Similarly, television receive-only satellite ("TVRO") programmers and future Direct Broadcast Satellite ("DBS") service providers should also report to the FCC on their national "footprint" and penetration levels. Since such services are nationwide in nature, these measurements should be broken down by zip code; each code supplemented with appropriate listings of authorized vendors and/or direct sale locations. (The proposed listing requirement would be unnecessary if the FCC were to reasonably conclude that the use of direct sale methods makes all homes within the service provider's footprint "homes passed.") This type of breakdown is already practiced by HSD distributors, which under the Satellite Home Viewer Act may only sell network signals to customers located in "white" areas and report such sales to the broadcast networks by zip codes. Thus, if a cable operator wanted to prove that it is subject to effective competition under the second or third tests, it could collect the relevant data from the FCC and attempt to make the required showings.

All providers must report the markets in which their services are available and their penetration. Indeed, cable operators are routinely required to disclose far more detailed information concerning their operations. There is nothing proprietary about aggregate subscriber numbers when presented without subscribers' names.

B. "Multichannel Video Programming Distributor" Should Be Broadly Defined [¶9-10]

The plain language of the 1992 Act establishes that the term "multichannel video programming distributor" is to be broadly construed to include, among others, cable operators and Multichannel Multipoint Distribution Service ("MMDS"), DBS and TVRO distributors. The statute states explicitly that Congress' list of multichannel video programming distributors is illustrative, not exhaustive. See 47 U.S.C. Section 602(12). The test for a multichannel video programming distributor is any entity that makes multiple channels of video programming available for purchase by subscribers or customers. Id. Both video dialtone service providers and multiplexed, multichannel television broadcast stations should be considered competitors in the multichannel video distribution market because both services comply literally with the provisions of the multichannel video programming distributor test. Indeed, the Commission has already declared them to be competitive with cable service.[2/]

2/ See, e.g., Telephone Company - Cable Television Cross Ownership Rules, Second Report and Order, Recommendation to Congress and Second Notice of Proposed Rule Making, ("Video Dialtone Proceeding"), 7 FCC Rcd. 5781, 5783 (1992) (the cable-telco rules are modified to advance FCC's overarching goal of "increasing competition in the video market place"). See generally Review of Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rule Making, 7 FCC Rcd. 4111 (1992) (NPRM's purpose is to lessen the regulatory burden on television broadcasters "as they seek to adapt to the multichannel video marketplace.")

The adoption of a broad definition would also encompass future advances or rule changes. For example, to the extent that 28 GHz operators distribute video programming or the broadcast duopoly rules are relaxed, adoption of a broad definition would automatically allow the evolving video marketplace to take priority over regulatory surrogates, as contemplated by Congress.

With regard to leased access-type users offering compressed, multichannel service (or "third party services"), these third parties should also be classified as multichannel video programming distributors. Nothing in the statutory definition of a multichannel video programming distributor requires distributors to be "facilities-based" before they can be included. In fact, by including TVRO distributors in the definition, Congress has already recognized the contrary. Likewise, the very concept of a video dialtone gateway contemplates that competition will emerge from a menu of single or multiple leased channels, all of which must be included in the definition of multichannel video programming distribution. [n.15]

All of such competitors' penetration must be measured cumulatively when applying the second effective competition test. The statute looks to "the number of households subscribing to programming services offered by multichannel video programming distributors . . ." 47 U.S.C. Section 623 (l)(1)(B). If Congress sought to require <u>each</u> multichannel video programming distributor to reach a 15 percent penetration level before being incorporated in the second test, it would not have referred to plural "distributors" in both the statute and explanations on the Senate floor. 138 Cong. Rec. S 14253 (Sep. 21, 1992).

The marketplace has already determined what constitutes a "comparable" video programming distributor: any distributor that has measurable penteration in a multichannel video programming market is a "comparable" competitor. A more narrow definition would lead to absurd results. For example, even though the typical wireless cable operator or HSD distributor does not carry all local broadcast signals, both still effectively compete with cable.

C. The Commission Should Utilize Its Existing Multiple Ownership Attribution Policy to Define "Unaffiliated" Distributors

The 1992 Act counts only "unaffiliated" distributors towards effective competition. In defining this term, the Commission should simply incorporate its existing cable ownership attribution policy as set forth in the cable rules. <u>See</u> 47 C.F.R. 76.501 and accompanying notes.

III. BASIC SERVICE -- CONTENTS & REGULATION

A. Basic As A Mandatory Buy Through [¶11]

The 1992 Cable Act requires a customer to buy "basic" (including local broadcast stations) as a condition to purchasing any other tier of cable programming service. 47 U.S.C. § 623(b)(7)(A). For example, a subscriber who wishes to subscribe to a $9 "tier" of satellite services is required to also buy the "basic" tier of broadcast signals, for, say, $10. The customer's total price is $19.

We believe it is poor policy to insulate programmers, including broadcasters who seek payment for "free broadcasting," from exposure to market demand. Placement on a satellite tier or a la carte channel would promote reliance on the marketplace. Nonetheless, the language of Sec. 623(b)(7)(A) is plain. We therefore agree with the Commission's proposal that -- for now -- retransmission consent stations must be carried on the basic tier under Sec. 623. We expect that in the future there may be part-time carriage arrangements or even joint venture programming in which programming delivered by "broadcast" might properly be placed on an upper tier. The Commission should invite waiver petitions to accommodate such cooperative arrangements.

B. Pay, PPV, and Non-Video Services May Be Sold Without Basic [¶12]

Although Congress has expressly required the purchase of broadcast stations as a condition to viewing satellite tier channels on cable, this protectionist provision must be narrowly construed as otherwise contrary to the pro-competitive, choice-driven goals of the Act. Neither a la carte pay services nor pay-per-view are "tiers" within the accepted meaning of that otherwise undefined term.[3/] Moreover, pay and pay-per-view programming compete far more with VCR rentals than with broadcasting[4/], and would not likely be a substitute for broadcasting. Permitting customers to receive broadcast stations off-air and pay/PPV off cable promotes choice without violating the protectionist purpose of Sec. 623(b)(7)(A), and establishes parity between cable operators and competing video providers (like MMDS).

Likewise, customers should be permitted to buy digital cable radio (DCR), interactive services, transactional services

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3/ For example, Jones Dictionary of Cable Television Terminology (p.98) defines a tier as a package or level of service other than basic or pay. The Commission used the same definition in Nevada, 95 F.C.C.2d at 1212, 1216 (1983); 98 F.C.C.2d at 1187 (1984) (distinguishing "tier" from per channel or per program services).

4/ Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C.Rcd. 4962, 4995 (1990).

and non-video services without basic. None compete significantly with broadcasting, and many do not even connect to the customer's TV receiver. A contrary ruling would require consumers to buy services they do not need (such as a commercial establishment seeking only DCR) or which they receive from competing sources.

C. Only One Level of "Basic" Service Is Subject to Regulation Under § 623(b) [¶13]

Continental agrees with the Commission that the precise method by which the cable operator quotes its "basic" and "tier" prices no longer has jurisdictional consequences. Under the ACLU decision, if a rate regulated cable operator quoted a price of $10 plus an "increment" of $9 for the tier, the $10 charge was regulated as "basic" and the $9 tier was not. If the operator did the arithmetic for the customer, he was deemed to offer two levels of "basic service", each subject to local rate regulation. As a result, marketing material and customer conversations with customer service representatives have been needlessly complicated and made more confusing.

In three ways the 1992 Act undoes that anomaly, and leaves only one level of "basic service" subject to local rate control.

First, the Act expressly grants local governments an opportunity to regulate only one level of basic -- "the basic service tier" for which the Commission establishes reasonable guidelines under § 623(b)(1) and to which the franchising authority must conform and limit its regulation under §§ 623(a)(2)(A) and 623(a)(3)(A). That basic tier is defined as non-superstation television broadcast stations and required PEG channels. Any additions to basic are within the discretion of the cable operator, § 623(b)(7)(A),(B) ("may add additional video programming"). The Act also expressly vests jurisdiction over all "cable programming services" to the FCC's complaint process. "Cable programming service" is defined to include any video programming other than "the basic service tier", pay services, and pay per view. Thus, under the Act's plain language, satellite "tiers" other than the (one and only) basic service are subject only to FCC complaint, not to regulation as a second level of basic service.

Second, the legislative history confirms that local jurisdiction is confined to a single basic tier of service. The Conference expressly rejected a Senate bill which would have extended local control to the first tier with 30% penetration. The Conference report is itself replete with reference to "the basic service," "the regulated, basic tier," and an intention to insulate the basic service from the costs of optional tiers. E.g., Conf. Rep. at 62-64. The legislative history confirms that Section 623's jurisdictional split between basic and tier regulation is intended to confine local control to a single basic tier.

Third, the purpose of related provisions cannot be fulfilled unless basic service is defined as the single level of non-superstation television broadcasters and required PEG. For example, the "tier buy through" restrictions could readily be defeated if tiers of cable nets could be redefined as "basic" merely by quoting cumulative prices for the tiers, rather than quoting incremental prices.

The Commission should therefore clarify that the ACLU definition of "basic," and the definition of basic in § 602(3) on which it was based, is an artifact of the 1984 Cable Act. That definition has been displaced for rate regulation purposes, by the language, history and purpose of the 1992 Act, all of which confine local jurisdiction to a single level of basic service, regardless of whether tier prices are marketed on an incremental basis or a cumulative basis. When coupled with the FCC's rules on full disclosure of "basic" options, such a ruling will make sense of the 1992 Act and avoid the customer confusion resulting from the ACLU definition. Contrary franchise provisions should automatically be preempted.

D. Jurisdictional Division [¶14-16]

The NPRM rightly concludes that the Commission has only limited authority to directly regulate "basic" cable rates. Local franchising authorities have primary responsibility for administering basic rate regulation (albeit subject to FCC certification). Section 623(a)(2)(A) states, "[T]he rates for the provision of basic cable services shall be subject to regulation by a franchising authority, or by the Commission _if_ the Commission exercises jurisdiction pursuant to paragraph (6)." 47 U.S.C. § 543(a)(2)(A)(emphasis added). The "Exercise of Jurisdiction by Commission," occurs only [i]f the Commission disapproves a franchising authority's certification . . . or revokes such authority's jurisdiction." § 543(a)(6). Even then, the Commission's jurisdiction is only on an interim basis until the franchising authority corrects its initial deficiency.5/

Leaving local franchising authorities with primary responsibility for basic rate regulation is consistent with long-established Commission policy. It is also a practical response to the potentially staggering burden of nationwide rate regulation of some 30,000 community units. While many jurisdictions may refrain from seeking certification, that is hardly an indictment of the statutory scheme. To the contrary, it makes little sense to impose federal regulation where franchising authorities are satisfied with local cable rates.

Some small communities may argue that they are troubled by cable rates, but unable to shoulder additional regulatory

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5/ Section 623(a) provides, "No federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612."

burdens. The solution to that problem is not to turn that regulation over to the FCC, but to devise sufficiently streamlined procedures to minimize the regulatory burden. A streamlined benchmark approach, established by the Commission but administered locally, would benefit all parties concerned.

E. Finding of Effective Competition [¶17-18]

So long as the FCC carefully defines "effective competition" local franchising authorities should make the initial determination regarding the presence or absence of "effective competition."

Because relatively few cable systems currently meet the "effective competition" standard set forth in the 1992 Act, it would be unnecessarily burdensome for cable operators to provide detailed data in every instance. Franchising authorities interested in obtaining rate regulation certification, should provide 30 days notice to the local cable operator prior to filing for certification. If the presence of "effective competition" is an issue, the operator could then provide the franchising authority with relevant data. The franchising authority must, of course, have the ability to then secure penetration figures from the public reports of all local multichannel video program distributors. These simple steps may dramatically reduce the Commission's processing burden. Local parties may be able to resolve rate disputes on an informal basis without ever burdening the Commission.