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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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February 16, 1993

Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: *Reply Comments of People's Choice TV in MM Docket No. 92-265*

Dear Ms. Searcy:

Enclosed for filing as the reply comments in MM Docket No. 92-265 of People's Choice TV Partners are an original and nine copies of a letter delivered today to Chairman Quello.

Very truly yours,



Dawn G. Alexander

DGA/cjl
Enclosure

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People's Choice-TV

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Hon. James H. Quello
Chairman
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

February 15, 1993

Re: MM Docket No. 92-265

Dear Mr. Chairman:

For over ten years, People's Choice TV Partners (PCTV) and its predecessor companies have been working to accumulate wireless cable frequencies and launch wireless cable systems. Today, PCTV has achieved a successful launch of such a system in Tucson Arizona, and currently plans to launch systems in Houston, St. Louis, Kansas City, and Baltimore. PCTV respectfully submits these comments to the FCC in light of the need of the emerging wireless cable industry for similar support to that granted to the then-emerging cable industry in the 1970's and 1980's. We are responding to various comments submitted in the above docket, including those of Turner Broadcasting, TCI, Continental, Viacom, and others.

The comments filed by both cable companies and their affiliated programmers in this proceeding continue sending the message that congress refused to accept: Let us do anything we want. Let us sell to whomever we want, charge what ever we want, set whatever terms we want. As always, these arguments should be considered in light of the fact that in the mid 1970's, cable was on the other side of this argument, and required congressional intervention to be ensured the right to carry broadcast programming. This is a point that the wireless cable industry is in a particular position to validate, since our trade association is led by Robert Schmidt, who fought the same battle on behalf of the cable industry in 1976. The cable industry prefers to ignore this argument and forget its history.

The rationales for this message are repeated over and over, and have lost all credibility in the face of what congress has recognized as abuse of monopoly power. Stated simply, the cable industry continues to draw scenarios where their sixty-plus million subscriber monopoly will fall apart if they are made to deal in a free market. Or, even more amazingly, they claim that a free market exists today.

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Essentially, the cable industry wishes to hide its monopolistic practices behind the skirts of the FCC. Having been told by one parent that its behavior needed correction, cable rushes to the other parent to plead for leniency.

For the record, PCTV wishes to state that no free market today exists in the purchase of programming. The exceptions are where an enlightened programmer realizes that the cable industry's practices effectively limit, not maximize distribution of programming. HBO is one such notable exception, having made its programming available consistently to the wireless cable industry, extending to wireless cable operators the same programming discounts available to cable operators. If other programmers had followed HBO's lead as early on, much of the impetus that drove the 1992 Cable Act would not have existed.

Cable programmers today fall into three categories: First, those enlightened "good actors", like HBO, Showtime, United Video and others, who wholeheartedly embrace the idea of multiple vendors for their product. Then, those who serve the wireless industry less enthusiastically, who may just be seeking to avoid trouble. Included in this group are programmers who make the process of obtaining contracts an arduous one for wireless operators, or who insist on terms and conditions that are not enforced with cable operators.

Finally, there are still programmers who refuse to sell wireless cable a license to compete. Chief among these is TNT, or Turner Network Television, the figurative "last stand" of the cable industry. Today, four months after passage of the cable act, TNT still refuses to sell programming to PCTV, now claiming it wants to see the FCC regulations before it makes a decision. This statement can be more readily interpreted to mean that TNT wants to see if the FCC really intends to enforce the law. We predict that when the FCC issues regulations that actually reflect the will of Congress, that TNT will then file suit against the FCC, and use that as an excuse to further delay selling to wireless cable. TNT views time as its ally. The longer it can delay program access, the weaker its masters' competitors will be, perhaps permanently. The FCC should acknowledge the crucial effect of timing here and issue regulations which presume the right of cable competitors to enter a real marketplace.

With regard to another programming service, Home Sports Entertainment (HSE) in Houston, PCTV has been told that we can buy the service in areas where Time-Warner has a cable system, but not in areas where TCI has a cable system. Reason: TCI owns an equity interest in HSE.

Recently, PCTV attempted to purchase rights to show a Denver superstation (which carries the new Colorado Rockies baseball team) uplinked by Netlink, the home satellite programmer. The representative of Netlink said that they had no intention of serving wireless cable operators. A cable operator who called Netlink the same week and requested a contract, was told within five minutes of making the request of Netlink that a contract

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would be sent out immediately.

The common threads running through all these experiences are first, that all the services have TCI as an equity owner, and second that all the services involve sports, the single most watched form of entertainment on cable. In fact, the NBA rights contract currently used by TNT was originally sold to Superstation TBS, which is available via common carrier to wireless. Turner exercised a special clause in the contract to move the NBA programming to TNT, to get it out of reach of cable competitors. In effect, TNT bought the rights to show the NBA games on wireless cable, and then has warehoused those rights. In the winter months, this programming is the highest rated on cable.

With regard to other program services, certain incipient programmers still trying to gain widespread cable distribution have told PCTV at various times that fear of retaliation from cable operators meant that the service was unavailable to us.

Viewed in the light of our ten year history trying to become a large system operator of wireless cable systems, many of the comments filed by cable-related groups in this proceeding seem highly ironic. Others plainly are contradictory.

For instance, many respondents, including Turner, maintain that exclusive contracts are "essential" for launching new services. Whether these statements are intentionally false or not, they are still false. Many programming services have recently launched without exclusivity, including The Sci-Fi Channel, Turner's own Cartoon Network, The Comedy Channel, The Learning Channel, etc. What Turner really should have said was, "If you are a big powerful company like Paramount (Sci-Fi), Turner (Cartoon), or Time-Warner (Comedy), you don't need to offer exclusivity. But if you are a small independent programmer, you have to dance to a different tune."

More irony abounds in further comments of Turner and TCI affiliate Liberty Media. Both say that programmers should be able to charge more to distributors who have a lower internal cost of distribution. This is one of the most backwards, Alice in Wonderland arguments yet presented to the Commission. The idea is that the programmer should be a sort of "handicapper", and when he sees someone with a better technology, he should charge that distributor more, thus forcing consumers to continuously pay prices based on the economics of the distributor with the highest costs. If this type of featherbedding were a generally employed economic principle, airlines would today be forced to charge the same rate per passenger mile as coal-fired railways. As these programmers are cable affiliates, the argument is not genuine, and we suspect what they really mean is "Since some of these upstart competitors have lower distribution costs than us, we'll just charge them so much that they won't be able to compete on price." A more anticompetitive rationale is hard to imagine.

The idea that cable needs to be protected from wireless cable because of wireless cable's better economics of distribution is ludicrous. Our company, PCTV, has not one one-thousandth the financial strength or resources of a major cable operator. We are

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chronically underfinanced, in part because of the reluctance of cable finance groups to finance a cable competitor. And, while cable operators complain about the fact that our cost per subscriber is lower than theirs, this is actually because many cable systems were bought for monopoly premiums, which the cable operators now seek protection for. And more ironically, other major cable operators make splashy press announcements about the costs they'll be incurring to put in 500-channel fiber and digital systems. Clearly, if low-cost distribution were all that mattered, these upgrades would not be occurring.

The comments of Continental Cablevision directly contradict this rationale of charging more to lower cost operators. Continental says that the programmers should be able to offer discounts to distributors with lower retail prices. We agree with Continental that this is the true economic incentive for a programmer without ulterior motive; encourage the distributor to maximize distribution through discounting. This valid pricing technique is appropriately employed by HBO and Showtime.

In other comments, Turner and Liberty claim that different distribution mechanisms than cable pose technological risks for programmers, and that MMDS in particular is not as secure as cable, and offers a technically inferior picture. This old saw has been used by cable for almost a decade, to deride the quality of service of its competitors. Until the claim began to sound as hollow as it was, many cable operators spouted horror-stories about wireless cable "rain fade", even though none happens at the 2.5 GHz band. The FCC with its technical expertise should be in an excellent position to refute this claim that the FCC-regulated MMDS service is inferior. Claims that our signal is not as secure are also disingenuous in the extreme. We encrypt every signal we transmit, whereas all cable companies transmit most of their programs in the clear. The cable industry complains to one section of the federal government that it suffers billions in piracy losses each year, and then touts its "security" to the FCC.

Rather than inferior, we maintain that a properly transmitted and received wireless cable picture is far superior to most cable systems in the United States. (One major programmer visited PCTV's system in Tucson, and commented that most cable operators would be aghast to see how clear the wireless cable picture is.) It has no noise injected into it from poorly balanced amplifiers, and has no outages. Many cable operators are trying to squeeze the last dollar of cash-flow out of antiquated plant. The much-heralded fiber optic rebuilds are in fact a reaction to the long amplifier cascades and leaky plant in many areas. PCTV market research in all of its major markets shows that outages are a particular bete-noire with cable customers. In an independent survey of PCTV's own customers in Tucson, our customers who have switched from cable give us higher marks for picture quality and reliability.

For Turner to claim that wireless is technically inferior to cable in reliability is plainly untrue. Obviously Turner is hopeful that those who make policy at the FCC do not communicate with those who handle engineering matters.

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What makes this contention of Turner's even more ironic, is that no cable programmer in cable's history, to our knowledge, has ever charged different prices to those cable operators who operate technically inferior systems. It is well known that operators of the nation's ten thousand cable systems run the gamut of picture quality and reliability from superb to abysmal. And yet, programmers don't penalize the bad actors within the cable industry. Apparently, this form of policing is reserved solely for cable's competitors.

The most telling confirmation that there is in fact no free market in cable programming actually comes from the cable operator and programmer Viacom International. In a beautifully convoluted argument, Viacom says (we paraphrase) that due to cable's monopoly power, programmers have historically been forced to charge artificially low rates to cable companies. In other words, cable operators are paying less than they should for Viacom's programs. Further, Viacom says that it should be allowed to charge higher rates to the competitors of cable, since these competitors don't have this monopoly power. Thus, Viacom wants to charge non-monopolistic prices to cable competitors while it still caves in to the cable monopoly. In other words, please, FCC, let the cable operators continue to reap the benefits of monopoly, while we programmers make up the difference on what we charge cable's competitors. Surely, the Mad Hatter could not have done any better at his tea party. The argument is so outlandish, that we wonder if there is not actually a subtext message being delivered by Viacom to the Commission here; that they would like not to have the rates they charge cable competitors lowered, but rather have the rates they charge cable companies raised. From PCTV's point of view, it makes no difference whether the bridge is lowered or the water is raised; we merely request that cable be stripped of its monopoly muscle. But, Viacom's argument is a stunning endorsement that such muscle does exist.

Finally, PCTV has a general response, to all those cable related entities that want the Commission to keep its nose out of their business, when it comes to reviewing programming contracts. Respondents have created endless rationales for the FCC to let existing programming agreements stay buried in dusty files, never to see the light of day, regardless of the nature of complaint by an aggrieved competitor. We wish to advise the FCC, that the light of day is precisely what these programming contracts need. No one really knows what the major cable operators pay for their programming. It is one of the industry's best kept secrets, for good reasons. In some cases, even system managers do not know what their system pays for programming, if there are special deals done at the corporate level. In other situations, there are clauses in programming agreements that are routinely ignored by cable operators with tacit approval from programmers, but rigorously enforced against cable competitors. Claims by cable related programmers that the price differentials are reasonable, are not able to be judged one way or the other, if the contract terms and conditions are not available for examination.

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We maintain, that as Viacom itself hinted, some of these contracts reek of monopolistic practices. We believe that if these practices are given a good airing, then many programmers like Viacom will breathe a covert sigh of relief, as they then have government backing for charging realistic prices to large distributors. Therefore we request that the Commission, especially in these early years of implementation of the Cable Act, set as liberal a standard as possible for the admission of complaints by cable competitors of unfair treatment, and that public review of contracts be a hallmark of this standard.

People's Choice TV respectfully requests that the Commission enforce the Cable Act to the full extent of Congress's wishes, and no less. With the growth of cable competitors that will then ensue, many of these contentious items will in years to come become moot, and a real free market can assert itself.

Very truly yours,



Matthew Oristano
Chairman