programmers should be permitted to charge wireless cable operators more because wireless cable systems can be constructed and operated at a lower cost than traditional coaxial cable systems.[54] Were the Commission to condone such conduct, however, it would be acting at cross-purposes with Congress.

Viacom contends that by authorizing the Commission "to take into account actual and reasonable difference in the cost of creation, sale, delivery, or transmission" of programming, Congress intended for costs of distribution from the wireless operator to subscribers to be considered.[55] Tacitly acknowledging that its position is unsupported by any language in Section 628 or the three committee reports in the legislative history, Viacom is left to rely on the now-famous colloquy between Senator Inouye and Senator Kerrey (one of the most staunch opponents of program access legislation). WCA has previously demonstrated that this colloquy is at best ambiguous, and in the interest of brevity will refrain from repeating that showing.[56] Suffice it to say that the ambiguity renders this colloquy a classic example of why statements made in floor debate are discounted because "in the course of oral argument on the Senate floor, the choice of words by a Senator is not always accurate or exact."[57]

Particularly given the lack of any persuasive evidence that Congress intended to permit programmers to charge higher fees to more cost-efficient distribution technologies, adoption of a policy permitting higher prices to more efficient technologies would be contrary to the

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[54]*See* Viacom Petition, *supra* note 20, at 12-13.

[55]*See id.* at [DGA to provide].

[56]*See* Reply Comments of Wireless Cable Ass'n Int'l, MM Docket No. 92-265, at 20-22 (filed Feb. 16, 1993).

[57]*In re Carlson*, 292 F. Supp. 778, 783 (CD Cal. 1968).

public interest. As the Commission found in the *FR&O*, "such a result could artificially raise the retail price of programming and discourage the development of low-cost technologies contrary to the statute's goals."[58] And, since Congress has recognized that the economics of coaxial cable make coaxial cable overbuilds improbable,[59] disincentives to the development of low cost distribution technology will most certainly frustrate the stated goal of the 1992 Cable Act "in promoting a diversity of views provided through multiple technology media."[60]

Moreover, the notion that low-cost distribution technologies should be saddled with higher programming costs is anathema to the overriding purpose of the 1992 Cable Act -- to drive down the prices consumers pay for programming. Because they employ a more efficient distribution technology, wireless cable operators can offer lower rates to subscribers.[61] Absent far more than the ambiguous Kerrey/Inouye colloquy, the Commission cannot lawfully ascribe to Congress a desire to permit programmers to capture the cost

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[58]*FR&O, supra* note 1, 8 FCC Rcd at 3406. The Conference Report accompanying the 1992 Cable Act expressly stated that:

> [T]he conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.

H.R. 102-862, 102d Cong., 2d Sess., *reprinted at* Cong. Rec. H8308, H8332 (Sept. 14, 1992).

[59]1992 Cable Act, § 2(a)(2).

[60]*Id.* at § 6.

[61]*See* WCA Comments, *supra* note 12, at 10.

savings of new technologies through higher rates and deny consumers the benefits of those rates.

III. CONCLUSION.

What Congress expected of the Commission in this proceeding was clear: "[t]he conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable."[62] With the *FR&O*, the Commission has achieved Congress' expectations. Now, the Commission should reject the tired arguments of cable against program access and retain the rules adopted in the *FR&O* to assure operators of wireless cable and other alternative distribution systems access to the cable programming subscribers demand on fair and reasonable terms.

Respectfully submitted,

WIRELESS CABLE ASSOCIATION

CERTIFICATE OF SERVICE

I, Candace Lamoree, hereby certify that the foregoing "Opposition to Petitions for Reconsideration was served this 14th day of July, 1993 by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to:

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