NYNEX Government Affairs
1300 I Street NW Suite 400 West Washington DC 20005
202-336-7893

C R (Cal) Carrington
Director — Federal Regulatory Matters

EX PARTE OR LATE FILED

DOCKET FILE COPY ORIGINAL

NYNEX

February 3, 1994

Ex Parte

RECEIVED
FEB - 3 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-266

Dear Mr. Caton:

Yesterday, P. Rosario, representing the Office of the Attorney General of the State of Connecticut, S. Harms, M. Evans and I, representing NYNEX Corporation, met with A. Katz, J. Kaufman, J. Buchanan and B. Ramano of the Commission's Cable Services Bureau to discuss the "low penetration systems" issue in the above referenced proceeding.

The meeting opened with a general review by Mr. Rosario of the "Connecticut experience", which would support a conclusion with respect to that state, that implementation of the Commission's rate regulations has not achieved the objectives set out by Congress in the Cable Television Consumer Protection and Competition Act of 1992.

The attached material served as the basis for the ensuing discussion regarding the Commission's discretion to exclude the rates of low penetration systems from its cable rate benchmark. Questions on this matter should be directed to me at the address or telephone number shown above.

Sincerely,

CR Carrington

Attachment

cc: A. Katz
J. Kaufman
J. Buchanan
B. Ramano

No. of Copies rec'd 0+4
List A B C D E

NYNEX Recycles

MAIN POINTS ON EXCLUDING THE RATES OF LOW PENETRATION SYSTEMS FROM THE CABLE RATE BENCHMARK

1. <u>The Statute's Mandate to Eradicate Cable's Market Power Requires the Commission to Exclude the Rates of Low Penetration Systems from the Competitive Benchmark.</u>

   - One of the Cable Act's fundamental objectives is to "ensure that cable television operators do not have undue market power vis-a-vis . . . consumers." Cable Act § 2(b)(5).

   - Congress recognized that, where "a cable system faces no local competition," the "result is undue market power for the cable operator as compared to that of consumers and video programmers." Cable Act § 2(a)(2).

   - Low penetration systems face no local competition for video distribution services; accordingly, by Congress's own definition, they exercise undue market power.

   - Rather than a function of local competition, the low penetration of cable systems results from high-priced service, incomplete cable plant, low community demand for cable, and reports of poor service.

   - It is evident from the exorbitant rates charged by low penetration systems that they exercise market power. The Commission's own study shows that these systems' rates are 10% higher than even those of monopoly systems.

   - By including low penetration systems in its benchmark calculations, the Commission will lock into the rate structure the effects of undue market power -- the very evil the statute was intended to eradicate.

2. <u>The Commission Need Not Include Low Penetration Systems in the Benchmark Simply Because They Are Encompassed Within the Definition of "Effective Competition."</u>

   - The Cable Act requires only that, when establishing its rate scheme, the Commission "take into account" (among other factors) the rates of cable operators subject to "effective competition," which by statutory definition includes low penetration systems. Cable Act § 2(b)(5).

- The language "take into account" plainly denotes a balancing and evaluative process calculated to achieve the overriding Congressional goal of ensuring that cable rates are reasonable.

- The courts have repeatedly held that, where a statute specifies that an agency "take into account" certain factors, that agency need only inform itself about those factors and may ultimately qualify them in any manner or disregard one or more altogether.

- The Commission has already found that nothing in the cable statute "mandates that all factors must be weighted equally . . . or that any one factor or set of factors be given primary weight." FCC May 3, 1993, Order and Notice ¶ 177.

- Because the Commission can modify or disregard factors that, after ample consideration, it deems incompatible with ensuring reasonable rates, it can exclude the rates of low penetration systems on the ground that they distort the competitive benchmark.

- Congress deemed systems with low penetration to fall within the regulatory exemption for systems subject to "effective competition" merely because it feared that rate regulation would have a disproportionate impact on small or fledgling cable operators. There is no evidence that, through a simple cross-reference elsewhere in the statute, Congress intended these systems' rates inevitably to govern the rates for other cable operators.

3. <u>Public and Congressional Criticism of the FCC's Regulatory Scheme Provides Added Reason for the Commission to Reverse Its Decision to Include Low Penetration Systems.</u>

- Approximately one-third of consumers have seen their cable rates increase under the Commission's new regulations.

- Congress has expressed concern that the Commission's rate scheme has permitted monopoly cable systems to continue to charge excessive prices or even increase rates further.

- Congress has demanded that the Commission's regulatory scheme provide additional consumer protection from monopoly rates.

- The Commission can help rectify the situation by removing low penetration systems from the

competitive benchmark, thereby lowering existing cable rates substantially.

- To the extent that an individual cable operator suffers hardship from a further rollback in its rates, it can obtain adequate relief through a cost-of-service showing.