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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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| In the Matter of |) | |
| |) | |
| Implementation of the Cable Television |) | |
| Consumer Protection and Competition |) | MM Docket No. 92-265 |
| Act of 1992 |) | |
| |) | |
| Development of Competition and Diversity in Video |) | |
| Programming Distribution and Carriage |) | |

REPLY

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby replies to the pleadings filed by Tele-Communications, Inc. ("TCI") and Liberty Media Corporation ("Liberty Media") in opposition to WCA's Petition for Partial Reconsideration (the "Petition") of the *Second Report and Order ("SR&O")* in this proceeding.¹

In its Petition, WCA urged the Commission to amend newly-adopted Section 76.1302(a) of the Rules to specifically afford any multichannel video programming distributor ("MVPD") aggrieved by a violation of Section 616 of the Communications Act of 1934 (the "1934 Act") standing to file a complaint. WCA established beyond peradventure that Congress passed Section 12 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), which added Section 616 to the 1934 Act, in response to record evidence that horizontally-concentrated franchised cable multiple system operators

¹*Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage*, FCC 93-457 (released Oct. 22, 1993)[hereinafter cited as "SR&O"].

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("MSOs") were extracting from independent programmers concessions designed to forestall the introduction of competition by non-cable MVPDs.² Since competing MVPDs are clearly among the intended beneficiaries of Section 616, WCA urged reversal of the decision to deny them standing to file complaints when violations of Section 616 occur.

Save for TCI and its corporate clone, Liberty Media,³ WCA's Petition has drawn unanimous support from those filing comments.⁴ It is not surprising that TCI would seek to bar MVPDs from complaining when a cable operator coerces a programmer to grant exclusivity. Time and again, TCI has been cited for its bullying tactics towards programmers.⁵ Indeed, throughout the Congressional debate leading up to enactment of the

²See Petition, at 2-4.

³Liberty Media was formed by TCI in 1990 and spun off to TCI shareholders in a transparent attempt to avoid restrictions on horizontal concentration and vertical integration then being debated by Congress. The United States Department of Justice has determined that five shareholders maintain voting control of both firms, that John Malone has simultaneously served as President, Chief Executive Officer and a director of TCI and Chairman of the Board of Liberty, and that Bob Magness has simultaneously served as Chairman of the Board of TCI and a director of Liberty. See *US v. TCI*, Competitive Impact Statement, Civ. Act. No. 94-0948 (DC Dist. Ct.) reprinted at 59 Fed. Reg. 24,723, 24,726 (May 12, 1994). On January 27, 1994, after it became evident that the divestiture of Liberty Media was unnecessary for TCI to comply with the 1992 Cable Act and the FCC's implementing rules, TCI and Liberty agreed to merge.

⁴See Comments of Liberty Cable Company, Inc. on Petition for Partial Reconsideration, MM Docket No. 92-265 (filed May 24, 1994); Comments of GTE Service Corporation on Petition for Reconsideration, MM Docket No. 92-265 (filed May 24, 1994).

⁵See, e.g. Roberts, "Cable Cabal: How Giant TCI Uses Self-Dealing, Hardball to Dominate Market," *Wall St. J.* at A1 (Jan. 27, 1992); Powell, Cable's "Biggest Leaguer," *Newsweek*, at 40 (June 1, 1988); Landro, "Tele-Communications Sets Cable-TV Agenda," *Wall St. J.*, at 6 (Feb. 11, 1986).

1992 Cable Act, TCI's misdeeds were frequently cited as evidence of the need for legislation.⁶ It is no wonder that the TCI/Liberty cabal wants to restrict standing to complain under Section 616 to just those programmers that can be coerced into silence.

I. Congress Envisioned Section 616 Complaints By Persons Other Than Video Programming Vendors.

Be that as it may, the arguments advanced by TCI and Liberty Media in opposition to WCA's Petition do not hold up under scrutiny. It is hornbook law that unless Congress has otherwise mandated, any person is entitled to participate in agency adjudicatory proceedings if that person has "an economic . . . interest within the zone of interests to be protected or regulated by the statute."⁷ If TCI and Liberty are to prevail, they must convince the Commission that Congress specifically intended to restrict standing under Section 616 solely to programmers. Neither the language of Section 616 nor its legislative history support that proposition.

Significantly, neither TCI nor Liberty has identified even a single provision of the 1992 Cable Act or its legislative history that expressly calls for the Commission to deny an aggrieved MVPD standing to complain when Section 616 is violated. Rather, they weave a tangled web of discombobulated excerpts from Section 616 and its legislative history to construct from whole cloth their argument that Congress intended to deny aggrieved MVPDs standing.

⁶See, e.g. Statement of Sen. Danforth, Cong. Rec. S426 (Jan. 27, 1992); Statement of Sen. Metzenbaum, Cong. Rec. S566 (Jan. 27, 1992);

⁷Davis and Pierce, 3 Administrative Law Treatise §16.10, at 65 (3d ed.).

From all appearances, Congress paid scant, if any, attention to which entities should be entitled to complain when a programmer is coerced into giving exclusivity. There is no question that Congress was not only concerned with the impact that coerced exclusivity has on programmers; Congress was equally concerned with the impact that coerced exclusivity has on the ability of emerging technologies to garner the programming necessary to compete.

To cite just one example, the Senate Committee on Commerce, Science and Transportation specifically found that:

In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.

* * *

[T]he Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors.⁸

Clearly, aggrieved MVPDs, as well as programmers, were intended to be the beneficiaries of Section 616. However, TCI would have the Commission ignore Congress' efforts on the grounds that:

Section 616 provides for expedited review of "complaints made by a video programming vendor pursuant to this section" and goes on to define exactly

⁸S. Rep. No. 102-92, 102d Cong., 1st Sess., at 23-24 (1991). See also H. Rep. No. 102-628, 102d Cong., 2d Sess., at 42-44 (1992). It is worth noting that this excerpt appears in the specific discussion by the Committee of what ultimately became Section 616 and, as demonstrated *infra*, is fully consistent with the plain language of Section 616. Thus, Liberty Media's reliance on Board of Governors of Fed. Reserve System. v. Dimension Fin. Corp. is grossly misplaced. See Liberty Media Opposition, at 4.

what a "video programming vendor" is . These is no mention in Section 616 of complaints to be filed by multichannel video programming distributors . . .⁹

TCI's argument is based on a false premise. What TCI conveniently ignores is that Section 616(a)(6) expressly contemplates that persons other than video programming vendors will be filing complaints. Section 616(a)(6) specifies that the Commission is to "provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section." If TCI were correct, and Congress only contemplated that video programming vendors would be entitled to file complaints, Section 616(a)(6) would presumably have called for the Commission to "provide penalties to be assessed against any video programming vendor filing a frivolous complaint under this section," since no one other than a video programming vendor would be entitled to file a complaint. Congress' use of the all-inclusive "person" in Section 616(a)(6) rather than the more restrictive "video programming vendor" suggests a recognition by Congress that non-video programming vendors would be filing Section 616 complaints.¹⁰ The Commission should decline TCI's unsupportable entreaties to

⁹TCI Opposition, at 3-4 (footnotes omitted).

¹⁰TCI and Liberty also seek to make much of the fact that in two obscure instances in the legislative history, it is suggested by Congress that the Commission expedite all complaints filed under Section 616. They stretch to argue that since Section 616(a)(4) only provides for expedited processing of complaints by video programming vendors, Congress must have intended for only video programming vendors to file complaints under Section 616. See Liberty Media Opposition, at 2 n.2, TCI Opposition, at 4-5. However, that is not the only possible explanation. For example, although Section 616(a)(4) mandates that the Commission give expedited treatment to Section 616 complaints filed by video programming vendors, it certainly does not preclude the Commission from giving expedited treatment to the complaints filed by others. However, whatever the references in the legislative history relied upon by TCI and Liberty Media calling for expedited processing of all complaints may mean, they cannot override the language of Section 616(a)(6) and its suggestion that Congress intended for Section 616 complaints to be filed by those who are not video programming vendors.

restrict standing in the face of Section 616(a)(6)'s reference to complaints filed by "any person."

II. Section 628 of the Cable Act Does Not Provide An Effective Remedy When A Cable Operator Coerces Exclusivity From An Unaffiliated Programmer.

TCI also misleadingly contends that MVPDs aggrieved by coerced exclusivity have adequate redress under Section 628 of the 1992 Cable Act.¹¹ However, TCI conveniently fails to discuss that Section 628 is designed to address the problems associated with vertical integration and is limited in scope to those situations where vertical integration proves problematic. Section 628 simply is not implicated when a cable operator coerces an exclusive programming agreement from an unaffiliated programmer. It is Section 616 that is intended by Congress to address the problems associated with the undue market power cable operators derive from their entrenched local monopolies. Whenever a cable operator coerces an exclusive programming agreement, it is Section 616 that is implicated, regardless of whether vertical integration is present.

III. Section 76.1302(q) of The Commission's Rules Assures That MVPDs Will Refrain From Filing Abusive Complaints.

Both TCI and Liberty Media urge the Commission to deny wireless cable operators standing to complain when Section 616 is violated because of groundless fears of potential "abuse."¹² It is certainly telling that neither TCI nor Liberty Media has cited a single instance in which wireless cable operators or other MVPDs have abused their rights under the 1992

¹¹See TCI Opposition, at 6-8.

¹²See *id.*, at 9-10; Liberty Media Opposition, at 6-7.

Cable Act -- no abuse has occurred. More importantly, to the extent abuses might occur in the future, the Commission has available to it a narrowly tailored remedy. With Section 616(a)(6) of the 1992 Cable Act, Congress authorized the Commission to impose penalties on those filing frivolous complaints. Section 76.1302(q) of the Commission's Rules, which was promulgated by the *Second Report and Order*, specifically provides that "it shall be unlawful for any party to file a frivolous complaint with the Commission alleging any violation of this subpart. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions." That provision will assure that MVPDs will not abuse their right to file Section 616 complaints.

Finally, TCI wrongly suggests that WCA engaged in some sort of abuse when, in the Petition, WCA noted that "[b]ased on . . . discussions with Fox affiliates, wireless cable operators believe that TCI had been able to coerce cable exclusivity from Fox for FX by implicitly or explicitly threatening to drop Fox's broadcast affiliates from TCI's cable systems and/or refusing to carry FX absent a grant of exclusivity."¹³ In fact, representatives of WCA were told of the coercion by Fox, which repeated its allegations to a then-sitting Commissioner. Simply put, the FX story supports WCA's call for awarding aggrieved MVPDs standing, rather than TCI's position.

¹³Petition, at 6.

WHEREFORE, for the foregoing reasons, WCA urges the Commission to amend Section 76.1302(a) to specifically afford any MVPD aggrieved by a violation of Section 616 of the 1934 Act standing to file a complaint.

Respectfully submitted,

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June 3, 1994

CERTIFICATE OF SERVICE

I, Candace J. Lamoree, hereby certify that the foregoing Reply was served this 3rd day of June, 1994, by depositing a true copy thereof with the United States Postal Service, first-class postage prepaid, addressed to the following:

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