Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of | ) | |
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| Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; | ) | MM Docket 92-266 |
| | ) | |
| Rate Regulation; and | ) | MM Docket 93-215 |
| | ) | |
| Adoption of a Uniform Accounting System for Provision of Regulated Cable Service | ) | CS Docket 94-28 |

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**REPLY COMMENTS TO PETITIONS FOR RECONSIDERATION**

GTE Service Corporation, on behalf of its affiliated GTE domestic telephone operating companies (GTE), respectfully submits these Reply Comments on the petitions for reconsideration filed in these dockets.[1] Reaction to these petitions, in the form of oppositions, responses, comments and one letter, were filed by GTE, A&E and

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[1] Petitions for reconsideration were filed by Bell Atlantic, Bend Cable Communications, Inc. *et al.*, Cablevision Industries, Inc., Comcast Cable Communications, Inc., the Commissioner of Baseball, Eternal Word Television Network, Media General of Fairfax County, Inc., the National Association of Telecommunications Officers and Advisors *et al.* (NATOA), Ovation, Inc. and PBS Horizons Cable Network, Dr. Everett C. Parker and Henry Geller, The Times Mirror Co., United Video, and Viacom International, Inc. The specific Commission orders subject to these petitions are *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Dkt. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, FCC 94-38 (*Second Recon. Order*); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation; Buy-Through Prohibition*, MM Dkts. 92-266, 92-262, Third Order on Reconsideration, FCC 94-40 (*Third Recon. Order*); and *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation; and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service*, MM Dkt. 93-215, CS Dkt. 94-28, Report and Order and Further Notice of Proposed Rulemaking, FCC 94-39 (*Cost of Service Order*).

ESPN, Bell Atlantic, Continental Cablevision, Discovery Communications, Fox Basic Cable, Liberty Media, NATOA, National Cable Television Association (NCTA), Time Warner, the United States Telephone Association (USTA) and Viacom.

## I. INTRODUCTION.

As set forth below, GTE (1) joins a number of cable industry participants in opposing NATOA's recommendation to restrict "fee plus" advertising and itemization of PEG costs; (2) supports NATOA's recommendation that franchise-related costs be treated as "external" in the cable industry price cap mechanism; (3) concurs with Liberty Media that the question of the proper mark-up for programming should be addressed in the Fifth Notice of Proposed Rulemaking (NPRM) but disagrees that any change adopted therein be treated as retroactive; and (4) opposes Discovery's contention that it is unnecessary to apply affiliate transaction rules to entrenched cable interests.

## II. THE RECOMMENDATION TO RESTRICT "FEE PLUS" ADVERTISING AND THE ITEMIZATION OF PEG COSTS SHOULD BE REJECTED.

In its petition for reconsideration, NATOA recommends that cable operators be prohibited from "fee plus" advertising and that the Commission narrowly restrict the itemization of costs arising from franchise agreement obligations to provide institutional networks, wiring of public buildings, special community video service and voice and data transmissions. (NATOA Pet. for Recon., at 7-14.) NCTA (Opp., at 4-7), Continental Cablevision (Resp., at 13-20), Time Warner (Opp., at 1-6) and Viacom (Opp., at 3-7) vigorously oppose NATOA's recommendations. GTE joins these cable industry participants in their opposition.

NATOA's recommendations simply reflect the continuing attempts by local authorities to shield the imposition of indirect taxes from the scrutiny of their constituents. As such, the Commission ought not to collude with these bodies which are endeavoring to avoid political accountability.

Contrary to the implicit position of many local governments, franchise fees do impose a direct burden on the marketplace. With the impending convergence of voice and video technologies, and attendant competition between the telephone and cable industries, these indirect taxes will become ever more apparent to consumers. Particularly in this light, it is unsurprising that taxing authorities are striving ever more diligently to conceal their actions. NATOA's recommendations to prohibit "fee plus" advertising and that the Commission narrowly restrict the itemization of costs arising from franchise agreement obligations is merely an attempt to escape accountability. NATOA's recommendations should be rejected.

## III. FRANCHISE-RELATED COSTS SHOULD BE TREATED AS EXTERNAL IN THE CABLE PRICE CAP MECHANISM.

In its petition for reconsideration, NATOA recommends that the Commission clarify what are "franchise-related costs" for the purpose of calculating external cost increases. (NATOA Pet. for Recon., at 3-6.)[2] Seeing NATOA's recommendation as an effort to narrow the pass-through rule, NCTA opposes. (NCTA Opp., at 2-4.) GTE supports NATOA; NCTA's opposition should be dismissed.

NATOA asks the Commission to modify its rules to specify the types of franchise costs that may form the basis for rate adjustments. According to NATOA, under the

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[2] *See* 47 C.F.R. § 76.922(d)(2).

existing rules, cable operators are afforded flexibility to interpret costs that may be classified as "franchise-related". GTE agrees with this assessment. Cable operators, seeking to maintain historically high rate levels, may take liberty with the term "franchise-related" cost and claim any cost that may be remotely associated with the requirements that local franchise authorities may impose. The vagueness in Commission's rules should be corrected in order to avoid cable operator abuse of this cost recovery mechanism.

## IV. THE APPROPRIATE MARK-UP FOR PROGRAMMING SHOULD PROPERLY BE ADDRESSED IN THE FIFTH NPRM, NOT ON THESE PETITIONS FOR RECONSIDERATION.

Several cable industry and programming participants have requested reconsideration of the Commission's 7.5% mark-up on programming costs and the "per channel adjustment" or "network adjustment". (E.g., Commissioner of Baseball Pet. for Recon., at 2; United Video Pet. for Recon., at 8-9; Viacom Pet. for Recon., at 2-6; Programming Providers Pet. for Recon., at 8-19.) These petitions were supported in opening comments by a number of participants. (E.g., Fox Basic Cable Letter, at 2; Discovery Communications, Opp. at 3-5.) Indeed, two commentators have made specific proposals for the appropriated mark-up for programming. (Continental Cablevision Resp., at 10-12; A&E Comments, at 9-13.)

In contrast to these positions, one participant has prudently recommended that these issues should be more properly addressed in the pending Fifth NPRM . (Liberty Media Comments, at 1-4.) GTE agrees. The Commission should judiciously defer these issues to the Fifth NPRM, rather than attempting to address them in the context of these petitions for reconsideration. However, while GTE supports Liberty Media in

this respect, Liberty Media's suggestion that any change in Commission policy should be made retroactive is imprudent. This latter suggestion should be rejected.

## V. IT IS WHOLLY CONSISTENT WITH THE ACT TO APPLY AFFILIATE TRANSACTION RULES TO ENTRENCHED CABLE INTERESTS.

In commenting on Bell Atlantic's petition for reconsideration, Discovery Communications engages in a lengthy challenge to the cable affiliate transaction rules. (Discovery Opp., at 7-10.) Discovery premises its attack on the assertion that the voice and video marketplaces are significantly distinct such that "the cable programmer affiliate stands in quite a different posture" than a telephone company affiliate. This assertion, in turn, rests upon the supposition that a cable programmer affiliate's "primary goal is not to serve its affiliate [the cable operator], but to maximize distribution and viewership." Because this supposition is wrong, Discovery's argument fails.

While Discovery might be correct as to the primary goal of the programming affiliate – the supposition underlying its argument – this says nothing about the objectives of the affiliated cable operator in the first instance. Contrary to Discovery's position, Congress has specifically found that cable operators frequently act to undermine the very programming distribution objective which Discovery touts. It was for this reason that Congress enacted Section 616 of the Act, 47 U.S.C. § 536, in order to protect video programming vendors from the anti-competitive actions of multichannel video programming distributors (MVPDs). Indeed, if unaffiliated programmers are so subject to such predatory conduct by cable operators, consider the dilemma for an affiliated programmer which receives a demand for exclusive rights against other MVPDs from its affiliated cable operator. Such an affiliate is hardly in a position to file a Section 616 complaint.

The Commission should not be so easily swayed by Discovery's assurances that affiliated cable and programming entities will act in a manner which does not warrant public scrutiny. To the contrary, cable operators have a long history of anti-competitive conduct which demands careful Commission oversight of affiliate transactions.

## VI. CONCLUSION.

For the reasons stated hereinabove, GTE respectfully urges the Commission to (1) reject NATOA's recommendation to restrict "fee plus" advertising and the itemization of PEG costs, (2) adopt NATOA's recommendation to treat franchise-related fees as external in the cable price cap mechanism, (3) defer the question of the appropriate mark-up for programming to the Fifth NPRM, and (4) reject Discovery's contention that affiliate transaction rules ought not to be applied to entrenched cable interests.

Respectfully submitted,

GTE Service Corporation and its affiliated domestic telephone operating companies

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## Certificate of Service

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