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

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 93-215
	)	
and	)	
	)	
Adoption of a Uniform Accounting System for Provision of Regulated Cable Service	)	CS Docket No. 94-28

REPLY COMMENTS OF
LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty Media") submits these reply comments in response to selected comments in this proceeding. No commenter has provided any empirical data or analytical support for the Commission's proposed revisions to the cable affiliate transaction rules or the adoption of any productivity offset.

I. The Record Confirms That The Proposed Revisions To the Affiliate Transaction Rules Are Unnecessary And Contrary To The Public Interest.

As Liberty Media explained in its initial comments, application of the proposed telco affiliate transaction rules to cable ignores substantial differences in the relevant affiliation standards, industries, and nature of affiliate transactions. The proposed revisions would result in substantial costs and burdens for cable operators and programmers,

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the Commission, and innumerable franchising authorities without any benefit to consumers. An "Economic Analysis of the Proposed Change in the Cable Television Affiliate Transaction Rule" by Robert W. Crandall ("Crandall Report") submitted by Liberty Media with its initial comments demonstrates that the proposed revisions are unnecessary and inappropriate.[1]

Every commenter with an interest in a cable programming service similarly opposed the Commission's proposed revisions to the cable affiliate transaction rules:

- "These proposed rules ignore significant differences between the cable and telephone industries. If applied to the cable industry they will have significant unintended consequences that will disserve the public interest."

  "First, the rules will limit the incentives for cable operators to invest in existing and new program services."

  "Second, the proposed affiliate transaction rules will likely increase the pressure on cable operators to shift affiliated programming to a la carte offerings, where their rates would not be subject to regulation." Comments of Discovery Communications, Inc. ("Discovery") at 3, 6, 7.

- "[T]he Commission's proposal which would generally prevent cable-affiliated programmers from pricing their services to their affiliates at prevailing company prices should not be adopted because it would seriously damage the vitality of

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[1] Turner Broadcasting System, Inc. ("Turner") also submitted with its comments two analyses based on economic models suggesting that the proposed revisions are unnecessary, would impose substantial additional costs upon affiliated programmers, and would create significant disincentives to cable operator investments in diverse programming services. See M. Salinger, "The Likely Effect of the FCC's Proposed Rule for Affiliate Transactions under Price Regulation" and "The Effect of a 'Prevailing Price' Rule for Affiliate Transactions under Price Regulation" (June 1994).

the cable programming industry without achieving any benefit to consumers." Comments of Jones Education Networks, Inc. ("Jones") at 3.

- "The Commission's proposed limit on an operator's ability to establish programming costs on the basis of prevailing company pricing will, in effect, reestablish the same disincentives for programming creation and expansion that the Commission sought to eliminate...." Comments of Rainbow Programming Holdings, Inc. at 5.

- "Restricting the use of prevailing company pricing for programming will undo these efforts to facilitate and encourage the development of programming, and will create needless burdens for operators and programmers." Comments of Tele-Communications, Inc. ("TCI") at 50.

- "Compliance with the Commission's proposed affiliate transaction rules would impose substantial burdens upon nonregulated businesses...."

  "The potential regulatory burdens on affiliated programmers are entirely inconsistent with the Commission's policy -- announced just last year -- to create a regulatory environment congenial to the development of programming." Comments of Time Warner Entertainment Company, L.P. ("Time Warner") at 26.

- "As a solution to a problem that does not exist, the proposal is inappropriate and unlawful." Turner Comments at 3.

Only selected telco commenters[2] support adoption of the revised cable affiliate transaction rules. Repeating their claims of technological convergence, telco commenters argue that, if the proposed telco affiliate transaction rules are adopted, they "should apply equally to cable

[2] BellSouth Telecommunications, Inc. ("BellSouth") opposes the proposed revisions to the cable affiliate transaction rules, explaining that "[t]he limited additional protection that the public would derive from the proposed rules does not begin to justify the massive additional burden that the proposed rules would impose." BellSouth Comments at 4.

as well." Comments of The Bell Atlantic Telephone Companies ("Bell Atlantic") at 11; see Comments of GTE Service Corp. ("GTE") at 12. Of course, Bell Atlantic and GTE vigorously opposed similar revisions to the telco rules. Bell Atlantic Comments in CC Docket No. 93-251, filed Dec. 10, 1993, at 1 ("the rules proposed in this proceeding would take a substantial, and ill-advised, step backward"); GTE Comments in CC Docket No. 93-251, filed Dec. 10, 1993, at 2 ("Without any real improvement in the quality of relevant information made available to the Commission, the proposed rule changes would dramatically increase regulatory costs and burdens"). Bell Atlantic and GTE simply ignore the substantial differences in the cable and telco industries and in the underlying affiliation standards for application of the rules.[3]

If cable operators could not use prevailing company prices to validate affiliated programming transactions, they would be required to set the cost of the programming at the lower of its estimated fair market value or the programmers' net book cost. Again, as Liberty Media explained in its comments, both of these alternatives involve subjective, costly, and burdensome evaluations. See Liberty Media Comments at 14-18; Crandall Report at 13-18. Indeed, in addition to the difficulty and expense of determining net book cost, such

[3] See Liberty Media Comments at 4-9; Crandall Report at 7-9. Other commenters similarly identified significant differences in industry characteristics relevant to application of the affiliate transaction rules. Discovery Comments at 4-5; Jones Comments at 5-7; TCI Comments at 45-49; Time Warner Comments at 23-25.

measure appears to be particularly ill-suited to valuing programming:

> The Commission's treatment of costs for cable-affiliated programming must be sensitive to the nature of the programming business. In traditional terms, a programmer does not always have significant capital. Much of the cost of producing, obtaining and airing programming, for instance, may consist of items that traditionally are expended, such as salaries paid to on air talent or production personnel. The ratio of capital costs to expenses, as those terms are traditionally defined, for a programmer may be much lower than for traditional utilities such as telephone companies.
>
> As a result, application of traditional rate of return principles to programming costs is likely to lead to absurd results.

Jones Comments at 8-9; see Crandall Report at 15-16.[4] Consequently, in addition to substantial regulatory compliance costs, the Commission's proposal to eviscerate the "prevailing company price" test would likely yield recoverable programming costs which are inconsistent with marketplace values.

II. The Record Provides No Support For A Productivity Offset.

No commenter questioned the Commission's tentative decision to exclude programming costs from any productivity offset. Indeed, the record in this proceeding provides no support for a productivity offset of any kind. This is in stark contrast to the record developed by the Commission

[4] As Dr. Crandall explained in his analysis, because the allowable rate of return must reflect the risk of the investment, "cable television programming would require a relatively high rate of return, and even this would not mitigate many of the problems of cost-of-service regulation." Crandall Report at 16.

before proposing a productivity offset for the telephone industry, which included the Commission's own long- and short-term studies, two independent studies, and Commission review of two studies before the divestiture of AT&T. See Policies and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd. 6786, 6797-98 (1990), on recon., 6 FCC Rcd. 2637 (1991), aff'd sub nom. National Rural Telecom. Ass'n v. F.C.C., 988 F.2d 174 (D.C. Cir. 1993); Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 3 FCC Rcd. 3195, 3401-05 (1988).

As Liberty Media noted in its comments at 22, the productivity offset proposed by the Commission was based upon an unsupported comment merely offering 2 percent as an example of a static productivity offset. Only the telco commenters, based on self-serving arguments of "regulatory symmetry" or "parity," supported a productivity offset "similar to that of the telephone industry." GTE Comments at 14; Bell Atlantic Comments at 3-6. In contrast, cable commenters presented detailed data demonstrating that any productivity offset is unwarranted and premature. See Comments of National Cable Television Association, Inc. at 13-22; Comments of Continental Cablevision, Inc., et al., at Exhibit F (D. Roddy, "Analysis of the FCC's Cable TV Productivity Offset Proposal"). Clearly, there is no record support for any productivity offset, much less the Commission's specific proposal.

Conclusion

The record is devoid of empirical support for the Commission's proposal to revise its newly adopted cable affiliate transaction rule. Its proposal would discourage cable operator investments in programming, thereby eliminating the "substantial" consumer benefits recognized by both Congress and the Commission. The regulatory costs of the Commission's proposal would be prohibitive, without any resulting benefit to consumers. Similarly, the productivity offset proposed by the Commission is without support in the record and is unwarranted.

Respectfully submitted,

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