

Original

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

DEC 16 1994

In the Matter of)
)
Implementation of Sections of the)
Cable Television Consumer Protection)
and Competition Act of 1992: Rate Regulation)
)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
MM Docket No. 93-215
MM Docket No. 92-266
DOCKET FILE

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA"), by its counsel, hereby submits its Reply Comments in response to the Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹ This proceeding was initiated to "establish a more complete record for purposes of promulgating final rate rules applicable to small operators, independent small systems, and small systems owned by small MSOs [by] obtain[ing] comment on possible alternative definitions..."²

INTRODUCTION

As discussed below, the parties filing comments in this proceeding generally agree on three fundamental points: (1) the Commission must promptly adopt additional substantive relief for small cable systems and small cable companies; (2) the eligibility standards for such relief should be relaxed from the current

¹ Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket Nos, 93-215, 92-266, FCC 94-234, released September 26, 1994 ("Further Notice")

² Id. at ¶11.

inadequate definitions so that all small systems (regardless of ownership) and cable companies with at least \$40 million in annual revenues from regulated cable services (or a subscriber-based equivalent) should be afforded relief; and (3) different degrees of relaxed regulation may be adopted for companies of up to \$100 million in annual revenues from regulated cable services (or a subscriber-based equivalent). Based on the general consensus expressed in the comments, the Commission should act promptly to afford the relief requested. To do otherwise would plainly be inconsistent with the record in this rulemaking proceeding -- a proceeding which was initiated by the Commission on its own motion.

In our initial Comments, we urged the Commission to afford relief to systems with 1,000 or fewer subscribers (regardless of their ownership) and to systems owned by "small cable companies."³ We demonstrated that there should be no "MSO cap" with respect to small system relief because all small systems, regardless of ownership, labor under the same burdens in complying with the Commission's rate regulation requirements.⁴ We also demonstrated that relief for systems with "1,000 or fewer subscribers" was not only compelled by the plain language and legislative history of the 1992 Cable Act, but also by sound public policy.⁵

Moreover, with respect to "small system" relief, we urged the Commission to revisit its decision to measure eligibility for small system relief on a headend basis. As we showed, the reasons for adopting the headend measure for other regulatory purposes do not apply with respect to determining eligibility for relief from rate

³ Comments of the National Cable Television Association, Inc., MM Docket Nos. 93-215, 92-266, filed November 16, 1994 ("NCTA Comments").

⁴ Id. at 10-13.

⁵ Id. at 7-13.

regulation.⁶ Instead, since rate regulation is imposed and calculated on a franchise basis, we urged that, for purposes of rate regulation, eligibility for small system relief be measured on a franchise basis.

We also urged the Commission to afford relief to small cable companies.⁷ Such relief would implement the federal policy, reflected in the 1992 Cable Act and the Small Business Act, of assisting small businesses in meeting the burdens of regulation. We recommended that a "small cable company" should be defined, at a minimum, as a company with \$40 million or less in annual gross revenues from regulated cable services (or a subscriber-based equivalent).⁸ In addition, based on its relaxed regulation of Tier 2 LECs, we urged that the Commission similarly should afford significant relief to comparable cable companies -- those with \$100 million or less in annual gross revenues from regulated cable operations (or a subscriber-based equivalent).⁹ As we discussed in our initial Comments, the definitions of small cable systems and small cable companies which we proposed find support not only in the 1992 Cable Act and the Small Business Act, but also in Commission precedent providing for special treatment for smaller telephone companies and "small business" applicants for broadband PCS licenses and in positions taken by the Small Business Administration ("SBA") in previous phases of this proceeding.¹⁰

⁶ Id. at 13-16.

⁷ Id. at 16-25.

⁸ Id. at 19-25.

⁹ Id. at 22.

¹⁰ Id. at 19-25.

Significantly, the "small business" eligibility standards adopted in the telco and PCS proceedings we cited were based on either the ability of the subject companies to attract capital (e.g., PCS auction definitions) or their ability to withstand burdensome regulatory requirements (e.g., telco definitions). While these were the same factors that the Commission said it must take into account in crafting eligibility standards for "small operator" cable rate regulation relief in earlier stages of this proceeding¹¹, the standard it eventually adopted for cable "small operator" relief (15,000 or fewer subscribers) is fundamentally at odds with the more liberal standards adopted in the PCS and telco proceedings.¹²

I. The Commission Must Promptly Afford Substantive Relief to Small Systems and Small Cable Companies

In addition to NCTA, five parties filed comments in response to the Further Notice: the Small Business Administration ("SBA")¹³; the Small Cable Business Association ("SCBA")¹⁴, the Cable Telecommunications Association ("CATA")¹⁵, and two groups -- one composed of mid-sized and smaller cable

¹¹ Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, March 30, 1994 at ¶ 118-120 and n.157.

¹² The 15,000 standard equates to a company with approximately \$3.6 to \$4.5 million in gross annual revenues (id. at ¶120) versus the \$100 million or \$40 million standards for smaller telco relief and PCS small business preferences.

¹³ Comments of the Chief Counsel for Advocacy of the United States Small Business Administration on the Further Notice of Proposed Rulemaking, MM Docket Nos. 93-215, 92-266, filed November 16, 1994 ("SBA Comments").

¹⁴ Comments to the Further Notice of Proposed Rulemaking, filed by the Small Cable Business Association, MM Docket No. 93-266, filed November 16, 1994 ("SCBA Comments").

¹⁵ Comments of the Cable Telecommunications Association, MM Docket Nos. 92-215, 92-266, filed November 16, 1994 ("CATA Comments").

operators,¹⁶ and the other composed of smaller operators.¹⁷ As noted above, all commenters agree that, whatever eligibility standards are adopted in this proceeding for regulatory relief purposes, the Commission must seriously and promptly provide significant substantive relief to smaller cable entities.¹⁸ As NCTA emphasized in its initial comments, regardless of the size classifications adopted by the Commission, the federal policy of ameliorating burdens on small businesses in general¹⁹ and small cable companies in particular,²⁰ will not be satisfied unless and until real relief from the current rate regulation regime is afforded to smaller cable entities.

Indeed, in addition to discussing eligibility standards, all of the commenting parties have adverted to a number of proposals for substantive relief which the Commission should consider expeditiously.²¹ In this regard, in addition

¹⁶ Joint Comments of Cable Operators, MM Docket Nos. 92-215, 92-266, filed November 16, 1994 ("Joint Comments").

¹⁷ Comments of Avenue TV Cable, Massillan Cable TV, Pegasus Cable and Thomson Cable Vision Co., MM Docket Nos. 93-215, 92-266, filed November 16, 1994 ("Avenue TV Cable et al. Comments").

¹⁸ See SBA Comments at 8-10; SCBA Comments at 31-34; CATA Comments at 3-4; Joint Comments at 12; Avenue TV Cable Comments at 15-18.

¹⁹ See Small Business Administration Act, 15 U.S.C. §631(a) et. seq. ("Government should aid, counsel, assist and protect, insofar as possible, the interests of small business concerns").

²⁰ See Sections 623(b)(2)(A) and 623(i) of the Cable Television Consumer Protection and Competition Act of 1992, Pub L. No. 102-305, 106 Stat. 1460 (1992)("1992 Cable Act").

²¹ NCTA Comments at 3-4; SBA Comments at 8-10; SCBA Comments at 31-34; CATA Comments at 3-4; Avenue TV Cable et al. 15-19; Joint Comments at 12. These proposals include CATA's proposal for alternative regulation, incorporated by reference in CATA's comments. The Commission should consider CATA's proposal as one means of reducing rate regulatory burdens for

to considering the proposals outlined in the initial comments in this proceeding, the Commission should immediately revisit that portion of its "going forward" decision limiting headend equipment cost pass-throughs to independent small systems of 1,000 or fewer subscribers and small systems owned by small MSOs.²²

Although the Commission attempted in its going forward rules to provide a measure of substantive relief to these small cable entities, the rules fall short of their desired goal. As adopted, and as both CATA and SCBA have indicated in letters to the Commission,²³ the headend equipment cost pass-through alternative is viable only for systems with 200-300 subscribers; and neither this option nor the \$.20 per subscriber formula alone permits any small system to both recover its equipment costs and maintain the reasonable mark-up permitted for systems able to spread headend costs over a larger subscriber base. To create meaningful incentives for small cable entities to add programming, the Commission should allow them to pass-through headend costs as well as take the \$.20 per channel adjustment.

As the commenters in this proceeding make clear, significant, substantive relief is required to address the serious and special problems small

Footnote cont'd

small cable systems, small cable companies and the communities in which they are located. Proposals like that advanced by CATA, as well as other proposals for relief, would bring certainty to operators of eligible systems, increasing their ability to attract the capital necessary to upgrade and improve their systems.

²² See Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, MM Docket No. 92-266, MM Docket No. 93-215, FCC 94-286, November 18, 1994 at ¶¶ 91-94..

²³ See Letter to the Honorable Reed E. Hundt, Chairman, FCC from Stephen R. Effros, President, CATA, November 23, 1994; Letter to Mr. Reed E. Hundt, Chairman, Federal Communications Commission from David D. Kinley, Chairman, SCBA, December 7, 1994.

system operators and small cable companies have in dealing with rate-regulation -- problems which are amply documented in the record of this and other rate proceedings.

II. All Commenters Agree That Current Definitions For Small System And Small Company Rate Relief Are Inadequate and Must Be Revised

As noted above, commenters in this proceeding fundamentally agree that the current definitional scheme is inadequate and fails to reflect business reality. Among those parties addressing the "small system" definition, most echo the NCTA position that all systems with 1,000 or fewer subscribers, without regard to MSO ownership, should be entitled to relief.²⁴ The Commission's rationale for an "MSO cap" on small system relief finds no support in the record, and as CATA points out, "[n]othing in the [FCC's] rules would permit a company to charge higher rates to subscribers in large communities in order to subsidize subscribers in small communities."²⁵ Moreover, those who addressed the issue agree that, for purposes of small system relief, eligibility should be measured on a franchise, not headend, basis.²⁶

With respect to the definition of a "small cable company," most commenters agree that the current definitions of "small cable operator" are inadequate and that the relief provided to those entities is insufficient. To address this inadequacy, a number of commenters argue that, at a minimum, companies with \$40 million or less in annual gross revenues from regulated cable services (or

²⁴ See SCBA Comments at 26. CATA urges that the standard be set at 3500 subscribers. CATA Comments at 5; 8-13.

²⁵ CATA Comments at 7-8.

²⁶ CATA recommends that the size be measured on a "community" level. CATA Comments at 4. See SCBA Comments at 27-29.

a subscriber-based equivalent) should be deemed to be "small cable companies" entitled to significant relief.²⁷ The Joint Comments proposed a subscriber-based standard of 400,000 subscribers (or 250,000) with different degrees of relief for different size companies.²⁸ In addition, there was strong support for the view that companies with up to \$100 million in annual revenues from regulated cable services (or a subscriber-based equivalent) should not be burdened with the full panoply of cable regulation.

In light of the comments filed to date, NCTA continues to believe that the Commission should afford significant rate and administrative relief to both "small systems" and "small cable companies." Based on the plain language of the Cable Act of 1992, its legislative history, the Federal policy of assistance to small businesses and Commission precedent, the Commission should define "small system" to be any system with 1,000 or fewer subscribers as determined on a franchise basis without regard to MSO ownership, and should define small cable companies, at a minimum, as companies with \$40 million or less in annual gross revenues from regulated cable services (or a subscriber-based equivalent). Those small cable entities should be afforded relief from the rate regulation regime to the greatest extent permissible by law. In addition, companies with \$100 million or less in regulated revenues (or a subscriber-based equivalent) should be afforded significant regulatory relief.

²⁷ See SBA Comments at 5-9 (suggesting \$100 million, \$40 million, or \$100,000 subscriber standards), 7-8 (\$40 million); SCBA Comments at 20-25 (\$100 million; \$40 million minimum); CATA comments at 3 (supports NCTA figure if FCC adopts gross revenue standard). Avenue TV Cable, et al. proposed a \$25 million gross revenue figure, but indicated that a higher figure could also be justified. Avenue TV Cable et al. Comments at 2, n. 20.

²⁸ Joint Comments at 7-13.

CONCLUSION

The record in this proceeding makes clear that the Commission should adopt real substantive relief for small systems and small cable companies currently burdened by the agency's rate regulation regime. All commenting parties -- without exception -- make this point. And, while the various commenters propose a variety of standards by which to determine eligibility for relief from the burdens of rate regulation, all -- including the SBA²⁹ -- agree that the current FCC and SBA classifications are inadequate to meet the legitimate needs of small systems and small cable companies. For these reasons, NCTA urges the Commission to act promptly in this proceeding to establish new eligibility standards based on one or more of the proposals advanced by the filing parties and to adopt significant regulatory relief for all eligible small systems and small cable companies.

Respectfully submitted,

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²⁹ See SBA Comments at n.5 (SBA "does not support adoption of the 11.5 million dollar size standard developed by the Small Business Administration for the purpose of carrying out its regulations.").

CERTIFICATE OF SERVICE

I, Leslie D. Heath, do hereby certify that on this 16th day of December, 1994, copies of the foregoing "REPLY COMMENTS " were delivered by first-class, postage pre-paid mail to the following parties:

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