BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 93-215

TO: The Commission

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RESPONSE OF HOME BOX OFFICE
TO PETITION FOR RECONSIDERATION

Home Box Office ("HBO"), a division of Time Warner Entertainment Company L.P., by its attorneys, hereby responds to the Petition for Reconsideration ("Petition") filed in this proceeding on January 5, 1995, by Cox Communications, Inc. ("Cox").[1]

In its Petition (pp. 14-18), Cox asked the Commission to reconsider its decision[2] to reassert rate-regulation jurisdiction

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1 By Public Notice, Report No. 2051, published in the Federal Register on January 19, 1995, 60 Fed. Reg. 3866, the Commission set the date of February 3, 1995, as the deadline for filing responses to petitions for reconsideration in this matter.

2 Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-286, released Nov. 18, 1994 ("Sixth Order").

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over all packages of program services, even though all of the services in the package also are offered on an à la carte basis. HBO agrees with Cox that the Commission, in claiming jurisdiction to regulate discounted packages of à la carte services, has exceeded its statutory authority.

HBO's HBO and Cinemax program services, since their inception, have been offered on an à la carte basis, and, since the very early days of federal oversight of cable television operators, HBO's services have been exempt from rate regulation.[3] Congress expressly excluded these types of services from regulation under the 1992 Cable Act, regardless of whether they are offered on a stand-alone basis or in a package with other exempt services.[4] The Commission's decision in the Sixth Order goes too far in subjecting HBO's services to rate regulation if they are offered in a package with other à la carte program services.

The plain language of the 1992 Cable Act states that "video programming offered on a per channel or per program basis" is exempt from all rate regulation by the FCC. We read this as the statute clearly states -- that it is "programming offered" in an à la carte manner -- not "programming [only to the extent that it is] offered" in an à la carte manner that is exempt from regulation. To read the bracketed words into the statute would

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3 E.g., Time-Life Broadcast, Inc., 31 FCC 2d 747 (1971); Subscription TV Program Rules, 52 FCC 2d 1 (1975).

4 Section 623(l)(2)(B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(l)(2)(B).

attribute to Congress an intent to regulate that it did not express.[5]

The Commission's latest reading of the statute also contradicts (1) the Congress' determination favoring unbundling of program services and (2) the Commission's correct inference from the statute that market forces will ensure that rates for unbundled services are reasonable and that "a collective offering of such [unbundled] services will also be reasonable to the extent that it does not exceed the sum of the charges for the component services." Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631, 5836-37 (1993) ("Rate Order"). See House Report at 90.

In the House Report (which was adopted in this regard in the Conference Report),[6] Congress expressed an intention that "services traditionally offered on a stand-alone, per-channel basis (premium channels like HBO or Showtime)" be free from rate regulation. House Report at 79; see id. at 90. The House Report reinforces the plain-language reading of the statute which exempts such services from regulation whether offered alone or in a package with other such services.

Since HBO started its business more than 20 years ago, HBO's services have been offered on a per channel basis. Indeed, cable

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5 Such a strained interpretation also is inconsistent with the non-regulated treatment Congress provided to multiplexed premium services. See H.R. Rep. No. 628, 102d Cong., 2d Sess ("House Report") 80 (1992).

6 Conf. Rep. 102-862, 102d Cong., 2d Sess 62, 66 (1992) (definition of rate-regulated "cable programming service," which definition includes the exemption at issue here).

system operators contracting for carriage of HBO and Cinemax programming must agree to offer HBO's services on an à la carte basis, regardless of other arrangements which the cable operators may make to package HBO and Cinemax services with those of other programmers. In HBO's experience, when its services are packaged by cable operators, they generally are combined with other services that also traditionally have been offered on a per channel basis (e.g., Showtime).

The Sixth Order fails to implement the congressional exemption from rate regulation of services such as HBO's, although the Commission acknowledges that:

> "[T]here are sound policy reasons to treat as reasonable any price offered for a package of channels that traditionally have been offered on a per-channel basis. Indeed, we cannot envision circumstances in which any price of a collective offering such as the commonly offered 'HBO/Showtime' package would be found to be unreasonable." [7]

While eminently correct as a matter of reasoning that supports outright exemption, the Sixth Order brings HBO and Cinemax, and other similarly situated services, within the ambit of rate regulation jurisdiction, and in so doing, violates the statutory requirement for a complete exemption from rate regulation.

Finally, the Commission is mistaken in analogizing its action in the Sixth Order to the Supreme Court's overruling of a multi-factor test to return to the plain meaning of a clause of the U.S. Constitution.[8] Although the Commission's originally adopted

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7 Sixth Order, ¶ 51; emphasis added.

8 Solorio v. United States, 483 U.S. 435 (1987).

multi-factor legitimacy test for a non-regulatable package of per-channel offerings may be imprecise, returning to the plain language of Section 623(l)(2)(B) of the Communications Act means returning to the Commission's original interpretation of the statute,[9] not straining to find a way around the plain language for the sake of simplicity that may not exist.

If, despite the objections of HBO and other petitioners, the Commission continues to assert regulatory jurisdiction over any packages of à la carte services, it should clarify its rules on grandfathering of packages (Section 76.986(b)) to more clearly reflect congressional intent. First, while less than clear, we understand the current rule intends to encompass any collective offerings where component channels were offered on a per channel basis as of April 1, 1993, whether or not as part of a package. This should be clarified. In addition, Section 76.986(b) should be modified so that it applies not just to programming offered à la carte on a particular cable system on the grandfathering date, but also to programming that was offered on a per channel basis within the cable industry as of the grandfathering date. The Section also should clarify that the addition of a grandfathered channel to an exempt collective offering does not subject such offering to regulation. HBO suggests that the following language would be appropriate to express this intent:

> A collective offering that contains only video programming available on a per channel basis from any cable operator on April 1, 1993, shall not be subject to regulation regardless

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9 Rate Order, 8 FCC Rcd at 5836-38 (1993).

> of when a cable system first offers such collective offering; provided, however, that this provision shall not apply to any collective offering offered by a particular cable system that contains any video programming that was carried by that cable system on such date only as part of the basic service or cable programming service tier.

HBO urges the Commission to reconsider the Sixth Order in light of what HBO believes to be the clear congressional mandate to exempt traditional à la carte services from rate regulation, and to return to the Commission's first and correct reading of Section 623(l)(2)(B) as it applies to à la carte services such as HBO and Cinemax. In any event, so long as the Commission continues to assert regulatory jurisdiction over any packages of à la carte services, it should clarify its grandfathering rules in the manner suggested herein.

Respectfully submitted,

HOME BOX OFFICE,
A Division of Time Warner
Entertainment Company, L.P.

By: _____

Benjamin J. Griffin
J. Laurent Scharff
REED SMITH SHAW & McCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100

Its Attorneys

February 3, 1995

CERTIFICATE OF SERVICE

I, Jette Ward, a secretary with the law firm of Reed Smith Shaw & McClay, hereby certify that on this 3rd day of February, 1995, a true and correct copy of the foregoing **"RESPONSE OF HOME BOX OFFICE TO PETITION FOR RECONSIDERATION"** was sent via U.S. first-class mail, postage prepaid, to the following:

Michael S. Schooler, Esquire
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
Counsel for Cox Communications, Inc.

James A. Hatcher, Esquire
Cox Communications, Inc.
1400 Lake Hearn Drive, N.E.
Atlanta, Georgia 30319

Robert J. Sachs, Esquire
Margaret A. Sofio, Esquire
Continental Cablevision, Inc.
The Pilot House
Lewis Wharf
Boston, Massachusetts 02110

Paul Glist, Esquire
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
Counsel for Continental Cablevision, Inc.

Gary E. Knell, Esquire
Children's Television Workshop
One Lincoln Affairs
New York, N.Y. 10023

Steven A. Lerman, Esquire
Barbara K. Gardner, Esquire
Deborah R. Coleman, Esquire
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
Counsel for Children's television Workshop

John W. Pestle, Esquire
Patrick A. Miles, Jr., Esquire
Varnum, Riddering, Schmidt & Howlett
Bridgewater Place
Post Office Box 352
Grand Rapids, Michigan 49501-0352
Counsel for West Michigan Communities

Philip L. Verveer, Esquire
Sue D. Blumenfeld, Esquire
Melissa E. Newman, Esquire
Willkie, Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
Counsel for QVC, Inc.

Joseph Van Eaton, Esquire
William Malone, Esquire
Miller, Canfield, Paddock and Stone
1225 19th Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for City of Tallahassee

Eric E. Breisach, Esquire
Christopher C. Cinnamon, Esquire
Howard & Howard
107 W. Michigan Avenue, Suite 400
Kalamazoo, Michigan 49007
Counsel for Small Cable Business Association

Norman M. Sinel, Esquire
William E. Cook, Jr., Esquire
Carl A. Fornaris, Esquire
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036-6885
Counsel for National Association of
Telecommunications Officers and Advisors

Brenda L. Fox, Esquire
Peter H. Feinberg, Esquire
Michael J. Pierce, Esquire
Dow, Lohnes & Albertson
1255 23rd Street, N.W., Suite 500
Washington, D.C. 20037
Counsel for Home Shopping Network, Inc.

Jette Ward