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

In the Matter of	)	
	)	
Amendment of Parts 2 and 15	)	
of the Commission's Rules to	)	ET Docket No. 94-124
Permit Use of Radio Frequencies	)	RM-8308
Above 40 GHz for New Radio	)	
Applications	)	

**JOINT REPLY COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS AND PUBLIC BROADCASTING SERVICE**

The Association of America's Public Television Stations ("APTS") and Public Broadcasting Service ("PBS") (hereinafter "Public Television") submit their joint reply comments in response to comments filed regarding the Commission's Notice of Proposed Rulemaking, ET Docket No. 94-124, released November 8, 1994 ("NPRM"). The Commission's NPRM proposes use of frequencies above 40 GHz to establish a new Local Millimeter Wave Service ("LMWS").

APTS is a private, non-profit membership organization whose members include virtually all of the nation's 350 public television stations. APTS engages in planning and research activities on behalf of its member stations, as well as representing its members in the legislative and policy arenas before the Commission, Congress and the Executive Branch.

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PBS is a private, non-profit corporation that distributes television programming produced by public television stations and independent production entities to member public television stations. PBS manages public television's satellite interconnection system, the capabilities of which have been expanded with the launch of AT&T's Telstar 401 satellite.

Public Television supports the comments offered by several parties advocating a set aside of spectrum or a reservation of capacity at no charge or preferential rates for nonprofit, educational public telecommunications entities in the development of the proposed LMWS systems in the 40 GHz spectrum. However, Public Television is concerned by the comments of other parties filed in the above-captioned proceeding that advocate development of LMWS as a substitute for Local Multipoint Distribution Service ("LMDS") in the 28 GHz spectrum proposed by the Commission in the LMDS rulemaking proceeding, CC Docket No. 92-297.<sup>1</sup>

I. The Proposed 40 GHz LMWS Service May Offer Potential for Interactive Educational Uses by Public Television and the Commission Should Adopt Measures to Ensure a Set Aside of Spectrum or Guaranteed Access at Preferential Rates

LMWS at 40.5-42.5 GHz, as described by the Commission in its NPRM, appears to offer potential for use by public television in its delivery of interactive distance learning services from stations to schools, libraries, homes, training centers, day care facilities and other recipient facilities. Public television stations currently offer interactive instructional services and community public services that continuously are being expanded through

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<sup>1</sup> In the Matter of Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration ("First LMDS NPRM"), 8 FCC Rcd 557 (1993); Second Notice of Proposed Rulemaking ("Second LMDS NPRM"), 9 FCC Rcd 1394 (1994).

development of new technologies. For example, Satellite Educational Resources Consortium ("SERC"), a consortium of state departments of education and public television stations, transmits interactive distance learning courses to 5,000 students in high schools in 28 states by satellite and other media. PBS ONLINE, which uses both satellite and ground-based networks, delivers lesson plans, course materials, program transcripts and video segments to schools in 20 states. Additionally, PBS offers *Mathline*, a video, data and voice service devoted to improving the math achievement of American students, and Ready-to-Learn, an early childhood development service aimed at helping parents and childcare providers raise children who are ready to learn. These existing interactive technologies depend upon wired classrooms and costly telephone hookups to operate. LMWS may be one of a number of wireless technologies that offers the dual benefits of reducing present costs of providing such services and providing the opportunity to expand such services to those who cannot easily be reached with wired telephony services, including classrooms and training facilities in rural and remote communities.

It is appropriate to ensure that public broadcasters be afforded the opportunity to use any new emerging services that offer the potential to expand the interactive capabilities of educational services. In this regard, Public Television is supportive of the comments filed in this proceeding by the Educational Parties, Troy State University Montgomery, and GHz Equipment Co., Inc. that discuss the potential uses of LMWS systems for interactive educational services and request a set aside of spectrum for such educational uses or guaranteed access on LMWS systems at no charge or reduced rates.

Such a policy would be consistent with Congress' recent finding that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies" (47 U.S.C. 396(a)(9)). It would also be consistent with the long-standing Congressional and Commission policies guaranteeing the American public access to public telecommunications services through broadcast, HDTV, cable, direct broadcast satellite and common carrier technologies.<sup>2</sup>

## II. Establishment of LMWS Should Not Be A Substitute for Continued Development of LMDS and Resolution of the LMDS Proceeding

Public Television has participated in the LMDS rulemaking proceeding since its inception. Public Television has several filings on record in that proceeding that explain the importance of reserving a portion of the proposed LMDS spectrum for use as a cost effective, "last mile" delivery system for the interactive video and data network of services made available through public broadcasting stations to school, libraries and other learning centers.<sup>3</sup> In addition, Public Television and various educational parties jointly held a position on the Negotiated Rulemaking Committee that attempted to reach a

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<sup>2</sup> The history of Congressional and Commission decisions manifesting the policy of assuring public telecommunications entities access to available technologies is set forth in various APTS and PBS filings before the Commission. For example, see the recent APTS comments filed in the video dialtone proceeding, In the Matter of the Application of Telephone Company—Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, CC Docket No. 87-266, pp. 12-17 (attached hereto as Appendix I).

<sup>3</sup> See the APTS and PBS Joint Comments, filed March 16, 1993; Joint Reply Comments, filed April 15, 1993; and, Response to the FCC's Public Notice on Establishment of a Negotiated Rulemaking Advisory Committee, filed March 21, 1994. See also the Educational and Public Telecommunications Entities' filing in the Negotiated Rulemaking process, Recommendations For Assurance of Access By Educational and Public Telecommunications Entities in the Event That Spectrum Auctions Are Used For Award of LMDS Licenses, NRMC-111, included in the Addenda to the Report of the LMDS/FSS 28 GHz Band Negotiated Rulemaking Committee, September 23, 1994 (attached hereto as Appendix II).

technical solution to sharing of the 28 GHz band by the competing terrestrial and satellite interests.

Although the Commission's NPRM in the LMWS proceeding does not indicate any intent to use establishment of LMWS in the 40 GHz spectrum as a substitute for development of LMDS in the 28 GHz spectrum, several parties filing comments in the LMWS proceeding have interpreted the Commission's proposal to mean just that. Such a substitution would concern Public Television for two reasons.

First, there is no basis in the record to assume that LMWS at 40 GHz would be a comparable substitute, both technically and economically, for LMDS in the 28 GHz band. In fact, the comments and technical studies filed in the LMWS proceeding that address these issues appear to be contradictory in their findings. Some commenting parties contend, for example, that LMWS at 40 GHz would be technically inferior and, moreover, very expensive to establish.<sup>4</sup> Given that the LMWS and LMDS spectrums are not interchangeable, the availability of both spectrums is important to public television for the delivery of its services to different markets. For example, the use of LMWS spectrum may be technically acceptable and economically feasible for some facilities but not for others. Thus, the Commission should disregard any suggestion that LMWS is a readily adaptable substitute for LMDS in terms of technical suitability and affordability.

Secondly, many parties including Public Television have made clear to the Commission the important potential uses for LMDS in the 28 GHz spectrum and the need for a set aside of spectrum for nonprofit uses in that spectrum. The Commission's Second Notice of Proposed Rulemaking in that

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<sup>4</sup> See, e.g., the comments of CellularVision and the comments of Texas Instruments.

proceeding indicated that, should the Negotiated Rulemaking process not yield a satisfactory sharing consensus, the Commission would address the public benefit issues set forth in the Second LMDS NPRM and request comment on those issues in order to decide whether the terrestrial or satellite parties would individually or jointly occupy the 28 GHz band. Public Television remains very interested in the potential uses of the 28 GHz spectrum in providing interactive educational and community outreach services and urges the Commission to resolve the public policy issues involved in allocation of the 28 GHz band.

### Conclusion

As it authorizes new technologies, such as the proposed LMWS, the Commission should assure that the potential uses of the new technology for noncommercial educational purposes are not eclipsed. For the reasons discussed above and in the attached comments, Public Television supports a set aside of spectrum or provision of a specific percentage of capacity on LMWS systems for public telecommunications use at free or incremental cost based rates. However, Public Television does not support the authorization

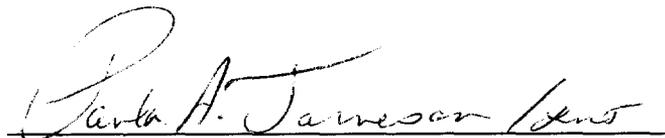
of LMWS in lieu of the LMDS service and urges the Commission to proceed with 28 GHz spectrum allocation proceeding.

Respectfully submitted,

ASSOCIATION OF AMERICA'S PUBLIC  
TELEVISION STATIONS

By: 

Marilyn Mohrman-Gillis  
General Counsel  
Lonna M. Thompson  
1350 Connecticut Avenue, N.W.  
Suite 200  
Washington, D.C. 20036  
(202) 887-1700



Paula A. Jameson  
General Counsel  
Gregory Ferenbach  
Assistant General Counsel  
Gary P. Poon  
Assistant General Counsel  
PUBLIC BROADCASTING SERVICE  
1320 Braddock Place  
Alexandria, Virginia 22314  
(703) 739-5063

March 1, 1995

**JOINT REPLY COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC  
TELEVISION STATIONS AND PUBLIC BROADCASTING SERVICE**

ET Docket No. 94-124

RM-8308

March 1, 1995

**APPENDIX I**

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

DEC 16 1994  
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of the Application of:  
  
TELEPHONE COMPANY -  
CABLE TELEVISION  
Cross-Ownership Rules,  
Sections 63.54 - 63.58

CC Docket No. 87-266

**COMMENTS OF**  
**THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS**

Marilyn Mohrman-Gillis  
General Counsel

Lonna Thompson

1350 Connecticut Avenue, N.W.  
Suite 200  
Washington, D.C. 20006  
(202) 887-1700

Jonathan D. Blake  
John Duffy  
Alane C. Weixel

Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 7566  
Washington, D.C. 20044-7566  
(202) 662-6000

Its Attorneys

December 16, 1994

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## SUMMARY

The Association of America's Public Television Stations ("APTS") urges the Commission to grant public telecommunications entities preferential access to video dialtone systems. This pleading supports mandatory preferential rates for public telecommunications entities. But at a minimum, the Commission must permit local exchange carriers ("LECs") to offer free or reduced rates to such entities.

Authorizing LECs to provide preferential access to public telecommunications entities is consistent with the Commission's regulatory framework for video dialtone and the Communications Act. Section 201(b) requires that all charges, practices, classifications and regulations for communications services be "just and reasonable" and any "unjust or unreasonable" charges, practices, classifications or regulations are unlawful. 47 U.S.C. § 201(b). Section 201(b) of the Act provides that "communications by wire or radio subject to this Act may be classified into . . . such other classes as the Commission may decide to be just and reasonable, and different charges may be made for different classes of communications." Thus, a variation in the price charged to customers for a particular service does not, by itself, create a violation of the Act. Only "unjust or unreasonable" preferences have that effect.

Preferential rates for public telecommunications entities are clearly "just and reasonable." Both Congress and the Commission have a longstanding policy of ensuring that public telecommunications entities have access to transmission facilities. Further, imposing general commercial rates on public telecommunications entities would impair the widespread dissemination of their programming.

Requiring or permitting preferential rates for public telecommunications entities is also consistent with the First Amendment and the Supreme Court's decision in Turner Broadcasting Systems v. FCC, 114 S.Ct. 2445 (1994). As an initial matter, the First Amendment concerns addressed in Turner are not present because the Commission has adopted a common carrier regulatory framework for video dialtone. In a common carrier context, requiring or permitting preferential rates would not reduce the number of channels over which LECs have unfettered control. Also, preferential rates would not make it more difficult for video programmers to compete for carriage on video dialtone systems because LECs are required to furnish service upon reasonable request.

Under the First Amendment scrutiny applied in Turner, requiring or permitting preferential rates for public telecommunications entities would be constitutional. A preference for "noncommercial, educational" broadcasters is not subject to strict scrutiny, and easily passes intermediate scrutiny. The policy reasons underlying preferential rates -- namely encouraging universal access to public telecommunications services -- is a substantial governmental interest unrelated to the suppression of free expression. Further, preferential video dialtone rates would not interfere with protected speech since common carriers do not exercise editorial discretion or a power of selection over the communications they carry.

APTS believes that incremental cost based rates are the most appropriate rates for public telecommunications entities. The compelling interest in having public telecommunications services distributed to the widest possible audience warrants mandatory preferential rates. In the alternative, allowing LECs to provide preferential

rates on a voluntary basis would also serve the public interest. Public telecommunications providers must be able to access video dialtone systems on a preferential-rate basis to ensure that their educational programming can be made available to all segments of the public.

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

In the Matter of the Application of:

TELEPHONE COMPANY -  
CABLE TELEVISION  
Cross-Ownership Rules,  
Sections 63.54 - 63.58

CC Docket No. 87-266

**COMMENTS OF  
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS**

The Association of America's Public Television Stations<sup>1/</sup> ("APTS") respectfully submits these comments urging the Commission to grant public telecommunications entities<sup>2/</sup> preferential access to video dialtone systems. APTS first addressed this issue in response to the Commission's Further Notice of Proposed Rulemaking in its video dialtone proceeding.<sup>3/</sup> In the Second Report and Order,<sup>4/</sup> however, the Commission declined to mandate special provisions for public telecommunications entities. APTS and the Corporation for Public Broadcasting (CPB)

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<sup>1/</sup> APTS is a private, nonprofit trade association which represents most of the nation's public television stations before the Commission, Congress and the Executive Branch.

<sup>2/</sup> "Public telecommunications entities" are public broadcast stations or noncommercial telecommunications entities that disseminate public telecommunications services to the public. 47 U.S.C. § 397(12) (1988).

<sup>3/</sup> Comments of The Association of America's Public Television Stations.

<sup>4/</sup> Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 F.C.C. Rcd. 5781 (1992).

filed a petition for reconsideration on the grounds that the Commission's initial decision was inconsistent with longstanding Congressional policy and Commission precedent.<sup>5/</sup>

In its Reconsideration Order,<sup>6/</sup> the Commission concluded that the record regarding preferential access for video dialtone systems was not sufficiently developed. Accordingly, the Commission released a Third Further Notice of Proposed Rulemaking requesting comment on specific issues related to preferential rates for video dialtone.

The country is in the middle of a period of great change in the delivery of video programming to consumers. The advent of video dialtone marks the latest development in this period. This technology has the potential to revolutionize the video environment by shifting to an interactive multi-channel world. It is important that the Commission accommodate public telecommunications services upon the introduction of this new technology, as it has done for other new technologies in the past. This pleading supports mandatory preferential rates for public telecommunications entities. At a minimum, however, the Commission must allow LECs to offer voluntarily free or reduced rates to such entities.

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<sup>5/</sup> Joint Petition for Reconsideration of The Association of America's Public Television Stations and Corporation for Public Broadcasting.

<sup>6/</sup> Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266 (November 7, 1994) ("Third Further Notice").

I. **GRANTING PREFERENTIAL ACCESS IS PERMISSIBLE  
UNDER THE COMMUNICATIONS ACT AND THE FIRST AMENDMENT.**

A. **Requiring Or Permitting Preferential Rates Is Consistent With The  
Communications Act.**

In the Second Report and Order, the Commission required local exchange carriers ("LECs") offering video dialtone service to make available, on a nondiscriminatory basis, a common carrier platform that provides sufficient capacity to serve multiple video programmers. The Commission further required that LECs expand their video dialtone capacity as demand increases so as not to create a bottleneck.

Authorizing LECs to provide preferential access to public telecommunications entities is consistent with the Commission's regulatory framework for video dialtone and the Communications Act. Common carrier status does not preclude different rates, only discriminatory rates. Common carriers traditionally have offered preferential rates where supported by sound public policy reasons.<sup>71</sup>

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<sup>71</sup> See, e.g., North Carolina v. United States, 325 U.S. 507, 516 (1945) (finding that the mere existence of a disparity between intrastate and interstate railroad rates does not render the intrastate rates discriminatory); 39 U.S.C. § 3626 (continuing in effect former 39 U.S.C. § 4358, which provides preferential postal rates for any "publication of a qualified nonprofit organization" including the program announcements and guides published by "a nonprofit educational radio or television station," § 4358(j)(2)); 49 U.S.C. 10721(b)(1) (common carriers may transport property for the United States government or state or municipal governments at free or reduced rates); 49 U.S.C. § 10723 (common carriers may provide transportation without charge, inter alia, to indigent persons, ministers and persons engaged in charitable work); Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, 50 Fed. Reg. 42408, 42454 (Oct. 18, 1985) (allowing pipelines to charge different prices because of business factors is not discriminatory), vacated and remanded on other grounds, Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988).

This concept of common carriage was expressly incorporated in Title II of the Communications Act of 1934. Pursuant to Section 201(b) of the Act, all charges, practices, classifications and regulations for communication services must be "just and reasonable" and any "unjust or unreasonable" charges, practices, classifications or regulations are unlawful. 47 U.S.C. § 201(b). Section 201(b), however, contains a further proviso that would specifically permit the grant of preferential rates by the Commission:

"That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for different classes of communications."<sup>8/</sup>

Requiring or allowing preferential rates also does not run afoul of Section 202(a) of the Act. Section 202(a) prohibits common carriers from unreasonably discriminating among customers in the "charges, practices, classifications, regulations, facilities or services" for "like" communications services. However, "Section 201(b) creates an exception to the general prohibition in Section 202(a) by permitting a carrier to establish a separate classification" that is just and reasonable. See AT&T Communications, Inc., Memorandum Opinion and Order, 5 F.C.C. Rcd. 700 (1990).

Thus, under the Act, a variation in the price charged to customers for a particular service does not, ipso facto, create a violation of the Act. See Associated Press v. FCC, 452 F.2d 1290, 1300-01 (D.C. Cir. 1971). Rather, only "unjust or unreasonable" preferences have that effect. See id. at 1300, n. 85 (citing General Tel. Co. of the

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<sup>8/</sup> 47 U.S.C. § 201(b) (emphasis added).

Southwest v. Robinson, 132 F. Supp. 39, 44 (E.D. Ark. 1955)). Further, it is solely within the Commission's discretion to determine whether a particular classification is "just and reasonable." See Sports Network v. American Telephone and Telegraph Co., 25 F.C.C. 2d 560, 576 (1968); see also Wilson & Co. v. United States, 335 F.2d 788, 800-01 (7th Cir. 1964).

As the Commission has express statutory authority to authorize preferential rates, the issue for this rulemaking boils down to whether it is "just and reasonable" for the Commission to require preferential video dialtone rates for public telecommunications entities. In determining whether preferential rates for the press were "just and reasonable" under Section 201(b), the Commission focused on two issues: (1) whether there was an affirmative federal policy that would warrant lower rates for the press and (2) whether imposing the general commercial rates on the press would impair the widespread dissemination of news information. See Copley Press, Inc. v. FCC, 444 F.2d 984, 986-87 (D.C. Cir. 1971); American Telephone & Telegraph Co., Charges, Classifications, Regulations and Practices For and In Connection With Private Line Services and Channels, 34 F.C.C. 1094, 1098 (1963). As discussed below in Sections II and III, public telecommunications entities are able to satisfy both criteria. Indeed, the Commission has previously found that "carriers may file tariffs providing for special classes of service for interconnection of educational broadcast stations at preferential rates pursuant to the provision of section 201(b)[.]"<sup>9/</sup>

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<sup>9/</sup> Free or Reduced Rate Interconnection Service for Noncommercial Educational Broadcasting, Memorandum Opinion and Order, 20 F.C.C. 2d 491, 493 (1969).

**B. Requiring Or Permitting Video Common Carriers To Provide Carriage For Public Telecommunications Entities at Preferential Rates Is Consistent With The First Amendment And The Supreme Court's Decision In Turner Broadcasting System, Inc. v. FCC.**

A policy of either requiring or permitting video common carriers to provide carriage for public telecommunications entities at preferential rates would be entirely consistent with the First Amendment, as interpreted in the Supreme Court's recent decision Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445 (1994), and in other case law.

**1. Requiring Or Permitting Preferential Rates Within A Common Carrier Regulatory Framework Does Not Impose Any Burden On Free Speech.**

As an initial matter, the First Amendment concerns that the Court addressed in Turner are not present in this context because the Commission has adopted "a common carrier regulatory model" for video dialtone. Third Further Notice at 16, ¶ 31. In Turner, the Court determined that the "must-carry" rules of the 1992 Cable Act did cause some "interference with speech" meriting scrutiny under the First Amendment. 114 S.Ct. at 2456. The Court held that:

"By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining." Id.

Neither of these two potential burdens on speech are present in a common carrier context.

First, unlike cable operators and newspapers, common carriers have no power to "exercis[e] editorial discretion" over the communications they carry. Compare

id.; Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986). Instead, common carriers are required "to furnish . . . communication service upon reasonable request therefor." 47 U.S.C. § 201(a). They may not edit the content of the communications carried, nor grant or deny carriage based on their agreement or disagreement with the communication. Thus, requiring or permitting preferential rates would not "reduce the number of channels over which [carriers] exercise unfettered control" because common carriers would have no such control in the first place.

Preferential rates also would not "render it more difficult for [video] programmers to compete for carriage on the limited number of channels remaining." 114 S.Ct. at 2456. In a common carrier regulatory structure, programmers do not "compete" for carriage because, as noted above, carriers are required to furnish service "upon reasonable request therefor." 47 U.S.C. § 201(a). Furthermore, video dialtone common carriers are under an obligation to expand their systems to meet new demand (except where the expansion would not be "technically feasible or economically reasonable at that time," Third Further Notice at 18, ¶ 38). Thus, unlike a regulation that requires a set-aside of a particular number of channels or a particular percentage of a system's channel capacity, a regulation setting (or allowing) preferential rates within a common carrier regulatory framework does not reduce or burden any other programmer's speech.

Providing preferential rates to a particular class of entities or groups (where the government does not impose impermissible content-based regulations on the class)<sup>10/</sup>

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<sup>10/</sup> As explained below, the Turner Court authoritatively rejected the argument that a preference for "noncommercial, education" television stations constituted a content-based  
(continued...)

does not implicate any First Amendment concerns. This conclusion is also supported by two provisions in the Communications Act authorizing such preferences. Neither has been held unconstitutional or apparently even had its constitutional validity seriously questioned. Section 201(b) expressly provides for the Commission to establish different rates for "commercial, press, Government, and such other classes as the Commission may decide are just and reasonable." 47 U.S.C. § 201(b). Courts have repeatedly sustained the power of the Commission under this provision to subject particular classes to different rates. See, e.g., Wilson & Co. v. United States, 335 F.2d 788, 800-01 (7th Cir. 1964) (Commission may place press in a separate classification with lower rates because of uncertainty whether ordinary rates "would impair the widespread dissemination of news information"); Associated Press v. FCC, 452 F.2d 1290, 1301 (D.C. Cir. 1971) (FCC may "establish different charges for press and nonpress communications"). Furthermore, in section 396(h), Congress expressly recognized the power of the Commission to allow special rates (or even free service) for "public television or radio services," 47 U.S.C. § 396(h), and to our knowledge no court has suggested that this provision raises constitutional problems.

2. **Requiring Or Permitting Preferential Rates Is Constitutional Even Under The Level Of Scrutiny Applied In Turner.**

Even under the First Amendment scrutiny applied in Turner, a regulation requiring or permitting preferential rates for public telecommunications entities

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<sup>10/</sup>(...continued)

regulation of speech. See 114 S.Ct. at 2463. That holding would apply equally to a preference for "public telecommunication entities." See note 11, infra.

would be held constitutional. As the Court in Turner concluded, a preference for "noncommercial, educational" broadcasters<sup>11/</sup> is not subject to strict scrutiny even though such broadcasters are subject to "certain limited content restraints imposed by statute and FCC regulation." 114 S.Ct. at 2463, 2462. As the Court noted, the "principal inquiry in determining content-neutrality . . . is whether the government has adopted the regulation of speech because of [agreement] or disagreement with the message it conveys.'" Id. at 2459 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); editorial changes in original). A preference for public telecommunications entities is not content-based regulation under this test because "noncommercial licensees are not required by statute or regulation to carry any specific quantity of 'educational' programming or any particular 'educational' programs." Id. at 2463. Because of the "the minimal extent" to which the FCC and Congress influence the programming of noncommercial, educational broadcasters, it would not be reasonable to conclude that requiring or permitting preferential rates for such broadcasters constitutes "an effort to exercise content control over what subscribers view on [video dialtone] television." Id. at 2464.

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<sup>11/</sup> The constitutional analysis of a preference for "public telecommunication entities" is the same as that for "noncommercial educational broadcast stations." The definition of public telecommunications entity includes only two groups: "public broadcast station[s]" and "noncommercial telecommunication entit[ies]." 47 U.S.C. § 397(12)(A). The definitions for a "public broadcast station" and a "noncommercial educational broadcast station" are the same, id. § 397(6), and a "noncommercial telecommunication entity" is essentially identical to a "noncommercial educational broadcast station" except that it disseminates its programming to the public "by means other than" a broadcast radio or television station, id. § 397(7)(B). See also Turner, 114 S.Ct. 2445, 2453 n.4 (1994) (noting definition of "noncommercial educational broadcast station[s]").

Providing preferential rates for public telecommunications entities would easily pass the intermediate level of scrutiny that Turner held should be applied to "content-neutral restrictions that impose an incidental burden on speech." Id. at 2469. This intermediate level of scrutiny requires that the regulation "'further[] an important or substantial governmental interest . . . unrelated to the suppression of free expression,'" and that "'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" Id. (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

The central policy reason underlying the proposal for providing preferential rates to public telecommunications entities has already been articulated by Congress in the Communications Act:

"It furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative communications services for all the citizens of the Nation." 47 U.S.C. § 396(a)(5).

This is a "substantial governmental interest . . . unrelated to the suppression of free expression," Turner, 114 S.Ct. at 2469, because "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." Id. at 2470. See also Section II, infra (discussing the governmental interest in, and policy for, facilitating access to public broadcasting). Preferential rates advance this governmental interest by allowing public

telecommunications entities to gain access to new technologies that they otherwise may not be able to afford. See Section III, infra (discussing need for preferential rates).

The O'Brien analysis also requires an assessment of "the extent to which [a regulation] in fact interfere[s] with protected speech." The difference between must-carry and preferential rates is crucial here because, as previously noted (see pp. 6-8, supra), the mere provision of preferential rates for a particular class of entities within a common carrier regulatory structure does not interfere with protected speech. Common carriers do not exercise editorial discretion, or a power of selection, over the communications they carry, and thus there can be no burden on their First Amendment rights. Compare Turner, 114 S.Ct. at 2472 (requiring findings on the extent that cable operators will "be forced to make changes in their current or anticipated programming selections"). Furthermore, because common carriers are required to provide carriage in response to all reasonable requests and to expand their systems to meet new demand (except where not "technically feasible or economically reasonable"), common carriers would not (and could not) deny carriage to other speakers "to make room for" public broadcasters. Compare id. ("the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters" is relevant to O'Brien analysis).

The only effect of the preferential rate structure would be either to allow the common carriers to receive some compensation for capacity that would otherwise go unused, compare id. ("the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters" relevant to determining actual burden on speech under O'Brien), or to spur