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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 95-61
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ('NCTA"), by its attorneys, hereby submits its reply comments to the Notice of Inquiry ("NOI") on the status of competition in the market for the delivery of video programming.

INTRODUCTION AND SUMMARY

In its initial comments, NCTA provided extensive evidence of the rapidly growing competition in the delivery of video programming. Consumers are increasingly able to choose from among a variety of multichannel video providers including cable, direct-to-home satellite services (DBS and C-band), and microwave-based wireless cable. Broadcast television, which continues to represent a significant competitive alternative to cable television, is also preparing to leap into the multichannel digital world. As these competitors gain steam, the telephone companies are maneuvering on every front to enter the video marketplace as soon as possible.

Although full-scale competition is still evolving, NCTA showed that under well-accepted economic and antitrust theory, competition from entities with little or no market share but capable of expanding or entering the market disciplines incumbent operators. Indeed, cable companies will respond to competitive pressures brought by any alternative provider whose services are widely available and who is a viable contender, well before the operator loses a crippling 15 percent of its market share under the current statutory definition of "effective competition." We urged the Commission, therefore, to recommend to Congress that the definition be revised to take into account existing and potential competition, rather than looking to an arbitrary measure of market share.

As in last year's proceeding, cable's competitors have sought to hijack this inquiry to advance a host of anticompetitive strategies, many of which are being dealt with in other Commission proceedings (e.g. , video dialtone, cable home wiring). The wireless cable industry, for example, seeks various government subsidies and protectionist measures to ensure its success in the video market, including extension of the program access rules to non-vertically integrated programmers and non-satellite-delivered programming, and the seizure of substantial portions of a cable operator's plant.[1] Wireless

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[1] The Wireless Cable Association and Liberty Cable continue their relentless campaign for Commission authority to force cable operators to cede ownership of their distribution facilities to competing wireless providers. NCTA and various cable companies have demonstrated again and again that such action would, among other things, violate the plain language of the 1992 Cable Act home wiring provision, would displace one provider by another provider and foreclose competition because the cable operator would lose access to its broadband pathway to individual subscribers. The Commission should reject these proposals and deny the pending reconsideration petitions. See e.g., In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Docket No. 92-260, Opposition to Petitions for Reconsideration, NCTA, filed May 18, 1995.

operators also wish to be exempt from the obligations imposed on cable operators, even when they serve single family homes or separately-owned apartment buildings by wire, so long as they do not cross public rights of way.

The telephone companies wish to circumvent the Communications Act and become cable television providers without the corresponding regulatory obligations. Their shifting regulatory proposals would essentially have the Commission deregulate the entire video dialtone process in a way that only enhances telco economic interests.

As we demonstrate below, the Commission should reject the wireless and telephone industry proposals on legal and policy grounds.

As an initial matter, we urge the Commission not to interfere with the marketplace forces that are driving consolidation of cable operations in regional areas. This trend is critical to the cable industry's ability to compete in the long-term with powerful regional telephone companies, nationwide DBS and MMDS services that are rapidly expanding in the video marketplace.

I. REGIONAL CLUSTERING OF CABLE SYSTEMS IS ESSENTIAL TO THE INDUSTRY'S ABILITY TO COMPETE WITH TELEPHONE COMPANIES AND OTHER MULTICHANNEL VIDEO PROVIDERS IN THE FUTURE

The record in this proceeding supports a finding that consolidation of ownership by "clustering" cable systems in adjacent areas benefits the competitive video marketplace. As NCTA and Time Warner Cable demonstrated, clustering creates economies of scale that facilitate higher quality and lower cost cable service.[2] The efficiencies gained by clustering

[2] Comments of NCTA at 31-32; Comments of Time Warner Cable at 3-12.

cable systems -- that would otherwise serve smaller, geographically dispersed pockets of metropolitan areas -- are essential to cable's ability to compete with the enormous Regional Bell Operating Companies and nationwide DBS service. Clustering is simply an inevitable strategy for the cable industry's survival in the next generation of telecommunications services. [3]

The Clinton Administration supports clustering because of its procompetitive benefits to consumers. Earlier this year, Larry Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration (NTIA), told the Federal Trade Commission, in response to concerns that the FTC was considering adopting a policy against cable clustering, that "the Administration believes that such an action by the FTC would disserve consumers and hinder the growth of competition in the telecommunications marketplace."[4] The letter cites "at least" two important benefits of clustering:

> First, owning systems in adjacent franchise areas can enable a cable firm to capture scale economies in the deployment of its distribution plant, thereby reducing the cost of providing cable service. As competition in the video marketplace continues to expand, a larger and larger proportion of those cost savings will be passed through to consumers in the form of lower rates. Second, cable companies are moving aggressively to enter the local telephone service market, and the Administration strongly supports such additional competition. Nevertheless, cable firms may not be able to offer local telephone services on a competitive basis unless, through clustering and other means, they can

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3 Comments of Time Warner Cable at 5-12.

4 Letter from Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Chairman Janet D. Steiger, Federal Trade Commission (January 12, 1995).

assemble service areas that approximate the areas served by the local telephone provider.

In contrast to the proven benefits of clustering, the Administration finds that the potential competitive harms are "largely conjectural, speculative, or de minimis."[5] Similarly, the record in this proceeding confirms that there is no empirical evidence to warrant Commission intervention to deter or otherwise discourage regional consolidation of cable operations. As we have shown, national and regional competition to cable is here today and growing rapidly. The Commission's concerns about the "competitive risks" of increased clustering, such as deterring potential entrants to the market, are unfounded.[6]

Nevertheless, to the extent that any particular cable merger or acquisition threatens to create excessive market concentration, federal and state antitrust bodies have authority to review such transactions to protect the public interest.[7]

We urge the FCC, therefore, not to take any action with regard to clustering that is inconsistent with Administration policy or unnecessarily replicates the oversight activities of other federal and state antitrust authorities. The Commission should report to Congress that regional

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5 Id.

6 In the 1994 Competition Report, the Commission also raised the concern that regional clustering of contiguous systems may impede competition by eliminating a likely potential entrant from an adjacent franchise area. As NTIA correctly points out, "this argument rests on the untested and unproven assumption that adjacent cable operators are more likely to overbuild a particular cable system than non-adjacent operators." Id.

7 As Time Warner notes, the FTC has investigated numerous transactions involving acquisitions of adjacent cable systems and declined to take any action to impede or prevent such consolidation. Comments of Time Warner at 13.

consolidation of cable systems is a positive trend and serves the interests of competition.

II. TELEPHONE COMPANY EFFORTS TO PROVIDE CABLE SERVICE WITHOUT A FRANCHISE CONTRAVENE THE COMMUNICATIONS ACT AND WILL ADVERSELY AFFECT COMPETITION

In their comments, the local exchange carriers ("LECs") repeat the now familiar refrain that regulatory barriers have impeded their offering of video services in competition with cable systems. Bell Atlantic, for example, complains that the FCC has heaped "anticompetitive, or economically harmful" restrictions on video dialtone service and deplores the application of "asymmetrical and redundant" regulatory burdens not borne by its competitors.[8] This is, of course, the same company that attacked the Commission for not acting quickly enough on its major market video dialtone applications, and then withdrew the applications just as action was about to occur. Most recently, Bell Atlantic sought delay in the adoption of comprehensive rules.[9] Other telephone companies, while not as strikingly hypocritical, also seek to provide cable service without cable regulation.[10]

Taken together, the LECs' comments reveal that their sole agenda is to create a regulatory model for their delivery of cable service devoid of any of

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[8] Comments of Bell Atlantic at 5.

[9] Communications Daily, July 20, 1995 at 8.

[10] Comments of BellSouth at 4 (alleging that LEC provision of cable service is thwarted by "substantial regulatory hurdles at the federal, state and local levels."); Comments of NYNEX at 5 (claiming that application of Title VI regulation "will be a disincentive for telephone companies to invest in wireline broadband technology for video and interactive services").

the federal and local restrictions and obligations applied to existing cable companies.[11]

As we explained in detail in our reply comments in the Fourth Notice of Proposed Rulemaking ("Fourth Notice") in the video dialtone proceeding, the regulatory arrangements sought by the telephone companies are contrary to the Communications Act.[12] The Act compels the finding that, when a local exchange carrier provides video programming directly to subscribers -- i.e., cable service -- its operations are subject to Title VI of the Communications Act, which governs all cable companies. Only a pure video dialtone system -- i.e., a nondiscriminatory platform accessible to nonaffiliated programmers -- may be regulated under Title II of the Communications Act as a common carrier facility. [13]

Now that the telephone companies have won the right to offer video services under the First Amendment, they are entitled to function as cable

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[11] Bell Atlantic and GTE seek unfettered flexibility to operate as either a cable operator under Title VI or a video programmer on their VDT platform under Title II. This option proposal is impermissible as a legal matter and untenable as a policy matter. See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-58, CC Docket No. 87-266, Fourth Notice of Proposed Rulemaking, released January 20, 1995, Reply Comments of NCTA, filed April 11, 1995 ("Fourth Notice Reply Comments").

[12] Id.

[13] NCTA demonstrated that the plain meaning of the statutory language in the Communications Act, Section 602(5)(6)(7), compels application of Title VI to LEC cable services provided over a LEC facility even if that facility also provides VDT services. The statute is clear that a facility of a common carrier is a cable system to the extent it is used to provide the LEC's video programming directly to subscribers. We also showed that Title VI regulation is not duplicative of, nor inconsistent with, Title II regulation of the LECs' common carrier offerings (including VDT). Furthermore, we argued that the Commission should strengthen, not weaken, safeguards applicable to LECs when they provide video programming directly to subscribers. See NCTA Fourth Notice Reply Comments.

operators under the same regulatory regime that applies to any other cable operator (their First Amendment rights being no greater than a cable company's rights). At the same time, however, they may not elect to provide cable service under a second regulatory option and thereby avoid the comprehensive Cable Act regulatory scheme. The second option, which is far removed from the video dialtone service originally conceived by the Commission, would permit telephone companies to essentially offer cable service without the accompanying cable regulatory obligations.[14] The Commission should, under no circumstances, give LECs the choice of opting out of the Title VI scheme in favor of their watered-down Title II regulatory approach.[15]

The provision of video programming via a video dialtone platform as opposed to direct transmission to subscribers under the Cable Act serves different policy objectives. Video dialtone preempts the local franchise process and requires telephone companies to guarantee programmers nondiscriminatory access to subscribers on a first come, first served basis. On the other hand, cable service is anchored in the franchise process and assumes that cable operators will exercise substantial editorial control over their system's channels by selecting the programmers (with the exception of

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14 NCTA Fourth Notice Reply Comments at 7-10 (describing evolution of video dialtone into a service that will possess most, if not all, of the attributes of cable service provided by existing cable system operators).

15 As in the video dialtone proceeding, the local exchange carriers reiterate their request to eliminate or "streamline" the section 214 process and to obliterate other Title II requirements. For example, they seek pricing flexibility of á la carte and programming packages, which is totally inconsistent with common carrier principles that require rates to be cost-justified and preclude common carriers from discriminating at will in the provision of transmission service. <u>See</u>, <u>e.g.</u>, Comments of Bell Atlantic, GTE.

certain leased and PEG access channels). The various federal and local regulatory provisions of the Cable Act are intended to serve specific public policy goals and are applicable to all providers of cable service.

If the Commission accepts the dual regulatory approach advocated by the telephone companies -- which would be unlawful under the agency's governing statute -- the likely outcome will defeat the policy objectives embodied in both Title II and Title VI. Instead of providing guaranteed, nondiscriminatory access under Title II regulation or providing video programming under the Cable Act regulatory scheme, the LECs are likely to do neither. Rather, they will comfortably play federal and local governmental authorities off each other, and ultimately choose whatever scheme offers them the fewest regulatory constraints. The Commission should reject the option proposal and conclude that Title VI regulation applies to local exchange carrier provision of video programming directly to subscribers.

In preparing its 1995 report to Congress, the Commission should recognize that the failure to apply the Title VI regime to the telephone companies' provision of programming directly to subscribers will have profound ramifications for future competition in the video programming market. As we showed in the Fourth Notice, an LEC entering the video business with 100 percent penetration of the local exchange business has increased incentives and opportunity to engage in cross-subsidization and other anticompetitive conduct to disadvantage other cable operators. Without regulation that effectively polices such cross-subsidies, i.e., separation procedures and cost allocation rules, telephone ratepayers could disproportionately bear the costs of telco entry into cable and unfairly disadvantaged cable companies in their ability to compete. Thus, LEC providers of cable service over integrated facilities must be subject to regulations that protect telephone ratepayers and cable operators from anticompetitive conduct.

Furthermore, deregulating telco entry into cable would mean that a telephone provider could freely take advantage of the program access rules without reciprocal obligation to provide their vertically-integrated programming to cable operators. Indeed, Bell Atlantic asserts that, as a video programmer offering multichannel services over a VDT system, it is "entitled to the benefits of the program access rules."[16] But if telephone companies are not subject to Title VI regulation, they would not be required to provide competing cable operators access to their services. Applying program access regulation to one cable provider and not the other will not promote competition. Indeed, the market distortions that would arise from such failure are readily apparent.[17]

We submit that LEC cable service providers are governed by Title VI, but the policy reasons underlying the program access rules -- the incentive and ability of vertically-integrated cable companies to favor their own programming to the disadvantage of unaffiliated networks -- should apply, if at all, with equal force to telco-affiliated cable operators under any regulatory regime.

In sum, as we have argued in numerous filings in the video dialtone proceeding, it is vital that the Commission adopt fair rules before permitting telephone companies to offer cable service. Fair rules must include the requirement that telcos offering video services comply with the same

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[16] Comments of Bell Atlantic at 14-16.

[17] Fourth Notice Reply Comments of NCTA at 40-41. See, e.g., Thomas Tyrer, TELE/TV Outlines its First Steps, Electronic Media, May 15, 1995 at 4.

regulations as other cable operators. Proposals that would enable telcos to avoid local franchising and other Cable Act obligations are inconsistent with this principle and will be detrimental to a competitive video market.

III. THE PROGRAM ACCESS RULES SHOULD NOT BE EXTENDED TO NON-VERTICALLY INTEGRATED PROGRAMMERS

In the NOI, the Commission sought comment on the "program access provisions" of the 1992 Cable Act and, among other things, asked whether it should recommend amending the rules to make them applicable to all cable program providers, not only those which are vertically integrated. While some commenters seized upon the Commission's suggestion, there is no reason to extend the applicability of the program access provisions to non-vertically integrated programmers.[18]

In our initial Comments, we demonstrated that sound public policy -- as well as the absence of evidence warranting modification of the provisions -- dictates that the program access rules should not be extended to non-vertically integrated program providers.[19]

Some commenters, in a self-serving effort to skew marketplace forces by government regulation, called for an extension of the program access rules to

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18 Indeed, as Time Warner Cable demonstrates in its Comments, the current program access rules applicable to vertically-integrated programmers are themselves suspect. Comments of Time Warner Cable at 19-20, 25. Vertical integration has played an important role in program development, giving cable systems a powerful incentive to invest in innovative cable programming. With the program access rules, cable systems have less incentive to invest and develop new programming because the rules effectively force them to make the programming available to competitors. Id. at 22, 25.

19 Comments of NCTA at 33-39.

all cable programmers, whether or not vertically integrated.[20] Others argued that the rules should apply to all programming, regardless of the method of distribution; i.e., regardless of whether or not the programming is delivered by satellite as required under the current rules.[21] The Commission should reject these suggestions.

First, as the Act's legislative history makes clear, Congress specifically limited its concerns only to vertically integrated cable systems.[22] Congress found that only "[v]ertically integrated program suppliers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[23] While acknowledging that non-vertically integrated cable operators *may* also engage in anticompetitive conduct, the Senate Report stated that the scope of the program access rules was limited *only* to vertically integrated systems.[24] The House Report also purposefully limited the application of the program access rules only to vertically integrated programmers.[25]

Similarly, there is no question that the program access provisions were aimed exclusively at *satellite-delivered* services, not *all* programming

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20 Comments of Liberty Cable Company ("Liberty") at 11; Comments of Satellite Receivers, Lmtd. ("Satellite Receivers") at 4-5; Comments of the Wireless Cable Association International ("WCAI") at 18.

21 Comments of Liberty at 11; Comments of WCAI at 18-19.

22 Communications Act of 1934, §628, 47 U.S.C. §548. See also S. Rep. No. 92, 102d Cong., 1st Sess. 27, 28 (1991) ("Senate Report").

23 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2 (a)(5), 106 Stat. 1460, 1460 (1992).

24 See Senate Report at 28.

25 H.R. Rep. No. 628, 102d Cong., 2d Sess. 41 (1992).

services.[26] Congress plainly limited scope of the statute language to "satellite cable programming or satellite broadcast programming," and the commenters have offered no convincing reason to recommend that Congress revisit that determination.[27]

When drafting the 1992 Cable Act, Congress was clearly concerned about the perceived anticompetitive practices of vertically integrated programmers and satellite-delivered programming and the Commission, following Congress' directive, narrowly defined the types of programming subject to the program access provisions.[28]

The record simply is devoid of compelling evidence that non-vertically integrated programmers have failed to provide access to alternative MVPDs at reasonable, marketplace rates. While some MVPDs alluded to anecdotal evidence suggesting that non-vertically integrated programmers have refused to make their programming available, there is no evidence that a problem of

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26 47 U.S.C. § 548(b) ("it shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing *satellite cable programming* or *satellite broadcast programming* to subscribers or consumers") (emphasis added). See also In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: First Report and Order ("First Report and Order"), 8 FCC Rcd 3359, 3369, ¶ 28 (1993).

27 See supra note 26, First Report and Order.

28 See supra note 26, First Report and Order, at 3369, 3371, ¶¶ 28, 34 (defining satellite cable programming as "video programming which is transmitted via satellite, other than satellite broadcast programming, and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers" and defining satellite broadcast programming as "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster").

public dimension exists.[29] The handful of anecdotes related by some commenters -- even if true -- plainly do not reflect a widespread phenomenon requiring governmental regulatory intervention.

In fact, only a handful of complaints have been filed under the Commission's program access rules.[30] Even the Wireless Cable Association International admits that the "relative paucity of complaints filed with the Commission on program access issues strongly suggests that most programmers are making good faith efforts to comply with the letter and with the spirit of the law."[31] Satellite Receivers, Lmtd. also grudgingly concedes that programming has been -- and remains -- available to all MVPDs.[32]

With more programming available to MVPDs than ever before, the extension of the program access provisions to non-vertically integrated programmers is unnecessary. There is simply *no* incentive for independent, non-vertically integrated programmers to discriminate against alternative MVPDs in a market where maximum distribution is the key to success.[33]

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29 See Comments of CAI Wireless Systems, Inc. ("CAI Wireless") at 1-2 (but note that CAI Wireless complaint refers to an alleged problem with obtaining programming from a *vertically* integrated cable operator); Comments of PrimeTime 24 at 5; Comments of Satellite Receivers at 3.

30 Comments of NCTA at 37.

31 Comments of WCAI at 16.

32 Comments of Satellite Receivers at 4.

33 See Comments of ESPN, Inc.("ESPN") at 3-4; Comments of Lifetime Television ("Lifetime") at 2, 7-8; Comments of Group W Satellite Communications at 4; Comments of Viacom, Inc. ("Viacom") at 1-2, 6. In its Comments, WCAI cites a recent article which suggests that *all* programmers act anticompetitively, whether or not vertically integrated. Comments of WCAI at 17-18. See also David Waterman, Vertical Integration and Program Access in the Cable Television Industry, 47 Fed. Comm. L.J. 511, 528 (1995) (hereinafter "Waterman article"). Based on anecdotal evidence in the Waterman article, WCAI claims that cable operators exert undue influence over *all* programmers because they currently provide the most effective means of distribution.

Especially in the face of must-carry, retransmission consent, and PEG and leased access rules which all act to limit the number of channels which are available for a cable operator to program, independent, non-vertically integrated cable programmers refusing to interact with *all* MVPDs would find themselves at a distinct economic disadvantage.

Not only do independent programmers lack the incentive to discriminate, but they also lack the ability, even if Congress' assessment of vertically integrated cable programmers' incentive and ability is correct. As Congress recognized, non-vertically integrated programmers plainly lack the market leverage to engage in the anticompetitive conduct which Congress sought to address.[34]

Several commenters also alleged that cable programmers engage in discriminatory pricing,[35] despite the Commission's recognition that there are

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Comments of WCAI at 17. Thus, WCAI argues, even independent, non-vertically integrated programmers have the incentive to deal exclusively with cable operators and discriminate against alternative MVPDs. However, regardless of the accuracy of Waterman's anecdotes, even he concedes that "[b]y the time the 1992 Cable Act became law, the prevalence of exclusive contracts and claims of other outright refusals to deal with alternative MVPDs had apparently diminished." 47 Fed. Comm. L.J. at 523. And the current record shows that it is in the interest of all programmers - both vertically and non-vertically integrated - to distribute their services through alternative video distributors as well as cable systems.

[34] Comments of ESPN at 4; Comments of Lifetime at 8; Comments of Viacom at 6. The Waterman article asserts that some popular independent cable programmers have the market power to act anticompetitively. Waterman article at 522. Waterman suggests that these programmers charge differential rates for their services and can afford to do so because alternative MVPDs believe that their programming is a "must-have." Waterman article at 518, 522. However, all evidence demonstrates that even the popular, non-vertically integrated programmers provide their services to alternative MVPDs. Differential pricing, where it exists, occurs for legitimate, routine business reasons, including the credit-worthiness of the MVPDs and the higher marketing and advertising costs associated with smaller, alternative MVPDs.

[35] Comments of Heartland Wireless Communications, Inc. at 1-2; Comments of OpTel, Inc. at 4-5; Comments of Satellite Receivers at Exhibit A.

legitimate reasons for differences in rates charged by programmers.[36]. While these parties indiscriminately allege "predatory pricing" practices, differentials in programming rates based on sound business practices are not anticompetitive. Programmers carefully weigh a variety of factors when establishing the rates to be charged to all multichannel distributors. The distributor's credit-worthiness, motivation and ability to market the programmer's services, and the distributor's capacity to deliver a high quality, secure signal are all important business considerations when programmers are setting rates.

Finally, Congress has demonstrated a clear preference that market competition, rather than governmental regulation, control the multichannel video programming distribution marketplace.[37] This pro-competitive stance is mirrored in Congress' recent legislation designed to deregulate the communications field.[38] To recommend the imposition of additional regulation on non-vertically integrated program providers would not only fly in the face of Congress' intent in the 1992 Act, but also would be inconsistent with the professed principles of the current Congress (and the current Commission) to let the marketplace govern industry transactions in the absence of compelling evidence warranting government intervention.

While Congress contemplates new pro-competitive communications legislation, the Commission should not lose sight of the precise scope of the program access rules and Congress' explicit preference for competitive, rather

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36 See 47 U.S.C. § 548(c)(ii)(B)(i)-(iv); 47 C.F.R. § 76.1002(b)(1)-(4).

37 See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2 (b), 106 Stat. 1460, 1460 (1992).

38 H.R. 1555, 104th Cong., 1st Sess. (1995); S.652, 104th Cong., 1st Sess. (1995).

than regulatory, solutions to the video distribution marketplace. Therefore, the Commission's suggestion that the program access rules be extended to non-vertically integrated programmers should be rejected.

IV. THE DEFINITION OF A CABLE SYSTEM SHOULD NOT BE CHANGED TO EXEMPT COMPETITORS THAT SERVE SUBSCRIBERS THROUGH WIRES

WCAI urges the Commission to once again recommend that Congress amend the Communications Act to exempt wireless cable operators from the definition of a cable system even when they serve single family homes or separately-owned apartment buildings by wire, so long as they do not cross public rights-of-way.[39] Wireless cable providers, of course, already are free to serve these dwellings throughout a community by microwave without being treated as a cable system. They are only considered to be a "cable system" when they in fact provide service like a traditional cable operator -- through wires that interconnect separately owned buildings. Modifying that treatment would provide an unfair competitive advantage to wireless operators over traditional cable operators, and should not be advanced by the Commission.

In support of its proposal, WCAI contends that wireless cable operators are "legally barred from responding to requests for service" when developers and trailer park owners "sometimes" demand service by wire.[40] Upon examination, though, no legal bar exists at all. Rather, wireless operators are fully able to provide this service, so long as they are willing to be subject to

[39] WCAI Comments at 25.

[40] WCAI Comments at 25.

the same obligations as traditional cable operators. It is hardly unfair to require a wireless operator to compete on a level playing field.

WCAI's proposal, in contrast, would give wireless a leg up on traditional operators. It would allow wireless operators to cream skim large geographic pockets in a community without facing any of the obligations of a franchised cable operator -- or any of the rules adopted by the FCC and Congress to serve the public interest.[41]

The Commission should not reverse decades of precedent distinguishing service to commonly-owned multiple dwelling units -- an activity traditionally viewed as more of a "limited" exception for "limited service"[42], rather than a competitive entry into the provision of cable service -- from service to single family residences and other separately-owned or managed MDUs by wire -- service that has all the attributes of traditional cable operations and has always been considered cable service.[43] The public interest -- and simple fairness -- demand a more even-handed approach than that which is embodied in the FCC's congressional recommendations last year. The Commission's proposal should be abandoned this year.

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[41] For example, wireless operators would be exempt from the FCC's signal leakage requirements and technical standards; would not be required to provide lockboxes to subscribers; would avoid must carry and other signal carriage obligations.

[42] In the Matter of Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions MM Docket No. 92-264, Memorandum Opinion and Order on Reconsideration of the First Report and Order, released January 30, 1995, ¶¶ 11-12.

[43] See, e.g., In the Matter of Massachusetts Community Antenna Television Commission, 2 FCC Rcd. 7321 (1987) (service to planned community); In re Application of Virginia Television Co., 40 R.R. 2d 75 (1977) (private townhome development); In re Application of Bayhead Mobile Home Park, 47 FCC 2d 763 (1974) (mobile home park).

CONCLUSION

For the foregoing reasons, the Commission should reject the efforts of multichannel video distributors to insulate themselves from competition at the expense of cable operators. We again urge the Commission to recommend to Congress that the definition of effective competition in the 1992 Cable Act be revised to reflect the changes in the video programming market over the last year. Effective competition should be defined by the availability and the viability of alternative multichannel providers, rather than be based upon an arbitrary measure of competitive market share.

Respectfully submitted,

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