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March 29, 1996

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VIA FEDERAL EXPRESS

Office of the Secretary
Federal Communications Commission
Room 222
1919 "M" Street N.W.
Washington, D.C. 20554

Re: In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems
CS Docket No. 96-46

Dear Sir or Madam:

Enclosed for filing with the Federal Communications Commission, please find the original and nine copies of Comments in connection with the above-referenced matter. If you have any questions, do not hesitate to contact me.

Very truly yours,

BERNICK AND LIFSON, P.A.

Thomas D. Creighton

TDC/rs
Enclosures

cc: Mr. Larry Walke, Cable Services Bureau
International Transcription Services, Inc.

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

In the Matter of: Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems	CS Docket No. 96-46

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TO: The Commission

COMMENTS OF THE BELOW-NAMED POLITICAL SUBDIVISIONS OF THE STATE OF MINNESOTA

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COMMENTS OF THE BELOW-NAMED POLITICAL SUBDIVISIONS OF THE STATE OF MINNESOTA

The following political subdivisions of the State of Minnesota respectfully submit these comments in the above-captioned proceeding:

North Suburban Cable Communications Commission	Representing the Minnesota Cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North Oaks, Roseville, St. Anthony and Shoreview.
Burnsville/Eagan Cable Communications Commission	Representing the Minnesota Cities of Burnsville and Eagan.
Quad Cities Cable Communications Commission	Representing the Minnesota Cities of Anoka, Champlin, Ramsey and Andover.
North Central Suburban Cable Communications Commission	Representing the Minnesota Cities of Blaine, Centerville, Circle Pines, Coon Rapids, Ham Lake, Lexington, Lino Lakes and Spring Lake Park.
Columbia Heights Communications Commission	Representing the Minnesota City of Columbia Heights.
Lake Minnetonka Telecommunications Commission	Representing the Minnesota Cities of Deephaven, Excelsior, Greenwood, Long Lake, Medina, Minnetonka Beach, Minnetrista, Orono, St. Bonifacius, Shorewood, Spring Park, Tonka Bay, Victoria and Woodland.
Sherburne/Wright Counties Cable Communications Commission	Representing the Minnesota Cities of Big Lake, Buffalo, Cokato, Dassel, Delano, Elk River, Maple Lake, Monticello, Rockford, and Watertown.
South Washington County Cable Communications Commission	Representing the Minnesota Cities of Newport, St. Paul Park, Woodbury, Afton, and Cottage Grove, and the Minnesota Townships of Grey Cloud and Denmark.
Ramsey/Washington Counties Cable Communications Commission	Representing the Minnesota Cities of Birchwood, Dellwood, Grant, Lake Elmo, Mahtomedi, Maplewood, North St. Paul, Oakdale, Vadnais Heights, White Bear Lake, White Bear Lake Township, and Willernie.

All such jurisdictions are collectively referred to herein as the "Cities".

INTRODUCTION

The Cities are municipal consortia operating pursuant to joint powers agreements that act as the franchising authorities on behalf of their respective member cities. The

Cities represent 68 Minnesota municipalities that are active in administration of cable franchises, and the provision of public, educational and governmental ("PEG") programming either directly or through affiliations with non-profit access providers and/or the cable operator itself. The Cities, by and large, are all currently involved in franchise renewal proceedings and nearly all have received official or unofficial notice of impending franchise transfer(s) (in a number of cases, no less than three transfers are contemplated within 18 months in a given franchise area). The Cities have expended significant resources, both money and time, ensuring reasonable franchise commitments protecting the public interest, managing access to public property and rights-of-way and providing the highest quality PEG access programming.

The Cities are particularly concerned with continuing the important functions of PEG access as the "electronic town hall" and "electronic soapbox" as well as to ensure access to local government, community news, educational information, and local sporting events and other events of local interest. The Cities, which all collect franchise fees of five percent of the cable operator's gross revenues, in many instances use a portion of these fees to support PEG access operations. In addition, all of the relevant cable operators are required to provide significant services, facilities and equipment to make PEG access possible.

BACKGROUND

The Commission requests initial comments regarding the regulatory treatment of video programming services provided by telephone companies pursuant to Section 302 of the Telecommunications Act of 1996 (the "1996 Act"), which establishes a new Part V

(new Sections 651-653) of Title VI of the Communications Act of 1934 (the "Communications Act"). In particular, the Commission requests comments regarding telephone companies' entry into the video programming marketplace by providing video programming via "open video systems" under new Section 653 of the Communications Act.

In this Notice of Proposed Rulemaking ("NPRM"), the Commission seeks comment regarding specific implementation of the requirements of the open video system framework in a way that will promote "Congress' goals of flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice."[1]

Generally, new Section 653 of the Communications Act provides that if a telephone company certifies that it complies with certain non-discrimination and other requirements established by the Commission in this and other proceedings, such operator's open video system will not be subject to regulation under Title II as a common carrier, and will be entitled to reduced regulation under Title VI. An open video system operator's certification, which the Commission must approve or disapprove within ten days of receipt, must state that it complies with the Commission's regulations pursuant to subsection 653(b). These regulations must be crafted, in part, to prohibit such open video system operator from discriminating among video programmers regarding carriage on the system, require the operator to establish rates, terms and conditions of carriage that are

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[1] NPRM ¶4.

just, reasonable and not unjustly or unreasonably discriminatory, and prohibit the operator or its affiliate, if carriage demand exceeds capacity, from selecting the video programming on more than one-third of its activated channels.

In addition, subsection 653(c)(2) directs the Commission to take all actions necessary to prescribe regulations which, to the fullest extent possible, apply Title VI PEG obligations to open video system operators. Finally, subsection 653(c) provides that an open video system operator will not be subject to Section 621 franchising requirements, nor Section 622 franchise fee obligations. However, subsection 653(c)(2)(B) provides that an operator of an open video system will be subject to a gross revenue fee imposed by a local franchising authority or other governmental entity for the provision of cable service at a rate not to exceed the rate of cable franchise fees in the franchise area, all in accordance with Commission regulations to be adopted.

SUMMARY

While the NPRM raises a wide range of issues to be considered by the Commission, only some of which are identified above, the Cities' comments are confined to the following: (i) application of Title VI PEG access requirements to open video systems; (ii) availability of open video system regulations for non-local exchange carriers system operators; and (iii) fees required in lieu of franchise fees (although the Commission has not directly requested such comments).

It is quite clear that in passing the 1996 Act, Congress devised a statutory scheme whereby certain regulatory requirements applicable to cable operators will be reduced or eliminated when applied to open video system operators. The intent is to encourage

competition in the video services market from non-incumbent telephone companies. However, Congress has specifically directed the Commission, to the fullest extent possible, to require competitive parity and a "leveling of the playing field" with respect to PEG access obligations and fees in lieu of franchise fees. In addition, Congress did not intend to reduce existing regulatory burdens on incumbent cable operators; rather, it intended to reduce such burdens in a narrowly delineated manner for potential competitors to cable operators. The Cities' comments seek to help draft regulations to implement these goals.

I. Application of Title VI PEG Access Requirements.

A. Background.

New Subsection 653(c)(1)(B) of the Communications Act provides, in part, that any requirement that applies to a cable operator under Section 611 (PEG access obligations), "shall apply in accordance with the regulations proscribed under paragraph (2)." Paragraph (2) provides that "the Commission shall, to the extent possible, impose obligations that are no greater or lesser than the obligations contained in the provisions described in paragraph (1)(B) of this subsection."[2] From this it is clear that Congress intended that the level of telephone companies' commitment to PEG access on open video systems be equivalent to that of cable companies in each franchising authority in which the telephone company does business.

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[2] See also, NPRM at ¶¶ 52-53.

Generally, Section 611 of the Communications Act permits a local cable franchising authority to require that a cable operator designate channel capacity for public, educational and governmental access. Under the statutory provisions governing PEG access channels, a franchising authority may require as part of a local cable franchise or as part of a cable operator's proposal for a franchise renewal that channel capacity be designated for PEG use, and that capacity on institutional networks can be designated for educational or governmental use. The franchising authority is allowed to mandate and enforce franchise requirements for services, facilities or equipment related to PEG use of channel capacity. Finally, with limited exceptions, the cable operator is not permitted to exercise any editorial control over PEG access channels being operated under the franchising authority's control.[3]

The Cities support the Commission's interpretation of Section 653(c), which acknowledges that the Commission is required to impose, or allow local franchising authorities to impose, equivalent obligations on open video system operators and cable operators.[4] The Cities encourage the Commission to adopt rules which implement the spirit and letter of the law and allow franchising authorities to continue to encourage the growth of quality PEG access programming which supports community needs and interests and enriches life in local communities. The Cities do not support any rule that would require only a sharing of incumbent obligations by the "new provider on the block". The

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[3] See NPRM at ¶ 53 (identifying the Section 611 PEG obligations).

[4] NPRM at ¶ 57.

incumbent operator's PEG obligations have been carefully negotiated, in many instances, at the level of commitment which the economics of the incumbent operator's can sustain. That should not be interpreted by the FCC as the level of PEG commitment which is needed or required by a City. By establishing rules requiring negotiation between the City and the new video provider to *match* the PEG commitment of the incumbent provider, the needs of the community would be better met, the playing field would be leveled and the letter of the law would be achieved.

The Cities note that in practice initial franchising or renewal negotiations focus largely on negotiation of PEG access obligations and commitments considering the communities' needs and interests and considering the technological and cost concerns of the cable operator. This background gives franchising authorities, primarily local municipalities or municipal consortia, considerable experience in successfully negotiating, creating and implementing such PEG obligations.

B. Comments.

Accordingly, the Cities make the following comments:

1. The Commission should expressly authorize the level of state, county or local government which currently imposes cable franchise requirements and PEG access obligations on cable operators (the franchising authority), pursuant to state and local law, to require an open video system operator providing service in the relevant franchise area to provide in addition to that already provided by the incumbent(s), equivalent or substantially similar obligations to those imposed upon a video incumbent or incumbents in such franchise area. Obligations to be imposed include allocation of channel space for

PEG access programming, provision of monetary operating support, and support for PEG access capital equipment needs. The Cities believe that in most instances under this approach local government (primarily municipalities or municipal consortia) would be authorized to establish through direct negotiations the requisite PEG access obligations for an open video system operator in that franchising area.

2. The Cities further submit that the open video system operator should be required to accept the PEG access obligations created pursuant to 1 above, unless such operator could show: (a) actual technical infeasibility; (b) that the obligations exceed those applied to an incumbent operator providing video service in that franchise area; or (c) in the event there is no incumbent, the proffered PEG access obligation is inconsistent with such obligations on similar systems. Appeal of the requirement should be made to the Commission pursuant to its Subsection 653(a)(2) dispute resolution authority over open video system disputes.

3. The Cities note that while the Commission properly raises a number of difficult issues involving the creation of such obligations where the open video system operator serves multiple franchise areas, where there are technical difficulties in providing franchise specific programming, and in determining equivalent or original PEG access channel allocations, such issues are commonly addressed in initial cable franchising and renewal negotiations and typically are dependent in large part on local needs and interests. Cities are capable of such negotiations with open video systems.

In addition, the Cities note that Congress' overriding goals include *flexible* market entry and streamlined regulation. The Cities submit that these goals are best met by not

creating broad federal mandates on the provision of PEG access by open video system operators, but rather by leaving the creation, negotiation and implementation of such obligations to franchising authorities that already have necessary local experience in such matters.

4. The Cities also note that an alternative, although less desirable, approach which may be considered would be to require a simple duplication of current PEG obligations by the open video system provider, including interconnection with existing PEG channels and the provision of equal or equivalent financial support, services and equipment and facilities in addition to those provided by the cable operator. Under this model, the open video system provider might be required to simply duplicate all activities and provide all such facilities and financial support as the incumbent provider(s). The Cities believe this to be the second best alternative which does not provide the level of regulatory flexibility which the Commission seeks. Issues such as whether the open video system provider should be required to duplicate the existing PEG access obligations imposed on a cable operator, whether interconnection should be required, and whether the expenses of equipping and operating PEG access facilities should be duplicated or shared, are the very type of issues that local franchising authorities commonly address successfully based on the community needs and interests and the interests of the provider, including technological and cost concerns. Some cities may not need duplication, while others with very minimal existing PEG resources provided by the cable operator could well utilize duplicated resources.

5. The Cities believe that as part of the authorization to create applicable PEG access obligations, the Commission should authorize the franchising authority to require negotiations with the open video system provider and other necessary parties during which technical limitations, the level of PEG access obligations to which the cable operator in the franchise area is subject, and/or the level of such obligations in similar systems (where there is no cable operator) should be identified and discussed. To the extent required, the franchising authority should be specifically permitted to ensure the participation by incumbent cable operator(s) in the franchising area.

In addition, the Commission's regulations should encourage all the franchising authorities which are creating and implementing PEG access obligations for a given open video system operator to jointly participate in such negotiations and to jointly establish consistent obligations, to the fullest extent possible, to ensure streamlined regulation. Finally, the Cities endorse the concept that the cable operator, the open video system provider, and the franchising authority(ies) be authorized to negotiate an arrangement to share enhanced PEG access responsibilities, with the franchising authority and cable operator amending the franchise to reflect any changes resultant from such negotiation and the open video system operator's participation therein.

6. The NPRM indicates that although an open video system operator may select the video programming on only one-third of the activated channels where demand exceeds capacity, it may provide additional channels to subscribers as part of its programming package so long as it has not selected such additional channels for carriage. Further, the Commission notes that PEG access obligations shall apply to open video

system operators, regardless of the status of carriage demand and available capacity. Finally, the Commission tentatively concludes that such PEG access obligations should not be counted against the one-third of capacity that an open video system operator or its affiliate may select because, as a legal and practical matter, the operator or its affiliate would not be "selecting" such programming.

The Cities agree with this tentative conclusion and comment that the PEG access channel obligations should be "counted against" the total open video system capacity (as would presumably the "must carry" obligations), and that the remaining channel capacity be allocated in accordance with the Commission's regulations whereby the operator would be permitted to select the programming on only one-third of the remaining capacity in the event demand exceeded capacity. In this manner, the PEG access channels would not be "counted against" the operators' one-third.

7. In the NPRM, the Commission also requests comment on whether and how the open video system operator should be required to provide the PEG channels to all subscribers, including those subscribers that do not subscribe to the operator's or its affiliate's programming service. The Cities comment that the open video system operator should be required to carry the required PEG access channels as part of its programming package, in addition to but not counted against its self-selected programming. However, the Cities submit that it may be unworkable to effectively create a "basic service tier" which includes the PEG access channels and must-carry channels, and which must be made available and received by all subscribers to any of the programming packages available on the open video system. Rather, the Cities submit that the PEG access programming (and

must-carry programming) in addition to being a part of the open video system operator's "package", should be available on an à la carte basis apart from any of the other programming package selections made by a subscriber. This "package" should be available at a cost not to exceed the charge for such similar services charged by the incumbent cable operator or other competing open video system operator.

8. The Commission also solicits comment on how cable operators today comply with different PEG requirements when a cable system spans more than one franchise area. Section 611 of the Communications Act requires cable operators to provide local PEG access to a franchising authority's residents pursuant to the franchise agreement. At the same time, must-carry and related rules require cable operators, often operating single systems in multiple franchising areas, to configure signal delivery to comply with differing contractual demands of neighboring cable systems.

All currently operating cable systems, including the systems operating in the Cities (one of which is interconnected across four of the franchising areas), are configured to provide specific programming to a franchising area, and in some cases even smaller sub-units of a franchising authority. Cable systems are also required to comply with geographic transmission limitations imposed by the sports exclusivity, network non-duplication, and syndicated exclusivity rules.

The 1996 Act requires open video system providers to do no less. At least one cable operator providing service to certain of the Cities, Meredith Cable, has widely clustered systems which are interconnected and which are already providing discrete PEG

access programming within given franchising authorities. In some cases, signal from a single headend is provided to multiple franchise areas yet "narrowcasting" is provided.

The telephone companies have and will oppose "narrowcasting" allegedly because of the expense and technological difficulties. The technological and cost concerns are regularly overcome by the markedly smaller, less capitalized cable industry. Further, with few exceptions, open video systems will result from new-builds which can be constructed to accommodate this concern or from acquisitions of cable systems which are currently capable of local programming delivery. While it is certainly true that the much larger telephone industry has the means to and may build much larger state-wide video distribution systems, increased resources provides no basis to trade away the public interest in local programming.

Finally, the Cities encourage the Commission to avoid specific technological requirements in favor of a results-based approach whereby the local franchising authority is authorized to negotiate and require appropriate PEG access obligations, regardless of the technological range or scope of a proposed open video system.

II. Availability of Open Video System Regulations For Non-Local Exchange Carriers.

A. Background.

By the NPRM, the Commission seeks comment on whether Subsection 653(a)(1) permits cable operators and others to become open video system operators, or whether they may be only authorized to provide video programming on others' open video systems. In general, the Cities comment that the 1996 Act prohibits cable operators from becoming

open video system platform operators noting that this privilege is only extended to common carriers. The legislative history of the 1996 Act, in relevant part, reads:

> New Section 651 of the Communications Act specifically addresses the regulatory treatment of video programming services provided by *telephone companies*. Recognizing that there can be different strategies, services and technologies for *entering* video markets, the conferees agree to multiple entry options to promote competition, to encourage investment in new technologies and to maximize customer choice of services ....[5]

B. Comments.

The Cities comment as follows:

1. Congress' reasoning in creating "open video systems", like the Commission's rationale in creating "video dialtone", was that telephone companies needed a modified regulatory regime to encourage them to compete in the video services market. This regime should not be available to cable operators.

Any other interpretation could permit a cable operator currently providing service under a cable franchise to avoid the obligations of the franchise and convert to an open video system operator. Under Minnesota law and, the Cities believe, the majority of other states' legal principles, a cable franchise is both a regulatory ordinance and a contract. To allow a cable operator to convert to an open video system would effectively eliminate many of the contractual obligations to which the local franchising authority and public are entitled. Clearly this raises a number of constitutional concerns.

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[5] Conference Report, H.Rep. 104-458 (1996) at 171-172 (emphasis added).

In addition, any other interpretation would lead to the erroneous result that former cable operators thereafter operating as open video system platforms would occupy local rights-of-way without the express authorization of the franchising authority. The securing and continuation of a cable franchise and the payment of a cable franchise fee are continuing statutory obligations on cable television operators which cannot and should not be obviated by Commission action. Further, the Cities believe that the "fee-in-lieu-of-franchise-fee" may not adequately compensate cities for the value of their property. Allowing a cable operator to spontaneously change to an open video system operator would therefore result in an unconstitutional taking under the Fifth Amendment to the Constitution.

2. The Cities additionally comment that the legislative history of the Act appears to offer cable operators the opportunity to use an open video system platform to offer cable services to customers via "leased" open video system channels instead of using their own facilities, or in addition to using their own facilities.[6] However, the statute was not meant to allow existing video programming providers to escape their existing contracts and avoid their prior commitments. The statute intended to encourage competition *to* cable operators and was not intended to allow conversion of regulatory status as a "cable operator" to that of an "open video system operator".

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[6] Again, the Cities wish to clarify that a cable operator providing service pursuant to an existing franchise could not cease operations to replace this service with "leased" packages on an open video system nor can they convert existing franchised systems to open video systems. Clearly this would violate the terms of the existing franchise.

III. Fees Required In Lieu of Franchise Fees.

A. Background.

The Commission notes in its NPRM that the specific issues raised therein were non-exclusive and were designed to develop a record to enable the Commission to determine what rules, if any, must be adopted to effectuate the 1996 Act's requirements. The Cities submit that it would be prudent to initiate rulemaking regarding the setting of applicable rates in lieu of franchise fees to be paid by open video system operators. While apparently the Commission's regulations in this regard are not subject to the six month rulemaking deadline, it is incumbent on the Commission to ensure, to the fullest extent possible, regulatory certainty for both potential open video system operators and the various levels of government affected.

The 1996 Act, Subsection 653(c), provides that, in general, the Section 621 franchising requirement and Section 622 franchise fee obligation shall not apply to any operator of an open video system. However, the 1996 Act, Subsection 653(c)(2)(B), provides that:

> An operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under Section 622. The rate at which such fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator transmitting video programming in the franchise area, as determined in accordance with regulations proscribed by the Commission. An operator of an open video system may designate that portion of a subscriber's bill attributable to the fee under this subparagraph as a separate item on the bill.

Accordingly, the Commission, by regulation, must only determine the method by which fees in lieu of franchise fees are to be imposed on open vide system operators and may not prohibit a local franchising authority or other governmental entity from charging such fee in accordance with applicable local and state law. This is consistent with Congress' determination in Section 101 of the 1996 Act, creating new Section 253 of the Communications Act, that while a state or local government may not by statute or regulation prohibit the ability of any entity to provide any telecommunications service or act as a barrier to entry, this provision does not affect the authority of a state or local government:

> to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for use of public rights-of-way on a non-discriminatory basis, if the compensation required is publicly disclosed by such government.[7]

In addition, the Conference Committee Report in discussing new Section 653 indicates that "the conferees intend that an operator of an open video system under this part shall be subject, to the extent permissible under state and local law, to the authority of a local government to manage its public rights-of-way in a non-discriminatory and competitively neutral manner." In short, while the Commission may determine the method of imposition of such fees in lieu of franchise fees, the Commission may not prohibit the collection of such fees.

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[7] Communications Act, Subsection 253(c).

B. Comments.

Therefore, the Cities make the following comments:

1. The Commission should by Order clarify that the governmental entity currently charging cable franchise fees in a given franchise area, whether it be local, county or state government, is authorized to apply a similar fee to the gross revenues of an open video system operator operating in such political subdivision.

2. The amount of such fee should be equal to the fee charged as a percent of gross revenues on a cable operator in that franchising area, not to exceed five percent of gross revenues in accordance with the Communications Act.

3. The open video system operators' "gross revenues" subject to such fee should specifically include payments made directly by subscribers to the operator or its affiliate for affiliated programming, and should additionally include fees paid by non-affiliated programmers for the "lease" of channel space. In other words, "gross revenues" as defined for open video systems should be the same as defined by the incumbent cable operators or other competing video provider.

The Cities note that cable operators traditionally pay a franchise fee on the fees collected for leased access channels which are required by law to be made available to unaffiliated programmers, and the Commission should provide for a "level playing field" with respect to the definition of "gross revenues". In addition, the Conference Committee Report regarding new Section 653 indicates that "in another effort to assure parity among video providers, the conferees state that such fees [imposed on open video system operators] may only be assessed on revenues derived from comparable cable services."

While Subsection 303(b) of the 1996 Act, which amends the cable franchise fee limitation, provides that cable franchise fees are limited to five percent of the cable operator's gross revenues derived from operation of the cable system "to provide cable services", the Conference Committee Report makes clear that this amendment is only intended to exclude new telecommunications services provided by a cable operator and is specifically *not* intended to exclude "cable-related revenues". Accordingly, the provision of "leased" channel space for video services, whether provided by an affiliated or unaffiliated programmer, and further whether selected by the open video system operator or a "lessee", should be subject to the gross revenues fee.

Respectfully submitted on behalf of the above-named political subdivisions of the State of Minnesota.

BERNICK AND LIFSON, P.A.

By Robert J. V. Vose

By Thomas D. Creighton

DATED: March 29, 1996

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