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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	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

Initial Regulatory Flexibility Analysis

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To: The Commission

INITIAL REGULATORY FLEXIBILITY ANALYSIS REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; MONTGOMERY COUNTY, MARYLAND; THE CITY OF LOS ANGELES, CALIFORNIA; THE CITY OF CHILLICOTHE, OHIO; THE CITY OF DEARBORN, MICHIGAN; THE CITY OF DUBUQUE, IOWA; THE CITY OF ST. LOUIS, MISSOURI; THE CITY OF SANTA CLARA, CALIFORNIA; AND THE CITY OF TALLAHASSEE, FLORIDA

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To: The Commission

The National League of Cities; the United States Conference of Mayors; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; the City of Los Angeles, California; the City of Chillicothe, Ohio; the City of Dearborn, Michigan; the City of Dubuque, Iowa; the City of St. Louis, Missouri; the City of Santa Clara, California; and the City of Tallahassee, Florida, by their attorneys, and, where appropriate, on behalf of their members, hereby file the following reply comments in response to the Initial Regulatory Flexibility Analysis ("IRFA")

contained in the Report and Order and Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, released March 11, 1996. These joint commenters have combined their comments in response to the Commission's request that filings be streamlined and consolidated wherever possible.

I. INTRODUCTION

Contrary to the statements regarding the potential effect on small entities found at in ¶ 81 of the NPRM, the proposals of the NPRM and of several commenters would have a "significant effect on a substantial number of small entities."[1] The NPRM at ¶ 81 inaccurately cites "video programming providers" as the only class of small entities that might be affected by the proposed rules. The NPRM completely ignores the significant economic effect the proposed rules will have on thousands of small governmental jurisdictions all across the country.

Small governmental jurisdictions are local franchise authorities with existing cable franchises that will be affected by the proposals of the Commission and the commenters. Small governmental jurisdictions are also owners and managers of local rights-of-way that will be affected by the proposals of the Commission and the commenters. And small governmental jurisdictions are managers, users, and funders of public, educational, and governmental ("PEG") access channels and programming that will be affected by the proposals of the NPRM and the commenters.

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[1] 5 U.S.C. § 601 et seq.

II. THE PROPOSALS WILL AFFECT A SUBSTANTIAL NUMBER OF SMALL ENTITIES.

The Regulatory Flexibility Act defines small entities to include small governmental jurisdictions. The Act defines small governmental jurisdictions as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[2] The NPRM proposals will affect over 38,000 such small governmental entities.

The Bureau of the Census compiles statistics on the number and size of sub-state governmental jurisdictions. According to the Bureau of the Census, there are 3,043 counties and 35,935 sub-county general purpose governments (municipalities, towns, and townships) in the United States.[3] Of these, 2,250 counties and 35,320 cities, towns and townships have populations under 50,000.[4] Thus, of the 38,363 local general-purpose governments in the United States (counties, cities, towns and townships), 37,570, or almost 98 percent, are small governmental jurisdictions subject to the Regulatory Flexibility Act.

The National Association of Counties represents the nation's 3,043 counties. Of these, 2,250 counties have a population of less than 50,000. These small governmental county jurisdictions

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[2] 5 U.S.C. § 601(5).

[3] See U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, 1992 Census of Governments Vol. 1 Number 1 (based on population counts as of April 1, 1990).

[4] Id.

consist of 612 counties with a population between 25,000 and 49,999; 908 counties with a population between 10,000 and 24,999; and 730 counties with a population under 10,000.

The United States Conference of Mayors represents the mayors of municipalities with populations of 30,000 or more. Of these, 422 are municipalities with populations under 50,000 (i.e., between 30,000 and 49,999). Only 505 cities in the nation have a population of 50,000 or more.

The National League of Cities represents the nation's 19,279 cities. Of these, 18,774, or 97 per cent, of all municipalities have a population of less than 50,000. In addition, there are 16,656 towns and townships in the United States. Of these, 16,546, or 99 per cent, have a population of less than 50,000.

A very significant number of the small governmental jurisdictions affected by the NPRM proposals are very small and stand to be particularly burdened by the proposed rules. For example, 18,770 of the nation's 35,935 cities, towns, and townships, or 52 per cent, have populations of less than 1,000 persons.

Based on the foregoing information, we believe it is inconceivable that the Commission's proposed rules will not have a significant effect on a substantial number of small governmental jurisdictions.

III. THE PROPOSALS WOULD IMPOSE SIGNIFICANT BURDENS ON SMALL GOVERNMENTAL JURISDICTIONS.

Our comments and reply comments on the merits of the NPRM's proposals and those of other commenters discuss at length the effects those proposals would have on local governments, including substantial numbers of small governmental jurisdictions, if adopted. We will not repeat our concerns in detail, but in sum, the proposals would place economic burdens on small governmental jurisdictions to participate in federal proceedings instead of allowing them to be resolved locally; would deprive small governmental jurisdictions of valuable resources in the form of the management of and compensation for the use of local public rights-of-way; would abrogate contracts that small governmental jurisdictions have entered into with incumbent cable operators; and would deprive small governmental jurisdictions of the investment of scarce local resources that they have made in PEG programming and facilities and in the ability to communicate with all of their residents in an equal manner.

For example, to the extent the NPRM's proposals or those of commenters would federalize essentially local issues such as the determination of PEG obligations, and place the forum for addressing these issues at the federal rather than local level, small governmental jurisdictions will face increased costs and procedural burdens. If the Commission sought jurisdiction over PEG obligations for its dispute resolution process, it would result in the added burden of appeals before the Commission

rather than local negotiations with the OVS operators directly. We estimate that, at a minimum, a small governmental jurisdiction would incur additional costs of $10,000 to prepare and carry through a proceeding at the Commission to resolve a dispute over OVS PEG obligations.

For another example, the proposal of commenter Bell Atlantic regarding rights-of-way would appropriate the property — local public rights-of-way — of small governmental jurisdictions. This would result in loss of control of these rights-of-way, which are essential for governmental functions, as well as the loss of revenue as compensation for their use by a private for-profit enterprise.

Small governmental jurisdictions have invested scarce local funds in PEG programming as a way to serve citizens better. Some commenters have proposed that the PEG obligations of an OVS operator be minimized, federalized, or generalized, instead of adhering to the statutory requirement that such obligations be no more than or no less than those of the cable operator. These proposals would deprive small governmental jurisdictions of the benefit of equal PEG services to serve citizens who chose OVS service.

IV. ALTERNATIVES EXIST WHICH DO NOT IMPOSE SIGNIFICANT IMPACT ON SUBSTANTIAL NUMBERS OF SMALL GOVERNMENTAL JURISDICTIONS.

The text of our comments and reply comments contain detailed discussion of alternatives that do not impose significant impact

on substantial numbers of small governmental jurisdictions. These include:

1. Open video systems must meet local community needs and interests.

2. OVS operators must meet locally established PEG requirements.

3. An OVS operator's PEG obligations extend to channel capacity, services, facilities, and equipment.

4. An OVS operator's PEG obligations must change as those of the competing locally franchised cable operator change.

5. The OVS certification process must ensure that an OVS operator obtains authorization to use local public rights-of-way.

6. The Act does not impliedly preempt State and local right-of-way authority.

7. The OVS provisions may not be interpreted in such a way as to require a taking of local governmental property.

8. The Act prohibits incumbent cable operators from reneging on their franchises and becoming OVS operators.

V. CONCLUSION

In preparing its final regulatory flexibility analyses in this proceeding, the Commission should amend its initial findings to reflect the information provided above. We would also urge the Commission to review its proposals in light of this new information and revise them accordingly.

In particular, we urge the Commission to find specifically that the proposed OVS rules will have a significant effect on a substantial number of small governmental jurisdictions. We also urge the Commission to adopt rules that do not impose significant economic or procedural burdens on small governmental jurisdictions.

Respectfully submitted,

THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; MONTGOMERY COUNTY, MARYLAND; THE CITY OF LOS ANGELES, CALIFORNIA; THE CITY OF CHILLICOTHE, OHIO; THE CITY OF DEARBORN, MICHIGAN; THE CITY OF DUBUQUE, IOWA; THE CITY OF ST. LOUIS, MISSOURI; THE CITY OF SANTA CLARA, CALIFORNIA; AND THE CITY OF TALLAHASSEE, FLORIDA

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