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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
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Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
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COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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June 4, 1996

No. of Copies rec'd 0+4
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The National Cable Television Association, Inc ("NCTA"), by its attorneys, hereby submits its comments in response to the Commission's Order and Notice of Proposed Rulemaking in the above-captioned proceeding.[1] NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television operators serving over 80 percent of the nation's cable television subscribers and over 100 cable program networks that now command 50 percent of the viewership in cable households.

INTRODUCTION AND SUMMARY

In this proceeding, the Commission proposes to implement the "cable reform" provisions of the Telecommunications Act of 1996 ("1996 Act"). As a general matter, NCTA agrees with the interim rules the Commission has adopted to implement the 1996 Act and, with the modifications discussed below, we believe the Commission's proposed final rules should be adopted.

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[1] ___ FCC Rcd. ___, FCC 96-154, released April 9, 1996 ("Notice").

We first address the effective competition test added by the 1996 Act under which a cable operator is freed from rate regulation if a local exchange carrier ("LEC") or its affiliate, or anyone else utilizing a LEC's facilities, offers comparable video service by any means, except DBS, in the cable operator's franchise area.

- Unlike the other three effective competition tests in the statute, there are no pass or penetration criteria in the new effective competition test. The Notice's suggestion that such a test could be adopted must be rejected. Effective competition exists once LEC-affiliated competition is deemed offered in a cable operator's franchise area. Satisfaction of the Commission's existing definition of "offer" is all that is required.
- MMDS systems should be rebuttably presumed to be available within their 35-mile protected zones.
- Because under Commission precedent and the plain meaning of the statute, SMATV service is not direct-to-home service (the only MVPD service not included in the new effective competition test), LEC-affiliated SMATV service must be deemed to satisfy the effective competition test.
- The Commission should include signals of "superstations" as qualifying "broadcast signals" under the "comparable" programming definition of this new test.
- The Commission should adopt the statutory definition of "affiliate" established in Section 3(a)(2) of the 1996 Act. This standard -- requiring 10% equity ownership or its equivalent -- will properly identify situations where competing MVPDs have received significant financial infusions from LECs which might be in the form of instruments other than voting stock -- as apparently is the case with the Bell Atlantic and NYNEX investments in CAI Wireless Systems, Inc.
- The interest of more than one LEC should be aggregated in determining whether the new test is met.
- A LEC need not be the licensee, lessee or owner of an MVPD to satisfy the effective competition test.

With regard to small cable operator rate relief, NCTA agrees that the national subscriber count number should be established on an annual basis and that this number should serve as the basis for determining the one percent eligibility limitation for the following year. As for the appropriate definition of "affiliate" in the context of the small cable operator rules, NCTA

generally agrees with the Commission's proposal to apply the standard used in the current small system rules, but urges excluding purely passive interests in a small cable operator. The Commission should adopt a flexible waiver policy to allow an entity cable operator to demonstrate the requisite attributes of a small cable operator.

NCTA agrees with the Commission's definition of gross revenues for purposes of the small cable operator revenue test and with the conclusion that the number of subscribers in a franchise area, not the number of subscribers to the system, is determinative of eligibility for small cable operator relief. In cases where both the BST and CPST are deregulated, rates for equipment are also deregulated. NCTA generally supports the Commission's interim small cable operator certification rules. Finally, as to transition issues, eligible systems should be grandfathered as long as there are 50,000 or fewer subscribers in the franchise area, even if the operator itself becomes ineligible.

On other issues, the Commission should allow application of the bulk rate exception to the uniform rate requirement in the case of MDUs where discounts are offered to residents based on penetration within the MDU. It should allow discounts to be offered to MDU residents who are billed individually. It should include areas served by private cable systems within the meaning of "multiple dwelling units" for purposes of applying the new uniform rate provisions. And it should review allegations of predatory pricing under principles of federal antitrust law.

As to Section 624 of the Communications Act, the Commission should complete the task mandated by Congress: LFAs no longer have a role in enforcing federal technical standards. Finally, we agree with the Commission that the word "nudity" as used in Sections 506(a) and (b) of the 1996 Act means only sexually explicit nudity which is obscene or indecent and that a

good faith judgment by a cable operator that certain programming is obscene or indecent is presumptively valid.

I. EFFECTIVE COMPETITION

The Telecommunications Act of 1996 ("1996 Act") added a new effective competition test to Section 623(l) pursuant to which a cable system is exempt from rate regulation if:

> a local exchange carrier ["LEC"] or its affiliate (or any multichannel video programming distributor ["MVPD"] using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.[2]

In its interim order, the Commission amended its rules to incorporate this new prong of the effective competition test. The Commission also adopted rules on an interim basis regarding certain procedural and definitional issues. In its Notice, the Commission seeks comment on whether to adopt certain of its interim rules on a permanent basis and seeks comment on several issues regarding implementation of the new effective competition test.

A. Defining "Comparable" Programming

1. Comparable programming includes all television broadcasting signals.

The 1996 Act states that for effective competition to exist the programming offered by LEC competitor must be "comparable" to the programming offered by the unaffiliated cable operator.[3] In its interim rules the Commission adopted the Conference Report definition of

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[2] 1996 Act at Section 301(b)(3).

[3] 1996 Act at Section 301(b)(3).

"comparable" programming, i.e., "access to at least twelve channels of programming, at least some of which are television broadcasting signals."[4] On an interim basis, the Commission required "the broadcast programming to include the signals of local broadcasters."[5] It found that broadcast programming delivered by satellite (e.g., "superstations") would not be deemed broadcast programming for purposes of the interim application of the new effective competition test. The Commission seeks comment on whether its permanent rules should "include satellite-delivered broadcast channels (e.g., 'superstations')."[6]

Under any rational definition, superstations should also count as "broadcast signals."[7] The legislative history of the 1996 Act does not limit the definition of comparable programming to local or distant terrestrially-delivered broadcast stations. Indeed, the Commission has not raised the prospect of disallowing all non-local (i.e., distant) television stations, only those delivered by satellite. There is no logical difference from the viewer's perspective between television stations received via satellite and those received via microwave or mountaintop antennas. Since Congress did not distinguish superstations from all other broadcast stations, it must be assumed that Congress intended that all television stations, including superstations.

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4 Notice at ¶ 12 (emphasis added), citing H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. ("Conference Report") 170 (1996).

5 Notice at ¶ 12.

6 Id. at ¶ 70.

7 A superstation is defined as "a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier." 17 U.S.C. § 119(d)(9); 47 C.F.R. § 76.64(c)(2).

qualify as "comparable" broadcast programming for purposes of the new effective competition test.[8]

2. MVPD offerings of television broadcast signals.

In making an effective competition showing, the cable operator will need to demonstrate that the competitor "offers" at least some television broadcast signals.[9] The simplest and most easily obtainable evidence of the competitor's programming offerings is its channel lineup, or other similar marketing materials. The Commission considers cable system channel lineups prima facie evidence of the channels carried by the system for purposes of certain Commission rules, such as the must-carry rules.[10] Accordingly, inclusion of signals on the cable competitor's channel lineup or marketing materials should be prima facie evidence that the competitor offers such channels.

As the interim rules recognize, it is not necessary for a television broadcast station to be "retransmitted" over the competitor's facilities in order for such stations to be considered "offered" by the competitor for effective competition purposes.[11] As described above, the

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[8] Congress clearly knows how to distinguish between local broadcast stations and superstations when it intends to treat the two differently. See, e.g., 47 U.S.C. § 543 (b)(7)(A) (distinguishing between superstations and other broadcast stations in context of placement on basic tier subject to rate regulation.)

[9] According to the legislative history of the 1996 Act, the term "offer" is to be defined in accordance with the existing FCC rule, Sec. 76.905(e). See Conference Report at 170. "Offer" under the Commission's rules means: "(1) When the multichannel video programming distributor is physically able to deliver service to potential subscribers, with the addition of no or only minimal investment by the distributor, in order for an individual subscriber to receive service; and (2) when no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of multichannel video programming distributor."

[10] See, e.g., 47 C.F.R. §§ 76.56(e), 76.302(a) (cable operator must place a list of the television broadcast signals carried in fulfillment of must-carry obligations in its public file).

[11] Notice at ¶ 13.

Conference Report explains Congress' intent that a MVPD provide "access" to at least 12 channels of programming, at least some of which are television broadcasting signals.[12] Congress did not require a MVPD to transmit the signal to subscribers -- rather, only that its customer have access to such a signal. Retransmission is only relevant to the question of whether or not the competing multichannel video program distributor is required to obtain the consent of a television broadcast station retransmitted pursuant to Section 325(b)(1) which provides that "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station . . . ."[13]

The policies underlying the effective competition standard are satisfied regardless of whether television broadcast stations are actually retransmitted by the multichannel video programming distributor or are merely offered in conjunction with the services of the MVPD using facilities that are under the subscriber's control. It is the comparability between the cable operator's and competing MVPD's service offering in the eyes of the customer that is relevant for purposes of the effective competition inquiry. When an MVPD takes any actions which facilitate a subscriber's receipt of off air television broadcast signals along with the cable satellite programming or other services provided by the MVPD, or even creates the impression that such reception is part of the MVPD's service package, the package of services received is indistinguishable from those services which can purchased from the local cable operator.[14] It

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[12] Conference Rep. at 170.

[13] 47 U.S.C. § 325(b)(1).

[14] The interim order found that an MMDS operator offered broadcast signals if: (1) such signals are available to a subscriber without an A/B switch; (2) the MMDS operator is responsible for installation

makes no difference whether the competing MVPD imposes a separate charge for the broadcast station retransmission or provides those services for free. Nor does it make a difference whether the subscriber or the MVPD owns or installs the antennas or A/B switches which are used to receive the television broadcast signals. All that matters is that customers have a realistic option to receive comparable MVPD service in place of cable service. Thus, NCTA urges a simple, easy to administer test: if the channel lineups or marketing materials of the MVPD make the subscriber reasonably aware of the ability to receive broadcast television signals along with all other programming provided by the MVPD, broadcast signals are "offered" for purposes of the comparability test.[15]

B. Defining When Programming Service is Deemed "Offered".

1. There are no pass or penetration tests for effective competition in the statute.

The Commission notes that new Section 301(b)(3) of the 1996 Act "does not, unlike the other three effective competition tests, include a percentage pass or penetration rate."[16] Despite the statute's clarity, the Notice "seek[s] comment as to whether Congress intended effective competition to be found if a LEC's, or its affiliate's, service was offered to subscribers in any portion of the franchise area, or whether the competitor's service must be offered to some larger portion of the franchise area to constitute effective competition."[17]

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of an A/B switch if needed; or (3) broadcast signals are included on the MMDS operator's rate card, advertising or other marketing materials. Notice at ¶ 14.

[15] Even in situations where the channel line-up does not list broadcast signals, a cable operator still should be able to show that access to such signals is provided by the MVPD.

[16] Notice at ¶ 72.

[17] Id.

The clear language of the statute states that deregulation results if LEC-affiliated competition is offered in the cable operator's franchise area. The legislative history states that "offer" has the same meaning given that term in the Commission's rules as in effect on the date of enactment of the bill.[18] Under the Commission's definition of "offer," (1) the competing MVPD must be physically able to deliver service to potential subscribers in the franchise area with no more than minimal additional investment, (2) there must be no regulatory, technical or other impediments for the delivery of service, and (3) potential subscribers must be reasonably aware that they may purchase the competing service.[19]

Neither the statute nor the Act's legislative history add anything to these three points. And there certainly is no reference to a specific "pass" or "penetration" test as a condition for a finding of effective competition.[20] Rather, the statute requires only that the competitor's service be "offered" in the franchise area, not that any specified level of customers actually subscribe to such service.[21]

Congress intended this new prong to reflect that an affiliation with a LEC gives an MVPD advantages over an unaffiliated competitor, such that no penetration rate test is necessary. As Commissioner Quello stated in his separate statement to the Notice, the new

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[18] Conference Report at 170.

[19] 47 C.F.R. § 76.905(e).

[20] As the interim order recognizes, the absence of a penetration rate of 15% and a pass rate of 50% sharply contrasts to the other prongs of the effective competition definition. 47 U.S.C. § 543 (l)(1)(B) (establishing effective competition where MVPDs serve at least 50 percent of households in franchise area and obtain more than 15 percent penetration); id., § 543 (l)(1)(B)(c) (establishing effective competition where LFA operates MVPD offering service to at least 50 percent of households).

[21] 1996 Act at Section 301(b)(3).

effective competition test is "one of the more straightforward provisions of the 1996 Act."[22] Thus, the question posed by the Notice of whether LEC-affiliated competition "is sufficient to have a restraining effect on cable rates"[23] has already been addressed by Congress: it does.

2. MMDS systems should be rebuttably presumed to be technically available within their 35-mile protected zones.

The Notice, citing the Conference Report, notes that the term "offer" will be applied as currently defined by Section 76.905(e) of the Commission's Rules.[24] In its Rate Order which adopted Section 76.905(e), the Commission stated that "[o]nce an MMDS operator has initiated operation, the service will be deemed 'offered' to those subscribers residing in the interference-free contour."[25] The Commission defines this "interference-free contour" as "a circle with a radius of 35 miles centered on the MMDS transmitter site."[26] Thus, a wireless cable system should be rebuttably presumed to be available within its 35-mile protected zone.[27] Within this 35-mile protected zone, actual signal strength measurements could be used to rebut the presumption of availability. Similarly, a cable operator should be able to offer signal strength measurements or other evidence that the wireless cable service is available to customers in

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22 See also separate statement of Commissioner Chong

23 Notice at ¶ 72.

24 Notice at ¶ 72.

25 Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd. 5631 (1993) ("Rate Order") at ¶ 30 (footnote omitted).

26 Notice at ¶ 10, citing 47 C.F.R. § 21.902(d).

27 See Memorandum Opinion and Order (Falcon Telecable, Sinton, TX), DA 95-23, 10 FCC Rcd. 1654 (1995) at ¶ 9.

communities lying outside the 35-mile zone if it wishes to avail itself of the effective competition test in those areas.

3. SMATV service should be included in the new effective competition test.

Under the new statutory test, effective competition exists wherever a LEC or its affiliate offers video programming services directly to subscribers "by any means (other than direct-to-home satellite services)."[28] Thus, any video distribution technology will satisfy the new test, except for "direct-to-home satellite services." Despite this unambiguous statutory language, the Commission seeks comment

> as to whether the type of service provided by, or over the facilities of, the LEC or its affiliate should be relevant. For example, we seek comment as to whether satellite master antenna television ("SMATV") systems constitute direct-to-home satellite services and hence do not fall within the class of video providers that can be a source of effective competition under the new test.[29]

SMATV is not "direct-to-home satellite service" within the meaning of the 1996 Act. As set forth in the 1996 Act itself:

> [t]he term "direct-to-home satellite service" means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.[30]

According to the legislative history of this section.

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[28] 1996 Act at Section 301(b)(3).

[29] Notice at ¶ 71 (footnote omitted).

[30] 1996 Act at Section 602(b)(1) (emphasis added).

> DTH [direct-to-home] satellite service is a national rather than a local service....[31]

In contrast, "the SMATV service operator functions much like a traditional cable operator,"[32] except that it does not use "any public right-of-way."[33] A SMATV system, like a cable system, is still "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide . . . video programming to multiple subscribers within a community."[34] On a SMATV system, the signals are received by the SMATV operator, and then processed, packaged, and distributed via internal distribution facilities to the dwelling units of subscribers, typically within multiple dwelling unit ("MDU") buildings. The ultimate customers do not receive the signal "direct" from the satellite, as is the case with direct-to-home satellite service. DTH service has subscribers scattered across the country, whereas subscribers to a SMATV system are all located in a single community. The DTH channel lineup is uniform throughout the nation, and does not include local broadcast signals. SMATV, on the other hand, is a local service, with a unique channel lineup on each system, almost always including a broad selection of local television stations.

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[31] H.R. Rep. No. 204, 104th Cong., 1st Sess. ("House Report") 125 (1995). The legislative history to the 1992 Cable Act also recognizes this distinction See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 91-93 (1992).

[32] Rate Order at ¶ 22.

[33] 47 U.S.C. § 522(7).

[34] Id. (emphasis added).

Indeed, the Commission recognized the distinction between DTH and SMATV only a few months ago in its Second Annual Report to Congress on the status of competition in the video marketplace.[35] There is no basis for the Commission to ignore this well understood distinction between DTH and SMATV that it clearly articulated only a few months ago -- and that is plainly spelled out in the 1996 Act's DTH definition. Thus, a LEC-affiliated SMATV clearly satisfies the effective competition test.

C. Determining LEC Affiliation

1. The Commission should adopt the new statutory definition of "affiliate" for the new effective competition test.

Title VI of the Communications Act contains the following definition of "affiliate":

> the term 'affiliate,' when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.[36]

However, as the Commission also notes, the 1996 Act adopted a new definition of "affiliate":

> [t]he term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.[37]

According to Section 3 of the Communications Act, this new definition of "affiliate," along with the other definitions set forth in Title I, applies "unless the context otherwise requires...." As a

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[35] Second Annual Report, CS Docket No. 95-61, FCC 95-491 (released December 11, 1995), at ¶¶ 48, 104.

[36] Notice at ¶ 74, citing 47 U.S.C. § 522(2).

[37] 47 U.S.C. § 153(1).

threshold matter, NCTA believes that the inclusion in Title VI of a separate definition of affiliate establishes a context in which the Title I definition need not govern.[38]

The Commission asks whether, for purposes of the effective competition test, "the context requires" a different definition of "affiliate" than in Section 3(a)(2) of the 1996 Act. The Commission tentatively concludes that the new Title I definition should apply because use of the new definition "is not inconsistent with Congressional intent and would create some uniformity throughout the Commission's rules."[39]

NCTA agrees that the Title I definition would carry out Congressional intent to find effective competition to exist in any situation where a local telephone company, due to its unique economic strengths and competitive advantages, has made a significant financial investment (more than 10% equity or its equivalent) in a competing MVPD. NCTA sees no reason why "the context requires" a different definition of affiliate for purposes of the effective competition definition than that adopted in the interim rules.[40] The new effective competition test demonstrates Congress' interest in a pro-competitive policy that recognizes telephone companies' diversification into competing technologies. Congress thus intended to allow a cable operator to compete as robustly and vigorously as possible against this powerful

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[38] 47 U.S.C. § 153.

[39] Notice at ¶ 77.

[40] NCTA disagrees, however, with the Commission's inference that "uniformity" of affiliation tests might be a valid policy objective. Indeed, the Communications Act includes the phrase "unless the context otherwise requires" in recognition of the Commission's discretion to tailor differing affiliation tests to comport with the policy goals in the context of each different FCC rule. As the Commission has noted, "various attribution rules have been used by the Commission and by other regulatory agencies depending on the specific policy or rule in question. . . ." First Report and Order, MM Docket No. 92-265, 8 FCC Rcd. at 3770 (1993). This policy makes sense and should continue.

competitor. This standard reflects Congress' specific policy concerns with regard to this type of competitor and this form of competition. It is the right fit for the specific policies to be served.

The Commission tentatively concludes that "both passive and active ownership interests are attributable,"[41] and seeks comment as to whether beneficial interests should be deemed "equivalent" to an equity interest for the purposes of the statutory test.[42] Non-voting stock and insulated limited partnership interests are "passive" ownership interests which should be included under any reasonable test measuring equity or its equivalent in this context. To do so serves the Congressional goal of finding effective competition in situations where a LEC has made a significant financial investment in a competing MVPD. Similarly, beneficial interests such as options, warrants, convertible debentures and interests held in trust should properly be deemed the "equivalent" of equity for carrying out the purposes of the new effective competition test.

Such a reading of the statute is consistent with recent Commission cases taking a broader view of ownership and control.[43] According to the Commission:

> Congress could not have envisioned every circumstance that might arise, and where a simple 'count the shares' methodology leads to patently absurd results that defeat the congressional intent, we intend to fill any such voids in the law consistent with the underlying congressional purpose.[44]

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[41] Notice at ¶ 15.

[42] Id. at ¶ 77.

[43] Fox Television Stations, Inc., Memorandum Opinion and Order, File No. BRCT-940201KZ ("Fox 1"), 10 FCC Rcd. 8452 (1995) at ¶ 37, citing Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as Amended, 103 FCC 2d 511 (1985), reconsidered in part, 1 FCC Rcd.. 12, 13-14 (1986). The Commission affirmed these conclusions from Fox 1 several months later, but granted a renewal of the television broadcast station at issue, WNYW-TV, due to the "unique facts" of the case. Fox Television Stations, Inc., File No. BRCT-940201KZ, 78 RR 2d 1294 (1995) ("Fox 2").

[44] Fox 1 at ¶ 43 (footnote omitted).

Accordingly, the affiliate definition added by Section 3(a)(2) of the 1996 Act[45] -- and the inclusion of beneficial interests as the "equivalent" of equity interests -- should be adopted because "a simple 'count the shares' methodology" is not sufficient in this context to effectuate the policy of the new effective competition test to identify significant LEC investments in MVPDs which may be evidenced by instruments other than traditional common stock.[46]

An overly narrow definition of "affiliate" fails to capture the massive investments currently being made by LECs in MVPDs. A prime case study is CAI Wireless Systems, Inc. ("CAI"), which operates MMDS systems in numerous communities. In 1995, Bell Atlantic and NYNEX invested $100 million in cash in CAI. As a result, Bell Atlantic and NYNEX hold the following interests in CAI:

- 14% Term Notes convertible to Senior Preferred Stock at the option of Bell Atlantic and NYNEX.
- 7,000 shares of Senior Preferred Stock.
- Warrants to purchase Common Stock and Voting Preferred Stock.
- The right to convert the Term Notes, Senior Preferred Stock and Warrants, after which they would together control 45% of the fully diluted stock of CAI.

If Bell Atlantic and NYNEX fully exercised all of their purchase and conversion rights under the Warrants and the Senior Preferred Stock, their aggregate purchase price, including the consideration originally paid for the Term Notes, the Senior Preferred Stock and the Warrants, would be in excess of $300 million.[47] The 14% Term Notes, convertible to Senior Preferred

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[45] 1996 Act at Section 3(a)(2).

[46] See Fox 1 at ¶ 43.

[47] See, Joint Proxy Statement-Prospectus of CAI Wireless Systems, Inc. and ACS Enterprises, Inc., August 25, 1995 ("Prospectus"); Amendment No. 2 to Schedule 13D, CAI Wireless Systems, Inc., filed with SEC October 12, 1995. According to Item 5 of Schedule 13D Bell Atlantic and NYNEX

Stock at the option of Bell Atlantic and NYNEX, and the Warrants to purchase Common Stock and Voting Preferred Stock, even if not qualifying as "equity" per se, certainly constitute a beneficial interest which should be deemed the "equivalent" of equity within the meaning of the "affiliate" definition adopted in the 1996 Act. Indeed, given the unilateral option of Bell Atlantic/NYNEX to exercise their conversion rights and warrants, it is apparent that Bell Atlantic and NYNEX hold beneficial interests in CAI which, at a minimum, are "equivalent" to an equity interest in CAI well in excess of 10%.[48]

In fact, on the Schedule 13D filed with the Securities and Exchange Commission on October 12, 1995, Bell Atlantic and NYNEX report their affiliates hold a collective beneficial interest in CAI equivalent to 49.4% of the CAI common shares (or 45.3% on a fully diluted basis).[49] Accordingly, even if the above interests are not deemed to be equity, the 1996 Act's "more than 10% equity or its equivalent" test for LEC affiliation must be construed to reach the substantial beneficial interests held by LECs in competing MVPDs, as is the case with CAI.

The Commission also asks how "beneficial interest" should be defined.[50] In order to properly effectuate Congressional policies, NCTA recommends that, for purpose of the new

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also have "shared voting" rights over 45.3% of the fully diluted Common Shares of CAI. Under the Securities and Exchange Commission's rules, even if Bell Atlantic and NYNEX merely had potential voting rights, that would constitute "beneficial ownership" of 45.3% of the Common Shares of CAI. See 17 C.F.R. § 240.13d-3(d)(1)(i)(A).

48 Such conversion rights and warrants are immediately exercisable by Bell Atlantic/NYNEX, in which case Bell Atlantic/NYNEX would immediately control over 45% of the fully diluted stock of CAI. Moreover, if the planned merger between Bell Atlantic and NYNEX becomes a reality, the coordination behind the exercise of such conversion rights and warrants would presumably become much easier.

49 Schedule 13D at pp. 4, 6 and 10.

50 Notice at ¶ 77.

effective competition test, the FCC consider using the definition of "beneficial ownership" promulgated by the Securities and Exchange Commission (the "SEC") in Rule 13d-3 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which reads, in pertinent part:

> (a) For purposes of Sections 13(d) and 13(g) of the [Exchange] Act, a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:
>
> > (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or
> >
> > (2) Investment power which includes the power to dispose, or to direct the disposition of, such security. . .
> >
> > > (d) Notwithstanding the provisions of [paragraph] (a)...of this rule
> > >
> > > > (1)(i) A person shall be deemed to be the beneficial owner of a security...if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) within 60 days, including but not limited to any right to acquire: (A) through the exercise of any option, warrant or right; (B) through the conversion of a security....[51]

The Notice also seeks comment on whether the affiliation standard may be met by aggregating interest of more than one LEC.[52] Consistent with the Commission's current effective competition rules, the interests of more than one LEC should be aggregated. As the Commission stated in deciding to aggregate the subscribership of alternate services for the 1992 Cable Act's effective competition definition, "we agree with those that argue that a cable system

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[51] 17 C.F.R. § 240.13d-3.

[52] Notice at ¶ 77.

experiences competitive pressures regardless of whether 15 percent of the households in the franchise area subscribe to many or only one single alternative service."[53]

The case is even stronger where, as in the example of CAI, LECs such as Bell Atlantic and NYNEX purchase equity interests (or their equivalent) in an MVPD. As the Commission recognized in aggregating subscribership of alternate services for the current effective competition rules, failure to do so here could result in the anomalous situation where one LEC purchases a 10.1% equity stake in an MMDS operator and is thus considered affiliated, but several LECs could enter into a joint venture, each purchasing less than a 10% stake in the MMDS operator, and not be deemed affiliates of the operator regardless of how large the total ownership was.[54] Such an anomaly would ignore the "business realities" of the situation and lead to a "patently absurd" result.[55] The policy goal behind Section 301(b)(3) of the 1996 Act is based on the unique competitive pressures which result from MVPDs with financial backing from deep-pocketed LECs. The financial benefits flow to the competing MVPD regardless of whether such investment is from a single LEC or an aggregated group of LECs.

As is the case with the Commission's current effective competition rules, competitors should be required to cooperate reasonably in the provision of ownership affiliation information requested by the cable operator. For example, under the current effective competition rules,

> cable operators may request from a competitor information regarding the competitor's reach and number of subscribers. A competitor must respond to such request within 15 days.[56]

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[53] Rate Order at ¶ 36 (footnote omitted).

[54] Id. at ¶ 118.

[55] See, Fox 1, supra.

[56] 47 C.F.R. § 76.911(b)(2).

Additionally, competitors must "supply the necessary information at their own expense, which we believe will be minimal."[57] A requirement that competitors cooperate reasonably in providing ownership affiliation information requested by cable operators would be consistent with the cooperation required of cable operators and other competitors throughout the Commission's rules.[58]

In addition, the Commission may want to modify FCC Form 430 to require wireless cable operators to certify that they are not LEC-affiliated. This simple requirement would alleviate the administrative burden on all parties, including the Commission, who might otherwise need to investigate the operator's ownership and affiliation relationships.

2. A LEC need not be the owner/licensee of a MVPD to satisfy the effective competition test.

The Commission "tentatively conclude[s] that the new test for effective competition applies with equal force" whether the LEC or its affiliate is (1) the video programming service provider, or (2) the licensee, lessee or owner of certain of the facilities utilized to offer the competitive video service.[59] NCTA agrees with this tentative conclusion. Indeed, the plain statutory language applies equally to situations in which the LEC or its affiliate is the offeror of video programming services to subscribers or the licensee or where "any multichannel video programming distributor using the facilities" of a LEC offers such competing programming.[60]

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[57] Rate Order at ¶ 45.

[58] See, e.g., 47 C.F.R. § 76.56(e).

[59] Notice at ¶ 71.

[60] 1996 Act at Section 301(b)(3).

Thus, in the wireless cable context, effective competition can be found regardless of whether (1) the LEC or its affiliate is the licensee of the MMDS or ITFS frequencies; (2) the LEC or its affiliate is the lessee of ITFS/MMDS channels which are then subleased to a third party who packages and markets the programming to subscribers; or (3) the LEC or its affiliate is the programmer/packager using ITFS/MMDS channels which are licensed to or leased by unaffiliated third parties.

It is not merely hypothetical to assume that LECs might obtain the rights to control the operations of competing MVPDs even in situations where they are not the licensee or outright owner of the underlying facilities. For example, in the August 25, 1995 Prospectus describing the $100 million investment by Bell Atlantic and NYNEX in CAI, a "Business Relationship Agreement" is described whereby Bell Atlantic and NYNEX have obtained the rights to program and operate CAI's wireless systems in thirteen different markets. LEC competition can be equally potent regardless of whether the LEC (or its affiliate) owns the underlying facilities or, instead, possesses the rights to provide services over competing facilities, even if such facilities are owned by or licensed to a third party.

D. Procedural Issues.

The new effective competition definition added by the 1996 Act requires the adoption of certain procedural guidelines. For example, NCTA agrees with the Commission that "[a] cable system that meets all of the relevant criteria in the new effective competition test is exempt from rate regulation as of February 8, 1996, the date the 1996 Act was enacted."[61] Congress intended deregulation to be self-executing at any time on or after February 8, 1996 where the new

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[61] Notice at ¶ 17.

effective competition test is satisfied. As stated in the legislative history, "[t]he test provides that effective competition exists when a telephone company or any multichannel video programming distributor is offering video programming services directly to subscribers by any means in the franchise area of an unaffiliated cable operator."[62] Since neither the statute nor the legislative history mention any transition period to deregulation once the test is met, no delays should be inferred. Accordingly, cable operators should be immediately deregulated upon the filing of an effective competition showing with the Commission, with service on the affected LFAs.[63] Consumers will be fully protected through the Commission's authority to take remedial action if the operator's effective competition showing is ultimately rejected.[64]

In reviewing effective competition petitions affirmatively submitted prior to any valid CPST complaint, the Commission should rule that such petitions are deemed granted if they are either (1) accompanied by a concurrence from all relevant certified LFAs, or (2) unopposed after the close of the applicable 30-day public notice period. If the petition is opposed, the Commission should issue a ruling within 90 days from the date the complaint was filed. This is consistent with the 1996 Act's requirement that the Commission resolve CPST complaints within 90 days after filing.[65] A cable operator should not be placed in a less favorable

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[62] Conference Rep. at 170 (emphasis added).

[63] The FCC already has the principle of immediate deregulation in its rules when effective competition is timely alleged by the cable operator. 47 C.F.R. § 76.911(c). In fact, an operator is deregulated whether it has made an effective competition filing, so long as it in fact faces "effective competition." Thus, for instance, an operator who faces effective competition and is the subject of a rate complaint has no liability so long as effective competition prevailed during the period addressed by the complaint.

[64] Cf. 47 C.F.R. § 76.942.

[65] 1996 Act at Section 301(b)(1)(C).