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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN - 4 1996

In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	CS Docket No. 96-85

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SUMMARY

The Commission should ensure that the "fourth prong" of the "effective competition" test properly reflects the special competitive prowess of Local Exchange Carriers. No minimum numerical standard should be required for determining whether a LEC-affiliate "offers" service in a particular franchise area. "Comparable programming" should be defined consistent with Section 76.905(g) of the Commission rules, and LEC affiliation should be measured based on a strict five percent equity threshold.

The Commission should measure the revenue cap included in the 1996 Act's definition of a "small operator" solely in terms of cable-related revenue. Any other interpretation risks eviscerating the regulatory benefits intended by Congress by foreclosing eligibility to the many smaller operators with large passive investors. The Commission should also ensure that systems initially eligible for small operator status have an appropriate transition mechanism should they subsequently lose their eligibility for rate relief.

The Commission should reject the proposal to narrowly construe the uniform rate exemption to cases where the units are billed to a single master account. Such an interpretation has no logical basis and would frustrate Congressional intent. In fact, the Commission should expressly expand the uniform rate exemption beyond the multiple-dwelling unit ("MDU") context to also apply to single family "planned unit developments" ("PUDs"). In determining the propriety of a discounted "bulk" rate, the Commission should rely on existing legal standards regarding "predatory pricing." It should, however, expressly place the burden of production on the complainant, unless the complainant makes a prima

face showing that the MDU/PUD price has been reduced by more than 50 percent below the standard rate.

The Commission should liberally construe the sweep of the 1996 Act's technical preemption. Congress has established that marketplace competition, rather than local franchising authority fiat, is the preferred mechanism to ensure the continued development of communications technology.

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COMMENTS

Cole, Raywid & Braverman ("CRB"), on behalf of the cable operators identified on Attachment A, hereby submits these Comments in response to the *Notice of Proposed Rulemaking* issued[1] the above-referenced proceeding. CRB urges the Commission to implement the "Cable Act Reform" components of the Telecommunications Act of 1996 consistent with the pro-competitive, deregulatory intent of the 1996 Act.

I. EFFECTIVE COMPETITION.

Congress revisited its existing "effective competition" definition in the 1996 Act and crafted a special, less restrictive test where a local exchange carrier ("LEC") is competing with the incumbent cable operator. 47 U.S.C. § 543(l)(1)(D). While non-LEC affiliated competitors must achieve a 50% availability/15% penetration threshold before

[1] *Order and Notice of Proposed Rulemaking*, CS Docket No. 96-85, FCC 96-154 (April 9, 1996) ("*NPRM*")

constituting "effective competition," Congress deliberately removed these numerical thresholds for LEC-affiliated competitors. Congress obviously recognized that the unique resources of LECs (which had heretofore led Congress and the Commission to bar LECs from providing video programming within their service area) make them particularly powerful competitors to incumbent cable operators, even at the earliest stages of operation. While an unaffiliated competitor might not have a serious constraining effect on cable prices and practices until it is relatively established in the local marketplace, common sense suggests that a LEC-affiliated competitor will be perceived as a meaningful competitive threat as soon as it begins operating.

CRB agrees with the separate statements issued with the *NPRM* contending that the Commission should **not** write numerical standards into the new effective competition test in the face of the deliberate deletion of such standards by Congress. Commissioner Chong correctly explained that the plain language of the statute precludes reliance on numerical standards. "Unlike the other three "effective competition" tests, this fourth test does *not* include a percentage or pass rate. . . In adopting an effective competition test without a specific pass or penetration test, Congress made its intention clear that this fourth effective competition test would be met if the LEC offered service in any portion of the franchise area."[2]

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[2]Separate Statement of Commissioner Rochelle B. Chong, FCC 96-154, at 2. *See also* Separate Statement of James H. Quello.

A. Definition of "Offer."

The LEC-affiliated service must, of course, be "offered" in the franchise area before counting as "effective competition" under the Act. This will necessarily require a case-by-case determination as to whether the service is, in fact, being marketed locally. Consistent with Congress' objective, the standards applied here should be relatively lenient and should not be tied to an arbitrary level of marketing activity or marketing success.

The Commission should also make it clear that the LEC-affiliated entity (as custodian of the necessary material) must provide information regarding the extent of its local presence to affected cable operators. Alternatively, if the LEC-affiliated entity is unwilling to provide such information, it can simply certify that it "offers" service in the franchise area. This certification process would streamline the process and avoid unnecessary discovery disputes and regulatory proceedings.

In the case of LEC-affiliated MMDS ventures, CRB agrees that the presumptive 35 mile zone established in the interim rules is an appropriate starting point to measure technical availability. Parties should be able to rebut the 35 mile presumption, however, based on engineering tests of signal strength.

The suggestion in the *NPRM* that LEC-affiliated competition might not count under the new effective competition (or might count in some different way) if "technical constraints" preclude the entity from ever achieving comprehensive distribution in the franchise area, *NPRM* at ¶ 72, reveals a troubling misunderstanding of LEC expansion into the video programming marketplace. The LECs currently are experimenting with a variety of technical, legal, and operational vehicles for quickly entering the video marketplace, some of

which (*e.g.*, MMDS) have obvious distribution limitations The LECs themselves have made it clear that these are strategic entry investments.[3] The Commission must recognize that the limitations of an "interim" distribution vehicle being used today do not constitute a permanent limitation on LEC delivery of video programming.[4]

B. Definition of "Comparable Programming."

As with any other multichannel video programming distributor, a LEC-affiliated MVPD must offer "comparable programming" if it is to provide "effective competition." The *NPRM* notes that the legislative history provides conflicting interpretations of what constitutes "comparable programming." *NPRM* at ¶ 12. The Conference Report explains that "comparable programming" "includes access to at least 12 channels of programming, at least some of which are television broadcasting signals." Conference Report, S. Rep. 104-230 at 170 (Feb. 1, 1996). It then cites for support Section 76.905(g) of the Commission rules, which establishes the same 12 channel minimum, but then adds that the channels must "includ[e] at least one channel of nonbroadcast service programming." 47 C.F.R. 76.905(g). The two definitions are irreconcilable in one important scenario -- 12

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[3]*See, e.g.*, *Pacific Telesis Revises Video Strategy in Response to New Competitors, Regulatory Delays*, Telecommunications Reports, October 2, 1985, at 5; Form S-3 Registration Statement of CAI Wireless Systems, Inc., SEC Reg. No. 33-3334, April 4, 1996, at 3; Joe Estrella, *Bell Atlantic Starts Testing Digital Wireless Cable in Va.*, Multichannel News, May 27, 1996, at 37.

[4]Likewise, there should be no distinction based on whether the LEC is involved in providing the video programming service itself or just making the facility available to others. The practical effect on the incumbent operator is likely to be much the same.

channels of non-broadcast services would be considered "non-comparable" under the first definition and "comparable" under the second definition

For some unexplained reason, the *NPRM* tentatively concludes that Congress meant to adopt the first definition. In fact, logic suggests that the error was in the Report's narrative description, not in the reference to the existing Commission rule. As Congress obviously was aware of the rule, it presumably would have offered some explanation why it was suddenly departing from the Commission's historic practice and analysis. Its failure to do so strongly suggests that Congress meant to adopt the definition already established under section 76.905(g) and simply misstated that definition. Congress had no reason to want one definition of "comparable programming" applicable to three prongs of the "effective competition" test and a different definition to apply to the final prong.

Because the statute itself provides no definition of "comparable programming" and the legislative history provides conflicting interpretations, the Commission should adopt the most sensible interpretation available. In fact, the definition already set forth under Section 76.905(g) has the compelling advantage of comporting with the realities of cable service and video competition. In practical terms, the critical programming component a MVPD needs in order to meaningfully compete with cable is not the offering of at least one broadcast signal (which is generally available off-air and can be secured through an A/B switch and an antenna), but the offering of cablecast channels (which are not available off-air). In addition, if the Commission were to reverse its tentative conclusion and apply the Section 76.509(g) definition here, it could avoid the rather complicated procedures it devised

on an interim basis to address situations where an MMDS provider offers broadcast signals through a separate "off-air" feed and an A/B switch.[5]

C. Definition of "Affiliate."

The *NPRM* also seeks comment on whether it should maintain its "interim" rule and define "affiliate" for purposes of the new effective competition test based on the Title I definition advanced in Section 3(1) of the 1996 Act. The *NPRM* properly notes that the definition in Title I does not necessarily apply to Title VI. *NPRM* at ¶ 16. CRB believes that the definition here should be at least as strict as that incorporated into Title I, and recommends adoption of an even lower numerical threshold of 5%.[6]

CRB believes a low threshold is appropriate here because, as already noted, LECs are currently investing in various means of video distribution for strategic entry purposes. A relatively modest investment in MMDS now is likely to be the precursor for additional investment in the future. More importantly, LECs presumably view these investments not simply in terms of whether the particular venture will fare well financially, but how the investment will facilitate broader expansion into the video marketplace. Accordingly, LECs have a very different commitment to these ventures than would a

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[5]*See NPRM* at ¶¶ 13-14. If the Commission retains its interim definition, it is imperative that it aggressively pursue its announced plan to attribute broadcast signals offered in connection with non-broadcast MMDS transmissions. Without this attribution policy, cable operators will be deprived of the regulatory benefits related to the presence of LEC-affiliated MMDS competition if the MMDS provider does not include local broadcast signals in the MMDS transmission.

[6]CRB supports the suggestion that all LEC investments be aggregated, regardless of the size of any individual LEC investment.

"passive" financial investor. The entry by certain LECs into the MMDS field, for example, is closely tied with the desire to find an immediate distribution vehicle for their new investments in video programming.[7]

On a practical level, the cable industry clearly perceives a serious threat from LEC affiliated MMDS providers. In discussing recent LEC investments in MMDS companies, the press invariably treats the MMDS ventures as "LEC-affiliated."[8] There is no discussion that LEC commitment to a particular MMDS venture will be moderated by the initial percentage of ownership the LEC has acquired.

Whatever numerical cut-off the Commission adopts, it should clarify that LECs (as custodians of the necessary material) are obligated to share essential ownership information with cable operators. Again, if a LEC does not wish to share that specific information, it should be allowed to certify that they are, in fact, "affiliated" with a particular media venture. But cable operators should not be denied the ability to show "effective competition" because of LEC reluctance to share information.

The importance of this requirement is well illustrated by the Petition for Special Relief recently filed by Time Warner Cable involving LEC-affiliated competition in the Bakersfield, California market. In that case, Time Warner Cable used SEC files in an attempt to ascertain the extent of the LEC affiliation. Although Time Warner Cable

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[7]*Supra*, n. 2.

[8]*See, e.g.*, Bryan Gruley and Mark Robichaux, *FCC Proposes Rules Backing Cable Systems*, The Wall Street Journal, April 10, 1996, at A4; Chris McConnell, *FCC Issues Rules to Reform Cable*, Broadcasting & Cable, April 15, 1996, at 68; Joe Estrella, *Bell Atlantic Starts Testing Digital Wireless Cable in Va.*, Mutlichannel News, May 27, 1996, at 37.

apparently identified the critical information in that case. it reveals the potential danger of LECs frustrating "effective competition" showings bv withholding information necessary to analyze their ownership structure.

II. SMALL OPERATOR RELIEF

A. Liberal Construction

The Commission's initial approach to defining the eligibility standards for "small operator" relief (as manifested in the *NPRM* and the Bureau's recent decision in *C- TEC Cable System of Michigan, Inc.*, DA 95-755 (May 13, 1996)), is surprisingly harsh. At the risk of using an old cliche, the Commission is in danger of losing sight of the forest through the trees. Congress created "small operator" relief as part of the general deregulatory thrust of the 1996 Act. It acted in recognition of the unique status of smaller cable operators in the current marketplace and a desire to liberate these operators immediately from the burdens of extensive rate regulation. There is absolutely no evidence in the record suggesting that Congress offered this relief begrudgingly or was particularly concerned that the relief would be abused The Commission should. therefore, not frustrate Congress's underlying objective of assisting smaller cable operators by narrowly construing the eligibility standards for regulatory relief. To the contrary, the Commission should accommodate smaller operators wherever possible.

It must be remembered that small operator relief is a temporary measure. In less than three years, CPST regulation will sunset, and the nation's largest cable operators will

be entitled to the very same relief available now for small operators.[9] This means that a harsh approach on eligibility now will accomplish little on a long-term basis, other than increasing the financial vulnerability of a class of operators Congress wanted to assist.

The temporary nature of small operator relief also places this rulemaking in a very different context than most rulemakings in which the Commission considers ownership limits. In those cases, the rules will have long-term, prospective effect, and parties have ample opportunity to devise ownership structures in advance to comport with Commission restrictions. In this case, potential regulatory beneficiaries have already structured their ownership and will not, as a practical matter, have the opportunity to revise a non-compliant structure in the relatively brief time that the relief applies. As a result, the Commission should be less concerned here with fashioning strict rules to minimize the possibility of larger operators restructuring to exploit the regulatory relief intended for smaller operators[10] and be more concerned with fashioning lenient rules that will accommodate smaller operators who happen to find themselves with an existing ownership structure potentially jeopardizing their eligibility.

B. Regulatory Definition

Section 301(m) if the 1996 Act defines a "small cable operator" as "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of

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[9]47 U.S.C. § 543(c)(4).

[10]The current business trends point so overwhelmingly towards increasing ownership consolidation, it is extremely unlikely that an entity will disassemble itself to gain the temporary regulatory benefits afforded small cable operators.

all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[11] The "subscriber count" component of the test is relatively straightforward and CRB supports the Commission's proposed treatment. The "gross revenue" component is far more troubling, because many smaller cable operators have ownership ties with large financial institutions that exceed this revenue threshold. The *NPRM* asks "Whether only affiliates of the cable operator that are also cable operators should be included when aggregating gross annual revenues with respect to the $250 million threshold." *NPRM* at ¶86. CRB strongly urges the Commission to answer that question in the affirmative and limit the "gross revenue" test to cable-related revenue.

CRB understands that the statutory language does not expressly limit the gross revenue test to cable operations, but the Commission has an obligation to implement the Act's provisions in a sensible fashion, and the most sensible interpretation of Section 301(m) is to assume that the gross revenue test includes an industry-specific limitation. As explained below, if non-cable revenue of affiliates can eliminate eligibility for small operator relief, many smaller cable operators will never secure the benefits Congress intended. To do so, they would need to restructure their current ownership and, in so doing, lose critical investors. Ironically, this would exacerbate the difficulties smaller operators already face in raising capital and frustrate the very objective Congress sought to achieve.

Significantly, the revenue cap at issue is only slightly higher than the gross revenue a cable operator with a subscribership at the 1 percent cap (*i.e.*, 617,00 subscribers) would produce based on today's typical subscriber fees. CRB suggests that the dollar cut-off

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[11] 47 U.S.C. § 543(m)(2).

was never intended to look at non-cable revenue and was simply intended by Congress as a "backstop" to the initial subscriber cut-off. The revenue cap, seen in this context, reduces the likelihood that serious disputes will arise regarding how a particular operator counts its subscribers or how the national subscriber figure is derived. The revenue cap also prevents an operator at the upper end of the subscriber cut-off from unduly exploiting "small operator" relief. If such an operator charged truly excessive rates, it would cross over the revenue cap and be subjected again to CPST rate regulation.

Linking subscriber size with annual revenues is not without precedent. When the Commission created its "small system" relief last year, it emphasized that a "cable company with an overall subscriber figure of 400,000 -- is roughly equivalent to a cable company with $100 million in annual revenues." *See Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266, 93-215 at ¶¶ 31-32. (June 5, 1995) (the "Eleventh Order"). The Commission explained, "By targeting rate relief at small cable companies with 400,000 or fewer subscribers, we believe we will be assisting those companies earning $100 million or less in annual gross revenues to obtain financing needed to grow." *Id.* at ¶ 32. Congress, too, recognized the link between subscriber size and gross revenues, and simply decided (out of an abundance of caution) to provide both measures as a cap on small operator eligibility.

Denying regulatory relief to a smaller cable operator based on the revenue its affiliates garner from non-cable sources is inconsistent with most of the traditional justifications for establishing such relief. The operator still would: (1) contribute to media diversity; (2) face relatively high operating costs; and (3) face relatively high per subscriber

costs administering rate regulation. Indeed, the only justification that arguably would not apply is that the operator might have better access to substantial financial resources. Assuming that were true, it still would not be a sufficient basis by itself to deny relief.

C. Financial Considerations

The key problem with counting non-cable revenue in the gross revenue cap is that it would preclude a large percentage of smaller cable operators from ever taking advantage of the relief Congress provided. These entities typically are highly leveraged. Because they lack the size to raise funds in the public market, they routinely rely on large investors to provide critical capital. If the operator wants to remain eligible for small operator relief, the current proposal requires the operator to keep individual investors below 20% equity or find willing investors with minimal outside revenue. The prospect of accomplishing this task is far from appealing, and is likely impossible for many smaller operators. This restriction on available investors necessarily makes the task of financing even more difficult on a class of operators already hard-pressed to secure favorable financing. As a result, the cost of financing will increase. The small operator's cost of capital (already higher than its larger counterparts) will be increased through increased brokerage and legal fees. This result is directly contrary to Congress' intention in fashioning small operator relief.

Unfortunately, investments by large financial institutions do not eliminate all the special problems faced by smaller cable operators. These investments do not provide the operator with any operational or administrative economies of scale. It would be unfortunate if smaller cable operators were categorically denied benefit of the relief Congress provided.

because of the unrelated revenue of their passive investors. It would be particularly unfortunate because it is far from clear that these entities are prepared to make funds available to the cable venture beyond those already invested.

The Commission has recognized in other contexts the need to relax attribution standards to facilitate media companies securing necessary financing. Indeed, in instances where it has adopted a relatively relaxed attribution standard, the Commission has emphasized that the relaxed standard "will afford qualified [entities] a reasonable measure of flexibility in obtaining needed financing from other entities, while ensuring that such entities do not acquire controlling interests."[12] This flexibility has been particularly pronounced in the area of passive investments. The Commission has explained, "[P]assive institutional investors generally invest funds on behalf of others, play passive investment roles, and are generally prohibited either by law or by fiduciary duties from becoming involved in the operation or control of the companies in which they invest."[13]

In the PCS context, the Commission recently explained, "We recognize[] that passive investment in entrepreneurs' block applicants would be critical to the successful development of these smaller companies."[14] The same considerations that led to relatively high attribution thresholds applicable to the PCS Entrepreneurs Block should be applicable here. In both instances, the Commission's goal is to facilitate entities competing in a very

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[12] *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 5532, ¶ 159 (1994).

[13] *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, 10 FCC Rcd 3606, ¶ 47 (1995)

[14] *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 4493, ¶ 8 (1994).

capital intensive field. In fact, the attribution standards should be even more lenient here because of the temporary nature of the relief, and its primary application to already formed entities.

In the event that the Commission concludes that revenue attributable to non-cable affiliates must be counted against the $250,000,000 cap, CRB suggests the following attributions standards to maximize potential eligibility for small cable operator relief:

1. **"Passive" Investments Should Not be Attributable, provided the equity stake of each such investments remains below 50%.** This favorable exemption would apply to investments by traditional passive investors (*e.g.*, banks, insurance companies, mutual funds). It would also apply to entities that assume a passive role with regard to this particular investment. For example, if the entity does not holding voting shares or serves only as a limited partner.[15]

The proposed 50% cap is similar to the cap used in the PCS-entrepreneurial block. In the PCS context, the Commission carefully considered the issue of how to define a "small business" for purposes of establishing eligibility for the "C Block" auction and established a combination of asset and revenue caps. However, recognizing the difficulties that small businesses often have great difficulty in accessing capital, the Commission also adopted passive investor exceptions to its financial caps. Specifically, the

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[15]Furthermore, certain types of "qualifying investors," which include "institutional investors," can own up to 20.1% of the 50.1% equity that must be held by the control group, and still meet the Commission's "small business" definition. See 47 C.F.R. §24.709(b)(6)(i)(C). Because of the difficulty of fitting new regulations to existing entities (rather than the other way around) the Commission should relax its normal safeguards for ensuring true "passivity." The Commission should presume every limited partner is passive and **not** require the additional insulating safeguards and certifications required in other circumstances.

gross revenues and total assets of certain passive investors are **not** attributed to a small business applicant if the applicant retains control over the applicant "control group". Under the broadband PCS C Block rules, passive investors can hold up to 49.9% of the applicant's equity, without jeopardizing the applicant's "small business" status. *See* 47 C.F.R. § 24.709(b)(6).[16] Although the ownership limits applicable PCS to C Block auction are far more complex then necessary here, the accommodation they afford passive investors should be pursued here.

If the Commission decides against the 50% cap for passive investors, it should in no event establish a figure less than double the cap set for active investors. This is consistent with the approach used in numerous other ownership rules.[17]

2. **The revenue figures of individual (non-cable) investors should not be aggregated.** If individual revenue figures are aggregated it will be extremely difficult for small cable operators to attract outside capital and still comply with the revenue cap.

3. **Investment Funds should be not measured by the size of the fund.** If the size of investment funds are measured in terms of the size of the fund itself, it will be extremely difficult for small cable operators to attract outside capital and still comply with the revenue cap. In any event, contributions to the fund by individual investors in the fund do not constitute fund "revenue." To the contrary, fund revenue consists, at most, of the return

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[16]However, the applicant must control at least 50.1% of the applicant's voting stock, if a corporation, or all of the applicant's general partnership interests, if a partnership. Further, any single nonattributable investor may only hold up to 25% of the applicant's voting equity, or only limited partnership interests if the applicant is a partnership.

[17]*See, e.g.*, 47 U.S.C. § 73.3555 note 2(i); 47 U.S.C. § 76.501 note 2(i).

the fund generates through its investment in other businesses. A more sensible approach for purposes of this rule would be to limit the "gross revenue" calculation to fees collected by the fund manager for managing the fund.

D. Transition

The *NPRM* tentatively concludes that "a deregulated system would become subject to regulation upon exceeding the statutory thresholds," and then suggests that "an instantaneous shift from complete deregulation to full regulation may not be in the public interest because it could be disruptive to consumers and operators." *NPRM* at ¶¶ 93-94. CRB agrees that a sudden reimposition of rate regulation would be contrary to the public interest. CRB urges the Commission to look towards the transition mechanism it created last year in fashioning its own "small cable company" relief and extend similar relief in this proceeding.

In the *Eleventh Order on Reconsideration*, the Commission recognized that if a system eligible for favorable rate treatment lost all rights to that treatment either by crossing over the numerical thresholds, the benefits provided would be largely illusory for many of these companies. Were that approach applied, a small cable company would be effectively locked into the status quo and denied a reasonable "exit" strategy. Indeed, the small cable company would face a serious regulatory impediment either to acquiring additional systems to increase its own competitive posture or to selling its systems to a larger MSO. To avoid this problem, the Commission essentially "grandfathered" all currently eligible cable systems. The same approach should be adopted here.

Should the Commission decide against relying on a simple forbearance policy (leaving the systems' CPST tiers unregulated until the general regulatory sunset in 1996), the best option available is to rely on the relatively favorable procedure extended to small cable companies in the *Eleventh Order*. In that proceeding, the Commission determined that a rate would be presumed reasonable (under Form 1230) as long as it does not exceed $1.24 per channel. CRB suggests that systems eligible for CPST rate deregulation under small operator relief as of February 8, 1996, who subsequently lose that eligibility, merit favorable transition treatment. They should be entitled to maintain any rate established during their deregulated period (consistent with the Commission's recent rejection of "all rates in play") and be allowed to take additional rate increases consistent with either conventional rate justifications or the special Form 1230.

III. UNIFORM RATE REQUIREMENT

The *NPRM* suggests that multiple dwelling units for which a cable operator renders a single bill would be exempted from the requirement for a uniform rate structure, but that those for which the cable operator renders individual bills to individual customers would not. *NPRM* at 98. CRB suggests that this distinction is both unworkable and inconsistent with the statute.

Cable operators have a variety of billing arrangements with owners and residents of multiple dwelling units. Some provide all services to all residents in the development, and render a single bill to the development's owner or manager. Others "bulk bill" only basic service, and individually bill premium or other optional services to the

individual residents according to their individual desires. Over the past decade, there has been an increasing trend towards direct billing to the individual MDU resident in order to promote maximum flexibility and customer choice. Indeed, in a world of CPS Tiers, Migrated Product Tiers, New Product Tiers, premium service packages and internet access, forcing cable operators into a "one size fits all" billing arrangement with all residents of an MDU derogate the very customer choice and marketplace forces which the 1996 Act is designed to promote.

The suggestion in the *NPRM* that the uniform rate exemption applies only when there is a single bill generated is an anachronistic throwback to the 1992 Act rules (under which each MDU price variation had to be specifically justified in light of specific cost savings). The 1996 Act replaces such regulation with a reliance on market competition from SMATVs, who are now free to interconnect MDUs regardless of ownership, and who themselves follow precisely the flexible billing arrangements we have outlined.

CRB is not suggesting that residents within an MDU complex should be subject to unjust discrimination among themselves. However, the Commission should construe the uniform rate exemption more broadly than is suggested in the *NPRM*, and permit variations from the single family home rate structure within MDUs, so long as the various residents of each MDU are treated without unjust discrimination among themselves.

The Commission has an additional opportunity to harmonize two provisions of the 1996 Act which further the same goal of replacing regulation with market competition. With the 1996 Act's redefinition of "cable system" to remove many planned unit developments (PUDs) from franchising and regulation, 47 U.S.C. § 522(7), many more

SMATVs will be competing to provide service within PUDs. Such PUDs include so-called "gated communities," mobile home parks, and other single family detached housing accessed through private streets. The competition for such developments is quite fierce today, as is illustrated in the case law.[18] CRB suggests that the Commission revise its uniform rate structure rule to exempt such PUDs, which are now subject to unfranchised and unregulated competition from SMATVs, and permit cable operators to package services in a manner most responsive to the demands of such PUDs.

The Commission has ample authority to regulate PUDs in this manner. Just as it departed from tier neutrality for the going forward rules, has adopted more flexible rate standards for NPTs, it may adopt relaxed regulation of PUDs and retain the authority to revisit the issue if market forces prove inadequate to the task. A failure to provide this relief will afford SMATVs, who already have this pricing flexibility, an unfair advantage. As the Commission stated yesterday in its OVS Order, "we do not believe that Congress intended to create a competitive video marketplace by giving one competitor a regulatory option that would be unavailable to all others." *Open Video Systems*, CS Docket 96-46, FCC 96-249 at ¶ 19, June 3, 1996).

CRB agrees with the Commission's proposal to rely upon existing antitrust laws for the substantive resolution of claims alleging "predatory pricing." There is ample case law to which parties may look for guidance in alleging and defending against such claims. The FTC is currently engaged in reforming its antitrust policies in an effort to conform Justice

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[18] *See, e.g., C/R TV Cable, Inc. v. Shannondale Inc.*, 27 F.3d 104 (4th Cir. 1994).

Department and FTC enforcement standards. It would multiply, rather than reduce, regulatory burdens if the FCC were to create a new body of law for resolving such cases.

For purposes of shifting the burden of production, however, the Commission should craft a standard for a "prima facie" case which reduces the potential for discovery disputes before the agency. CRB suggests that the Commission allow a complainant to shift the burden of production in cases where it is evident that regulated prices in an MDU/PUD have been reduced from the comparable single family home price by more than the usual ratio of revenue to cash flow. The FCC identified that ratio as 2 to 1 in its final cost of service rules.[19] This figure represents a reasonable surrogate for the average variable cost figure looked to in antitrust litigation.[20] If a complainant demonstrated that the regulated MDU/PUD rate in issue was reduced more that 43.6% from comparable single family homes, the burden would shift to the cable operator to produce information with which it could defend itself under conventional antitrust standards.

IV. TECHNICAL PREEMPTION.

The *NPRM* solicits Comments on the preemptive scope of Section 301(e) of the 1996 Act. *NPRM* at ¶¶ 40-42. Despite the Commission's apparent concerns, the Section's language and intent are quite clear. It eliminates two sentences previously authorizing local

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[19]*Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking*, MM Docket No. 93-215, CS Docket No. 94-28 at ¶ 50 (Jan. 26, 1996).

[20]*See, e.g., Northeastern Telephone Co. v. AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48 (2d Cir. 1979). *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

franchising authorities to establish and enforce technical standards, and it adds a new sentence precluding local franchising authorities from dictating cable technology. Section 624(e) of the Communications Act now succinctly provides, "No state or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." 47 U.S.C. § 544(e). CRB submits that the preemptive sweep of this provision should be broadly construed to effectuate the underlying goals and philosophy of the 1996 Act.

The 1996 Act established "a pro-competitive, de-regulatory national policy framework designed to accelerate rapid private sector deployment of advanced communications and information technologies and services to all Americans." S. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996). To accomplish this goal, the 1996 Act begins by inviting competitors into the video marketplace. LECs, for example, can now provide video programming within their service area,[21] and they can do so without a franchise under the OVS model.[22] SMATVs can now serve a broader category of property without securing a local franchise[23], and MMDS and DBS antennas can be installed virtually free of local zoning restrictions.[24]

Having eliminated legal entry barriers, the 1996 Act takes the next step and encourages technological experimentation by these competitors. The revisions to Section

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[21] 47 U.S.C. § 571(a)(3), § 572(d).

[22] 47 U.S.C. § 571(a)(4).

[23] 47 U.S.C. §522(7).

[24] 47 U.S.C. §332(c)(7)(B).