

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

JUN - 4 1996

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

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COMMENTS

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	ii
I. INTRODUCTION AND SUMMARY	1
II. DISCUSSION.	2
A. The Commission’s Rules Implementing Section 301(b)(2) of the 1996 Act Must Not Depart from Congress’ Uniform Pricing Requirements.	2
B. The Commission Should Revise Proposed Section 76.984 Of Its Rules To Make Clear That It Neither Condone Predatory Pricing Nor Supersedes Antitrust Law.	6
C. The FCC Should Utilize Procedures Similar To Those Employed To Resolve Complaints of Discriminatory Program Pricing When Addressing Allegations of Violations of the Uniform Pricing Rules.	8
D. The Commission’s Definition of Effective Competition Should Accommodate The Wireless Cable Industry’s Use of Off-Air Reception of Local Broadcast Signals.	10
E. Wireless Cable Service Should Only Be Deemed “Offered” Where Actually Available, Regardless Of The Protected Service Area.	13
III. CONCLUSION.	15

EXECUTIVE SUMMARY

WCA generally agrees that the rules adopted and proposed in the *Order & NPRM* faithfully reflect the intention of Congress in promulgating the 1996 Act.

In implementing Section 301(b)(2) of the 1996 Act, the Commission must not permit deviations from the uniform pricing requirement of Section 623(d) of the Communications Act beyond those authorized by Congress. Specifically, the Commission should only permit deviations where true “bulk” sales are made to MDUs. Non-uniform discounts should not be available to individual subscribers who happen to reside in MDUs. Nor should the “bulk” sale exception permit departures from uniform pricing outside of MDUs. Moreover, the Commission should make clear that the “bulk” sale exception does not permit predatory pricing by any cable operator, and does not supersede antitrust laws. The Commission should adopt procedural rules to govern the enforcement of the uniform pricing requirement modeled on those adopted in connection with its program access and program carriage rules. Those rules have proven to be fair and effective.

For purposes of determining whether a wireless cable operator provides “effective competition”, the Commission should adopt its proposed policies for handling those situations in which the wireless cable operator utilizes VHF/UHF antennas to receive local broadcast signals at the subscriber’s premises. However, the Commission should not depart from its current policy of considering wireless cable signals as being offered only within their “interference-free contour ” Particularly in light of recent changes to the definition of the

wireless cable “protected service area”, the “protected service area” does not reflect the area in which service is actually available.

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COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits its initial comments in response to the *Order and Notice of Proposed Rulemaking ("Order & NPRM")* released by the Commission on April 9, 1996 in the above-captioned proceeding.^{1/}

I. INTRODUCTION AND SUMMARY

With this proceeding, the Commission is proposing to adopt rules implementing various sections of the Telecommunications Act of 1996 (the "1996 Act") that relate to regulation of the cable television industry. Many of the provisions of the 1996 Act in issue here will have a direct bearing in the competitive environment within the multichannel programming distribution industry. Thus, WCA, the principal trade association of the wireless cable industry, has a vital interest in this matter.^{2/}

^{1/}*Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154, CS Docket No. 96-85 (rel. Apr. 9, 1996).

^{2/}WCA's members include wireless cable system operators, manufacturers of wireless cable equipment, program suppliers and licensees in the Multipoint Distribution Service and the Instructional Television Fixed Service

As will be discussed in more detail below, WCA generally agrees with the rules adopted and proposed by the *Order & NPRM*.^{3/} However, certain revisions in the proposed rules are necessary in order to assure that the public benefit from the deregulatory thrust of the 1996 Act. The specific revisions are discussed below.

II. DISCUSSION.

A. The Commission's Rules Implementing Section 301(b)(2) of the 1996 Act Must Not Depart from Congress' Uniform Pricing Requirements.

As adopted by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Section 623(d) of the Communications Act had mandated that each cable operator "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."^{4/} Section 301((b)(2) of the 1996 Act amended Section 623(d) by adding, in pertinent part, the following language:

Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit.

^{3/}For example, WCA believes that the Commission has correctly amended the program access rules embodied in Section 76.1000 *et seq.* of the Rules by adding Section 76.1004 to reflect Section 301(j) of the 1996 Act. *See Order & NPRM*, at ¶¶ 46-48. Similarly, the Commission has correctly amended its definition of "cable system" at Section 76.5(a) of the Rules in accordance with the mandate of Section 301(a)(2) of the 1996 Act. *See id.* at ¶¶ 51-55.

^{4/}47 U.S.C. § 543(d) (1994).

The *Order & NPRM* adopts interim rules to implement this language, and proposes permanent rules.

At the outset, WCA agrees with the Commission's tentative conclusion that the "bulk discount" exception to the uniform rate requirement only applies where a cable operator negotiates a single "bulk" sale with the multiple dwelling unit ("MDU") property owner or manager, *not* where the cable operator offers discounted rates on an individual basis to subscribers simply because they are residents of an MDU.^{5/} As the Commission has recognized, "there is a fundamental difference between the nature of bulk rate accounts and individual residential accounts."^{6/} Historically, the Commission has used the term "bulk discount" when referring to reduced rates offered on a bulk contract basis directly to owners and managers MDU properties, and not to any reduced "per unit" rates charged to individual subscribers.^{7/} The plain language of Section 301(b)(2) of the 1996 Act specifically authorizes departures from uniform pricing only to reflect discounts provided for bulk accounts at MDU properties.^{8/} There is no indication in the language of Section 301(b)(2) or in its legislative history to suggest any intent by Congress to permit cable operators to depart from uniform

^{5/}See *Order & NPRM*, at ¶ 98.

^{6/}*Social Contract for Continental Cablevision*, 11 FCC Rcd 299, 327 (1995).

^{7/}See, e.g., *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5898 (1993).

^{8/}See 1996 Act, § 301(b)(2) ("*Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator . . . may not charge predatory prices to a multiple dwelling unit.*") (emphasis added).

pricing when entering into individual subscription relationships with individual MDU residents. Presumably, if Congress had intended to give cable operators *carte blanche* in setting rates to individual residents of MDUs, it would not have included the “bulk discount” language of Section 301(b)(2).^{2/}

As is recognized by the *Order & NPRM*, Congress and the Commission historically have defined a “multiple dwelling unit” as being a single building that contains multiple residences.^{10/} The Commission inquires, however, whether the Commission should permit deviations from uniform pricing in non-MDU environments given that the 1996 Act expanded the so-called “private cable exemption” from local franchising to permit private cable operators to interconnect any type of buildings via wire without a franchise, so long as no public right of way is crossed.^{11/} WCA vigorously opposes any expansion of the bulk sale exception to uniform pricing outside the MDU context.

^{2/}It would run counter to the Commission’s long-standing concerns over anti-competitive conduct by cable operators in the MDU environment to permit cable operators to end run the uniform pricing requirement when dealing with MDU residents. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, 2155 (1995); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5898 (1993).

^{10/}See *Order & NPRM*, at ¶ 99; See also, *Massachusetts Community Antenna Television Commission*, 2 FCC Rcd 7321, 7322 (1987); *Amendment of Part 76 of the Commission’s Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, 633 F.C.C. 2d 956, 996-97 (1977).

^{11/}See *Order & NPRM*, at ¶ 99.

As the Commission itself has noted, the term “multiple dwelling unit” has been afforded a very limited meaning.^{12/} There is nothing in the 1996 Act or its legislative history to suggest Congress intended to deviate from that definition and permit non-uniform pricing outside of MDUs. Indeed, the fact that the 1996 Act modified the “private cable exemption” to eliminate any reference to MDUs demonstrates that Congress is fully capable of distinguishing between MDUs and other situations where private cable service is provided. Just as Congress expanded the “private cable exemption” beyond MDUs, Congress could have just as easily expanded the “bulk discount” exception to include non-MDU properties.^{13/} However, Congress chose not to do so.

Thus, the 1996 Act provides the Commission no basis for permitting departures from uniform pricing in non-MDUs merely because the residents can be served under the new, expanded “private cable exemption.” Absent such a basis, it would be violative of Section 623(d) for the Commission to allow “bulk” sale deviations from uniform pricing in non-MDUs.

^{12/}*Id.*

^{13/}*Compare Telephone Company-Cable Television Cross Ownership Rules*, 10 FCC Rcd 244, 276 (1994) (“[W]e addressed and rejected assertions that Congress intended to codify the interpretive notes to Section 63.54 of our rules. . . . In support of this assertion, we noted that Congress changed the language of our cross-ownership rules, specifically codifying some aspects of these rules, while overruling others. We also noted that Congress could have explicitly codified Notes 1 and 2 had it intended to, but did not.”).

B. The Commission Should Revise Proposed Section 76.984 Of Its Rules To Make Clear That It Neither Condones Predatory Pricing Nor Supersedes Antitrust Law.

In order to implement Section 301(b)(2) of the 1996 Act, the Commission has proposed to amend Section 76.984 of its Rules to provide, in pertinent part, that:

(c) This section does not apply to:

* * *

(2) Any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

(emphasis added). WCA is concerned that the underscored language could be misconstrued to permit a cable operator to engage in predatory pricing if it is subject to effective competition, or if it is serving non-MDUs.

Such a result would clearly be inconsistent with Congressional intent. Section 601(b) of the 1996 Act generally provides that, save for certain specific provisions, nothing in the 1996 Act is intended to “modify, impair, or supersede the applicability of any of the antitrust laws.” The legislative history of the 1996 Act evidences a Congressional recognition that Section 301(b)(2) is not intended to permit predatory pricing in violation of antitrust laws of general applicability. For example, on the Senate floor Senator Slade Gorton (a member of the House/Senate Conference Committee) stated that

I would like to clarify, and express my understanding, of a somewhat confusing provision in the bill regarding uniform pricing of cable rates. The conference report changes the uniform rate requirement in two essential ways.

First, section 301(b)(2) of the legislation sunsets the uniform rate structure requirement in markets where the cable operator faces effective competition.

The second change to the uniform rate requirement is the addition of language that permits cable operators to offer bulk discounts to multiple dwelling units for MDU's. The language in this section permits cable operators to offer bulk discounts to MDU's "except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit."

I understand that there has been concern that this somewhat awkwardly worded section implicitly condones predatory pricing once there is competition in a market, or for subscribers who do not live in MDU's. Clearly it is not the intent of Congress to supersede the Sherman Act by allowing cable operators to engage in predatory pricing at any time or under any circumstances. In fact, the legislation includes a general antitrust savings clause in section 601(b). This clause guarantees that antitrust concerns still will be addressed in the telecommunications industry.^{14/}

Others also emphasized the importance of the antitrust savings clause in Section 601(b).^{15/}

To avoid any confusion, WCA suggests that proposed Section 76.984(c)(2) be revised to read as follows:

(2) Any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system ~~that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit~~. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

^{14/}142 Cong. Rec. 5720 (daily ed. Feb. 1, 1996) (Statement of Sen. Gorton).

^{15/}*Id.*, at S687 (Statement of Sen. Pressler); *id.*, at S711 (Statement of Sen. Thurmond).

The proposed revisions make clear what Congress obviously intended — that cable operators cannot engage in predatory pricing even where permitted to deviate from the uniform pricing when offering a bulk discount to an MDU.

C. The FCC Should Utilize Procedures Similar To Those Employed To Resolve Complaints of Discriminatory Program Pricing When Addressing Allegations of Violations of the Uniform Pricing Rules.

In the *Order & NPRM*, the Commission has tentatively concluded that complaints alleging violation of the uniform pricing rules should be governed by the procedures set forth in Section 76.1003 of the Commission's Rules generally applicable to the adjudication of program access complaints.^{16/} WCA strongly endorses that proposal. With just a few editorial revisions, the provisions of Section 76.1003, particularly those applicable to discriminatory program pricing, can be employed to resolve uniform pricing complaints in a manner that is fair and efficient. The program access complaint procedures, which also served as the model for the Commission's rules governing complaints by programmers of refusals to carry,^{17/} have worked well in the past, and are an appropriate model for procedures to govern uniform pricing complaints.

^{16/}See *Order & NPRM*, at ¶ 100.

^{17/}*Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2652 (1993) [hereinafter cited as "*Program Carriage Order*"].

As the Commission recognizes, complaints of violation of the uniform pricing rules will inevitably involve some measure of discovery.^{18/} That is particularly true where the complainant must demonstrate predation. Unlike the rules applicable generally to cable petitions for special relief^{19/} or other adjudicatory proceedings before the Commission, the program access rules specifically provide for discovery. See 47 C.F.R. § 76.1003(g). Those rule have been carefully crafted by the Commission to “minimize Commission involvement in the analysis of voluminous evidentiary materials but provide access by the parties to the information necessary to resolve a complaint ”^{20/} In particular, they do not permit discovery as of right, but only as needed on a case-by-case basis, as determined by the staff.^{21/} Moreover, the program access rules provide for the staff to manage situations where only a relatively small amount of discovery is required, with only the most complex cases being referred to

^{18/}See *Order & NPRM*, at ¶ 100.

^{19/}On an interim basis, the Commission is utilizing the procedures applicable to cable petitions for special relief under Section 76.7 of the Commission’s Rules to govern uniform pricing complaints. See *id.*, at ¶ 36.

^{20/}*Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 194, 204 n. 62 (1992).

^{21/}*Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3416 (1993) [hereinafter cited as “*Program Access Order*”].

Administrative Law Judges.^{22/} Thus, uniform pricing complaint rules modeled on the program access enforcement procedures will permit needed discovery with a minimum delay, assuring rapid enforcement of the Commission's uniform pricing requirements.

In addition, Section 76.1003(a) mandates pre-complaint efforts to resolve disputes prior to bringing them to the attention of the Commission — an approach that is particularly appropriate given the scarcity of resources facing the Commission. As the Commission recognized when it adopted this requirement in the program access arena, it should “minimize the number of complaints brought to the Commission.”^{23/} It has been the experience of WCA's members that uniform pricing violations can frequently be ended through informal communications with the offending cable operators. Thus, a mandatory precomplaint resolution process should achieve the benefit of minimizing uniform pricing complaints.

For these reasons, WCA agrees with the proposal in the *Order & NPRM* to model its procedures for resolving uniform pricing complaints on the program access model.

D. The Commission's Definition of Effective Competition Should Accommodate The Wireless Cable Industry's Use of Off-Air Reception of Local Broadcast Signals.

Section 301(b)(3) of the 1996 Act amends the prior definition of “effective competition” so that, in addition to the previous three tests, “effective competition” is present if:

^{22/}See *id.*; *Program Carriage Order*, 9 FCC Rcd at 2652.

^{23/}See *Program Access Order*, 8 FCC Rcd at 3416; *Program Carriage Order*, 9 FCC Rcd at 2652.

[a] local exchange carrier or its affiliate (or any multichannel video programming distributor 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.

The *Order & NPRM* seeks comment on, among other issues raised by Section 301(b)(3), whether a wireless cable system should be considered to “offer” local broadcast signals if the wireless operator employs traditional VHF/UHF antennas on subscribers’ premises to receive local broadcast signals, and whether off air reception of such local broadcast programming is “comparable” to that of cable.^{24/}

The Commission has tentatively concluded that if the local broadcast channels are available to the subscriber either without an A/B switch or similar device, or the wireless cable operator supplies any necessary A/B switch or similar device, the local broadcast signals will be deemed “offered” by the wireless cable system and be considered in determining whether the wireless cable programming package is “comparable.”^{25/} The Commission has also tentatively concluded that a wireless cable system which promotes local signal availability will be deemed to “offer” local broadcast signals, regardless of the technical means employed, because “an MMDS operator that markets itself as a provider of local

^{24/}See *Order & NPRM*, at ¶¶ 13-14.

^{25/}See *id.*, at ¶ 14.

broadcast channels will take the steps necessary to ensure that subscribers receive those channels.”^{26/}

WCA agrees with the Commission’s interim approach, and urges that it be employed when final rules are adopted. Because of the importance of local broadcast signals to consumers, wireless cable operators take great strides to assure that they are available to subscribers. When wireless cable channel capacity permits, most wireless cable operators retransmit local broadcast signals over microwave frequencies to assure that the subscriber can enjoy the same high quality picture he or she sees on the non-broadcast channels. Where channel capacity is constrained, however, wireless cable operators have no choice but to utilize rooftop VHF/UHF antennas on subscribers’ premises.^{27/} When wireless cable operators do so, they almost invariably provide subscribers with a sophisticated set-top channel selector box that functions like an automatic A/B switch — the set-top has inputs for both the wireless cable antenna and the VHF/UHF antenna and automatically selects the proper antenna based on the channel to which the subscriber tunes. Thus, in almost all cases, the use of dual antennas is transparent to the wireless cable subscriber.

^{26/}*Id.*

^{27/}WCA agrees with the *Order & NPRM* that regardless how the Commission resolves the question of whether channels received by VHF/UHF antennas are “offered” for purposes of “effective competition,” the determination of when a wireless cable operator must obtain retransmission consent with respect to local broadcast signals should not be altered. See *Order & NPRM*, at ¶ 14, n. 24.

E. Wireless Cable Service Should Only Be Deemed “Offered” Where Actually Available, Regardless Of The Protected Service Area.

When the Commission first implemented the effective competition standard, it ruled that wireless cable service will only be deemed “offered” in those areas that are actually within the “interference-free contour.”^{28/} At that time, the Commission rejected suggestions that it define wireless cable service to be available within the protected service contour defined by Section 21.902(d) of the Rules, noting that “[t]hese rules define the protected service area of a wireless cable system, which is different from the ‘interference-free contour.’”^{29/}

In the *Order & NPRM*, however, the Commission implies that it may be changing its view as to the relevance of the protected service area. The Commission states that:

With respect to multichannel multipoint distribution service (“MMDS”), for example, we previously have determined that the potential subscribers include only those who reside in “areas to which the MMDS operator is capable of providing video programming.” We note that the zone in which our rules protect a MMDS licensee from harmful electrical interference is a circle with a radius of 35 miles centered on the MMDS transmitter site. Thus, in seeking to establish effective competition from a LEC-affiliated MMDS operator, a cable operator should provide the location of the MMDS transmitter and the 35-mile protected zone.^{30/}

^{28/} See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5658 (1993).

^{29/} *Id.* at n. 90.

^{30/} *Order & NPRM*, at ¶ 10.

WCA urges the Commission to clarify that, regardless of the protected service area, wireless cable service will only be deemed “offered” where interference-free service can actually be received.

While WCA once supported the use of the protected service area as a proxy for determining where wireless cable service is available, its position changed last year when the Commission significantly modified its protected service area rules in the *Second Order on Reconsideration* in Gen. Docket Nos. 90-54 and 80-113 and in the *Report and Order* in MM Docket No. 94-131.^{31/} These decisions made two significant changes. First, the protected service area for older facilities was fixed as a 35 mile circle centered on the transmitter location as of a date certain in September 1995 — regardless of whether the facility utilizes an omnidirectional antenna, and regardless of whether the facility is subsequently relocated. Thus, the protected service area can now contain areas that cannot be actually served by an operator. Second, the protected service area for new MDS facilities is based on Rand-McNally Basic Trading Area boundaries — boundaries that have absolutely nothing to do with the geographic area that a facility can actually serve. Thus, the protected service area

^{31/}*Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 10 FCC Rcd 7074 (1995); *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 9509 (1995).

no longer bears a significant relationship to the area that existing facilities can serve without interference, and cannot serve as a substitute for the interference-free contour.

III. CONCLUSION.

For the foregoing reasons, the Commission should adopt the rules proposed in the *Order & NPRM*, modified to reflect the concerns addressed by WCA above.

Respectfully submitted,

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