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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

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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To: The Commission

REPLY COMMENTS OF PRIVATE AND WIRELESS CABLE OPERATORS

United States Wireless Cable, Inc. ("U.S. Wireless") and Wedgewood Communications, Inc. ("Wedgewood") through counsel, and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415 hereby submit joint reply comments in the above-captioned proceeding.[1] U.S. Wireless and Wedgewood limit their response to the issues raised in their original comments.

I. Bulk Discounts Should Not Apply to Individual Tenants in MDUs.

Cable operators, wireless and private cable operators, and local franchise authorities commenting in this proceeding agree that the bulk rate exception does not permit a cable operator to offer a discounted rate to subscribers on an individual basis, simply because they live in MDUs. This would result in discriminatory pricing among tenants in an MDU, wholly

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[1] Order and Notice of Proposed Rulemaking, CS Docket No. 96-85, FCC 96-154, Released April 9, 1996 ("Order" and "NPRM"). By Public Notice released May 9, 1996, DA 96-726, the FCC extended the comment due date to June 4, 1996.

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inconsistent with the uniform rate requirement and the bulk discount exception. Section 301(b)(2) of the Telecommunications Act of 1996 does not imply, nor does the Congressional intent suggest such practice.

Commenters' opinions differ, however, whether to allow bulk discounts when cable operators bill tenants individually, or if bulk discounts should be allowed only where they are deducted from a bulk payment paid to the cable operators by the property owner. On its face, most commenters do not perceive harm in allowing cable operators to bill individuals directly, so long as all of the residents in the MDU are offered the same discounted rate. U.S. Wireless and Wedgewood nevertheless, are concerned that cable operators could use this practice to discriminate among tenants, and charge different discounted rates throughout the building. Moreover, if a cable operator is allowed to bill individuals directly, such discriminatory practice would be difficult to prove or detect. The FCC should take this opportunity to seal this potential loophole in the bulk discount exemption, by requiring bulk discounts to be offered only when the property owner negotiates the rate and pays the cable operator directly.

As commenters such as the Independent Cable and Telecommunication Association (ICTA), Wireless Cable Association (WCA), and Optel point out, bulk discounts have a long standing, industry accepted usage, which does not include offering bulk discounts on an individual basis. Bulk discounts are negotiated

between the property owner on behalf of the tenants with a single contract between the property owner and the cable operator. See e.g. ICTA Comments at 9. There is no reason to alter from this commonly accepted practice.

II. The FCC Should Retain the Definition of an MDU.

Cable operators support changing the definition of an MDU, to parallel the expanded private cable exemption, so that cable operators can offer bulk discounts in such venues as trailer parks and military bases. NCTA Comments at 46, Time Warner Cable Comments at 36. These parties, though, failed to provide evidence of Congressional intent to allow the use of bulk discounts in non-MDU settings. Without such evidence, the FCC should retain the definition of an MDU, and adhere to the language of the 1996 Act.

The bulk discount exemption should not be broadened to include non-MDU settings. The FCC should retain the uniform pricing structure to protect competition and prohibit cable operators from targeting these areas with low prices to drive out competition.

III. Predatory Pricing Should Be Defined in a Just and Reasonable Manner.

U.S. Wireless and Wedgewood support the use of the federal antitrust standards in allegations of predatory pricing, so long as the cost analysis used accounts for a cable operator's actual costs, which may be dramatically lower than that of a wireless or private cable operator.

Some commenters propose using a "bright-line test" to prove predatory pricing. U.S. Wireless and Wedgewood would support such a test, as long as the threshold is set at a reasonable level. OpTel suggests that if a cable operator gives more than a 25% discount from its normal rate in the franchise area, then the price would be deemed predatory. Optel Comments at 9. U.S. Wireless and Wedgewood do not object to a bright-line rule, but a 25% discount is far too great to be exempt from all scrutiny under the predatory price rules. Allowing a 25% discount without scrutiny fails to implement Congress' directive to police predatory pricing. Certainly, the FCC cannot adopt the 43.6% discount threshold suggested by Cole, Raywid & Braverman, Comments at 20, as a 43.6% discount effectively strips away the predatory pricing statute.

Some parties have suggested a specific threshold showing that complainants must meet, such as a showing that an "MDU is a matter of competitive significance." Fleischman & Walsh Comments at 34 The FCC should not require a complainant in an antitrust allegation to jump through arbitrarily invented hoops in order to make a complaint.

U.S. Wireless and Wedgewood also oppose adopting a "meeting competition defense," as proposed by one commenter. The defense prohibits further investigations into allegations of predatory pricing if the accused party can show that its discounted price is "made in good faith to meet a lawful and equally low price of a competitor." TCI at 20. Such a defense

is unnecessary and unreasonable. If the FCC adopted such a defense, cable operators would be given the means necessary to engage in anticompetitive practices, for the purpose of wiping out competition.

Conclusion

For the reasons set forth herein, U.S. Wireless and Wedgewood respectfully request that the FCC give consideration to these issues when adopting its Order in this Notice of Proposed Rulemaking.

Respectfully submitted,

UNITED STATES WIRELESS CABLE, INC.

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June 28, 1996

CERTIFICATE OF SERVICE

I, Magdalene Copp, a legal secretary for the law firm of Ross & Hardies, hereby certify that a copy of the foregoing **"Reply Comments of Wireless and Private Cable Operators"** was served via hand delivery, on this **28th** day of **June, 1996** to:

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