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William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.,
Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Reply Comments of Viacom Inc.
CS Docket No. 96-85 (Cable Reform)

Dear Mr. Caton:

By its undersigned attorney, Viacom Inc. hereby submits for filing its reply comments in the above-referenced proceeding. This submission consists of the original document and six copies. As requested in the Notice of Proposed Rulemaking in this proceeding, Viacom also is submitting, under separate cover, a diskette version of its reply comments to Nancy Stevenson of the Cable Services Bureau.

Please date-stamp the attached duplicate upon receipt and return to us via the messenger for our records.

If any questions arise concerning this submission, kindly contact the undersigned.

Respectfully submitted,

Rosemary C. Harold

Enclosures

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

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

REPLY COMMENTS OF VIACOM INC.

VIACOM INC.

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REPLY COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom"), by its attorneys, hereby submits its response to comments filed in connection with the Commission's Order and Notice of Proposed Rulemaking (the "Order" or the "NPRM")[1] in the above-referenced proceeding. These reply comments highlight and seek to confirm the reasonable parameters of the Commission's inquiry into the appropriate definition of a local exchange carrier ("LEC") "affiliate" for purposes of implementing open video system ("OVS") and certain cable reform provisions of the Telecommunications Act of 1996.[2] Viacom submits that the congressional preference and public policy embodied in the 1996 Act compel adoption of a ten percent equity threshold for determining LEC affiliation. Regardless of whether the Commission looks to the Title I standard -- which expressly sets a ten percent equity threshold -- or the Title VI approach -- with an equity test (where specified) ranging from five to 20 percent -- the Commission should, in any

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[1] Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, CS Docket No. 96-85, FCC 96-154 (rel. Apr. 9, 1996).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) (the "1996 Act").

event, reject out of hand the isolated calls to adopt an equity test of less than five percent or to resurrect an anachronistic "carrier-user" test for purposes of defining a LEC affiliate in this proceeding.[3]

The NPRM has effectively framed this matter as one of which of two general definitions should be used to determine whether an entity is a LEC affiliate for purposes of certain new Title VI provisions. The 1996 Act established a new definition of "affiliate" in the Title I "definitions" section of the Communications Act, as follows:

> The 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.*[4]

As the NPRM notes, however, Title VI of the Communications Act -- which contains the OVS and other new cable provisions here at issue -- continues to include a definition of affiliate employing similar "owns or controls" language, but establishing no numerical ownership benchmark of general applicability.[5] The FCC has established a variety of ownership thresholds in applying this standard to different Title VI

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[3] Under a carrier-user test, a LEC would be considered an affiliate of any entity with which it engaged in any financial or contractual relationship outside its strict common carrier role.

[4] 47 U.S.C. § 153(1)(emphasis added).

[5] In the Title VI definitions section, "[t]he 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." 47 U.S.C. § 522(2).

regulations, ranging from its strictest five percent equity test to a 20 percent equity test to determine whether an entity is deemed affiliated.[6]

The NPRM identified three new cable-related provisions of the 1996 Act requiring the Commission to decide whether to adopt the Title I ten percent threshold definition or some threshold under the Title VI definition to determine LEC affiliation:[7]

- **Effective Competition**: Cable operators are no longer subject to rate regulation if a LEC or its affiliate provides a comparable video distribution service within the cable operator's service area. The Commission tentatively selected the ten percent equity standard to determine affiliation for this purpose.

- **OVS**: A LEC and its affiliate(s) are precluded from selecting programming for more than one-third of the channel capacity of the open video system. The Commission has left open whether the Title I ten percent standard or some other threshold adopted under the Title VI standard will determine affiliation for this purpose.

- **Cable/Telco Buy-outs**: This provision restricts the ability of LECs and cable operators -- and their respective affiliates -- to buy-out one another

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[6] For example, a five percent equity test is used in program access, cable/MMDS cross-ownership and cable/SMATV cross-ownership. As noted in the NPRM, the Commission used a 20 percent standard to determine affiliation in the context of its rules applicable to small cable systems. NPRM at ¶ 83.

[7] The NPRM also sought comment on the appropriate definition of affiliate for purposes of determining whether a cable operator is indeed a "small operator" entitled to additional rate regulation relief. Although this pleading focuses on the proper standard for determining *LEC* affiliation, it should be noted that the Commission tentatively adopted its existing 20 percent ownership standard for determining small operator status. NPRM at ¶¶ 82-83. In addition, as the Commission concluded in the Order and as Time Warner notes in its comments here, Congress incorporated (with a clarification) the Commission's existing standards for purposes of applying the program access rules to LECs or LEC-affiliated program services. NPRM at ¶ 48.

> in their common service areas. Although the Commission left open which affiliation standard to apply here, the buy-out prohibition itself permits the acquisition of up to a ten percent interest.

Among these issues, Viacom's concerns focus on the appropriate definition of LEC affiliate in the OVS context -- as well as any affiliation definition that might apply to Title VI provisions more broadly. Having just completed its careful crafting of a balanced regulatory framework designed to make OVS both viable for LECs and fair to unaffiliated programmers, the Commission should take the same care in establishing its standard for affiliation with a LEC which operates an open video system. Too permissive a standard could undermine the fundamental nondiscrimination protections OVS affords. Yet too restrictive a standard would render the one-third channel cap on affiliated programming so unduly constraining as to discourage limited but beneficial LEC relationships with, or investments in, independent video packagers or program services on the OVS platform -- or stamp out altogether any serious LEC interest in this form of video entry.

Viacom therefore endorses the prevailing non-LEC view in this record, particularly as expressed by cable commenters, that embraces the Title I ten percent equity test for OVS affiliation purposes.[8] Clearly, the 1996 Act indicates a strong preference for use of a ten percent equity test generally for determining LEC

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[8] See, e.g., Comments of National Cable Television Association, Inc., CS Docket No. 96-85, at 14 (filed May 28, 1996).

affiliation.[9] Not only does the Title I affiliation standard added by the 1996 Act expressly codify a ten percent equity test, but also the 1996 Act's cable/telco buy-out provisions -- expressly designed to preclude affiliations that could compromise the emergence of competition in the distribution of video programming -- specifically allow LECs to obtain up to a ten percent interest in a cable operator. Viacom submits that, notwithstanding LECs' desire for a more permissive standard, this ten percent standard would strike an appropriate balance in making effective, but not prohibitive, the Commission's OVS safeguards.[10]

In any event, if the Commission determines that it is not appropriate to use the Title I standard and looks instead to apply some form of the Title VI definition to LEC affiliation for OVS or broader purposes, there is certainly no basis for going below a five percent equity threshold -- the most stringent Title VI test used by the Commission -- or to adopt a "carrier-user" test as advocated by the National League of Cities.[11]

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[9] On the other hand, the Commission would not be adhering to the 1996 Act's intent if it were to take into account "equity equivalents," including beneficial interests, as part of any equity test set below the ten percent level established by Congress.

[10] Indeed, given the strong indications that Congress was not concerned about ownership interests of less than ten percent, Viacom submits that the Commission should consider whether it is appropriate to raise the ownership threshold to ten percent for situations in which the five percent standard is currently in use. This is particularly appropriate given the Commission's consideration of a ten percent standard in the ongoing broadcast attribution rulemaking proceeding. Review of the Commission's Regulations Governing Attribution of Broadcast Interests ("Attribution NPRM"), MM Docket No. 94-150, FCC 94-324 (rel. Jan. 12, 1995).

[11] See Comments of National League of Cities, et al., CS Docket No. 96-85 at 7-9, 14-15 (filed May 28, 1996). Indeed, a strict equity test which considers both voting

(continued...)

There simply is no indication that -- for purposes of any of its OVS or cable reform provisions -- Congress intended or desired that the Commission promulgate affiliation tests harkening back to long-discarded standards designed to prohibit altogether LECs' participation in video distribution in-region. Indeed, a principal purpose of the 1996 Act was precisely to relieve LECs from just such restrictions. Any carrier-user test or equity test reaching interests below five percent would plainly discourage LECs from giving any serious consideration to entering the video distribution business as OVS operators -- a result wholly at odds with the express goal of both Congress and the Commission.[12] The isolated calls for such restraints are wholly out of step with the general market-oriented thrust of the 1996 Act and its design for fostering real-world competition in the distribution of video programming. Accordingly, the Commission should reject out of hand calls to adopt any equity standard below five percent or to prohibit LECs from entering into any relationships that go beyond their strict common carrier function for purposes of OVS or, indeed, any cable reform provision.

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[11](...continued)
and non-voting interests, as used by the Commission in certain contexts including program access, cable/MMDS cross-ownership and cable/SMATV cross-ownership rules, is already more restrictive than the general approach applicable to broadcast stations which considers only voting interests. See Attribution NPRM, supra, at ¶ 30 (use of a more restrictive five percent equity standard -- including both voting and non-voting interests -- found appropriate to foster the development of competition to traditional cable operators).

[12] The OVS rules recently adopted by the Commission are already designed to prohibit LECs from discriminating for or against any entity utilizing the open video system. Accordingly, it is in no way necessary to layer on unduly onerous affiliation standards in order to prevent LEC discrimination on open video systems.

The 1996 Act indicates a clear congressional preference and policy basis for use of a ten percent standard to determine LEC affiliation and provides no support for those that urge the Commission to adopt any standard more restrictive than a five percent equity test for OVS -- or any Title VI -- purposes. Accordingly, Viacom submits that the Commission should reject such proposals. Instead, Viacom urges the Commission to adopt a ten percent equity test to determine LEC affiliation for purposes of OVS and other Title VI provisions.

Respectfully submitted,

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