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

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

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## REPLY COMMENTS OF
## THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits it Reply Comments in the above-captioned proceeding.

## INTRODUCTION AND SUMMARY

In amending the Cable Act in 1996, Congress deliberately provided cable operators with increased flexibility to respond to rapidly emerging competition in the video marketplace. It freed cable operators from rate regulation where they face competition in the provision of video programming from local exchange carriers ("LECs") or LEC-affiliated entities. It allowed operators to price compete in multiple dwelling units ("MDUs") where operators have been faced with aggressive competition from unregulated competitors. It provided qualified small cable operators with regulatory relief and it removed certain other regulatory impediments to operators' ability to quickly respond in the marketplace. These changes all took effect on February 8.

Several commenters filing in this proceeding -- particularly unregulated competitors to cable -- continue to seek to use the Commission's previous cable regulations to their advantage.

The Commission should reject these efforts to hamstring cable's competitive position in the marketplace -- and proceed to implement the clear, plain meaning of the 1996 Act.

Specifically, the Commission should:

- adopt a LEC affiliation test for the new effective competition test that recognizes their substantial investments in MVPDs;
- not incorporate a pass or penetration test into the LEC effective competition provision;
- affirm its interim rules regarding when a LEC is "offering comparable programming";
- adopt reasonable time limits on local franchising authorities' filing cable programming service ("CPS") tier rate complaints;
- clearly establish the preemptive nature of operators' new notice requirements;
- exclude passive interests from the small system affiliation test and provide appropriate transition relief;
- provide operators the flexibility that Congress intended in competing for customers residing in multiple dwelling units; and
- grant operators the relief from franchise-by-franchise technical requirements intended by the 1996 Act.

## DISCUSSION

## I. THE NEW EFFECTIVE COMPETITION TEST

### A. Definition of Affiliate

One of the significant changes adopted by Congress in 1996 to the rate regulation of cable operating companies was its recognition that telephone companies are unique competitors to traditional cable operators. Their deep pockets and avowed intention to aggressively enter the video programming marketplace convinced Congress to adopt a new test for determining when their presence -- either directly or through an affiliate -- warranted releasing cable operators from the constraints on marketing flexibility caused by rate regulation. While Congress mandated deregulation of all CPS rates as of March 31, 1999, it provided for immediate deregulation in these special circumstances to allow cable operators to fully compete.

Telcos have a variety of strategies for competing against cable in the video programming marketplace. For example, Bell Atlantic, NYNEX and PacTel have created Tele-TV; Ameritech, SBC, BellSouth, GTE and others have joined together in americast. Clearly, when these LECs provide their video service -- even as lessees of the facilities owned by others[1] -- Congress intended the operator to be able to quickly respond in the marketplace.

The remaining question concerns when a LEC's investment in another multichannel video programming distributor ("MVPD") is such that it is "affiliated" with that MVPD. In our initial comments, NCTA endorsed the Commission's interim order's determination that, for effective competition purposes, the Commission should look to the Title I definition of "affiliation." Numerous commenters agree with that approach.[2] But some commenters seek to shield the telcos' significant investments in video competitors to cable -- in the nature of hundreds of millions of dollars in wireless ventures -- from any recognition by the Commission.[3]

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1 The Comments of the New York City Department of Information Technology and Telecommunications ("NYC") argue that a LEC or its affiliate must be the owner or licensee of the facilities in order to satisfy the effective competition test. NYC Comments at 5-6. The statute, however, provides that effective competition exists where a LEC or its affiliate "offers video programming directly to subscribers by any means," as well as where LEC facilities are used to offer service. 47 U.S.C. §543 (l)(1)(D).

2 See, e.g., Comments of Cox Communications, Inc. at 12; Comments of Comcast Communications, Inc. at 13-17; Comments of Time Warner Cable at 2-11.

3 The NYC Comments argue that "to protect the public from a purely technical finding of effective competition under the new test merely because a small amount of stock has changed hands, the Commission should adopt an ownership affiliation standard of 50% or more." NYC at 9. According to NYC, "this will tend to avoid the unfair result of finding effective competition based upon a LEC's de minimis investment in an existing MVPD. Such passive investments have no bearing on whether competition is effective, and do nothing to protect the consumers from cable rates that, in reality, are unrestrained by a competitive market in video programming services." Id. NCTA does not advocate

For example, USTA argues against adoption of the Title I standard. Instead, it asserts that "the blanket 10 percent benchmark for affiliation defined in Title I will not reflect the competitive participation of LECs in the video marketplace as well as the 'control' standard of the Title VI definition."[4] USTA is wrong to equate affiliation with control. The Commission need not find a transfer of control of a multichannel video competitor in order to find that a cable operator faces effective competition from a LEC or its affiliate.

First, the definitions of "affiliate" in Titles I and VI include ownership as well as control.[5] The Commission consistently has established rules to define certain ownership thresholds that while short of a "controlling" interest are significant for regulatory purposes.[6]

Second, a broader view of affiliation than simply relying on control is warranted here.[7] In the case of the new effective competition test, Congress identified LEC investments as representing a unique set of competitive circumstances justifying different regulatory treatment of a cable competitor. As explained by the principal author of the Senate bill:

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the Commission adopting a test that recognizes "de minimis" investments. But surely the LEC investments in wireless cable cannot be characterized as de minimis. Instead, the LECs have touted these investments as their entry into the competitive video market. See e.g., Bell Atlantic 1995 Annual Report ("We also have an early market-entry strategy while we continue to modernize our network to switched broadband. Using a wireless cable technology called MMDS, we will enter the field in early 1997 with a digital cable service offering customers more than 100 channels of high-quality video programming."); NYNEX 1995 Annual Report & Proxy Statement ("[w]e plan to begin offering TELE-TV services later this year through our investment in CAI Wireless. This investment will give us the ability to reach up to 7 million NYNEX customers with digital wireless cable technology.") The Commission's rules should recognize them as such.

4 USTA Comments at 10. See also Bell Atlantic at 2 (suggesting adoption of single majority shareholder provision).

5 47 U.S.C. §522 (2) (definition of "affiliate").

6 See, e.g., 47 C.F.R. §501 & notes.

7 See NCTA Comments at 13-19.

> Looming large on the fringes of the [video programming] market are the telephone companies. The telephone companies pose a very highly credible competitive threat because of their specific identities, the technology they are capable of deploying, the technological evolution their networks are undergoing for reasons apart from video distribution, and last but by no means least, <u>their financial strength and staying power</u>.[8]

The LECs' significant investments -- even if not controlling -- make the entity which LECs have backed to enter the video marketplace a unique competitor to cable. In these circumstances, therefore, the Commission should apply a test that recognizes these underlying investments -- whether active or passive equity ownership or the equivalent thereof -- and not define affiliation by resorting solely to questions of control of the licensee of the facilities.

### B. Pass or Penetration Test

Our initial comments, and the comments of numerous parties in this proceeding,[9] demonstrate that the statute is clear and unambiguous that the new effective competition test contains <u>no</u> pass or penetration test. Certain commenters nonetheless urge the Commission to incorporate such a test, even though doing so would deny cable operators the flexibility to compete. The Commission should not adopt these proposals.

For example, NYC argues that the Commission should apply the existing 50% pass test before finding effective competition under the new standard.[10] The City and County of Denver ("Denver") acknowledge that Congress did not include pass or penetration rates in the new test, but believe that LEC-delivered multichannel video programming should be subject to the same

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[8] 141 Cong. Rec. S8243 (daily ed. June 13, 1995) (statement of Sen. Pressler) (emphasis supplied).

[9] <u>See</u>, <u>e.g.</u>, Comments of SBC Communications, Inc. and Southwestern Bell Video Services, Inc. at 1-3; Comments of the United States Telephone Association at 7-8 ("USTA"); Comments of Bell Atlantic at 1-2; Comments of New York State Department of Public Service at 9 ("NYS").

[10] NYC at 8.

50%/15% test as under the other effective competition test.[11] If that was Congress' intent, however, there would have been no reason to amend the statute. Any MVPD achieving that level of competitive entry already would be covered by the statute. Since Congress acted to distinguish LEC competition from other competition faced by cable, its intent was to adopt a different standard for finding LEC effective competition.

The New Jersey State Board of Public Utilities proposes an equally untenable reading of the statute.[12] The Board urges that the Commission only deregulate cable in those portions of a franchise area in which it faces competition -- and allow continued regulation in the remainder of its franchise area. There are several problems with this approach. First, it would impose a test even more stringent than the 50% pass test contained in the other prongs of the effective competition test. Under the 50/15 test, an entire franchise area is deregulated, even if head-to-head competition only occurs at that point in time in part of the franchise. There is, accordingly, no support in the statutory scheme for the proposition that deregulation should occur only where head-to-head competition is actually faced in a particular neighborhood.

In addition, the proposal will not work as a practical matter. A cable operator may desire to change channel offerings, for example, in the face of competition. But, due to the technical and practical constraints of system operation, an operator would lose the flexible packaging and marketing that deregulation allows if the remainder of its franchise is regulated.

As the Comments of the State of New York correctly explain,

> Congress has emphasized the identity of the competitor -- as opposed to the scope or success of the competitive programming venture -- as the dispositive element

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11 Denver Comments at 5.

12 NJBPU at 5.

in determining the impact on cable operators. There is a reasonable basis for this conclusion. As a general rule, a LEC will have resources far in excess of the resources available to an existing cable operator....Under these circumstances, it is not unreasonable for Congress to conclude that LEC investment in the mere offering or delivery of a comparable service in any part of a cable operator's franchise area would have an effect similar to the effect of competition measured by any one of the other criteria.[13]

The Massachusetts Cable Television Commission similarly explains that no penetration or pass test is appropriate:

> [C]ongress intended the fourth effective competition prong to be met when a LEC or its affiliate offers multichannel video programming to subscribers in <u>any</u> portion of a franchise area, even if the service is actually provided on a very limited basis. Because such a presence would trigger subscriber interest, and hence threaten an operator's market share, that presence alone may restrain cable rates. It would appear that if Congress was concerned about the extent of market availability or penetration of video services offered by a LEC in a given franchise, it would have made at least some reference to it when the provision was drafted. Consistent with the statutory language, we would urge the Commission to refrain from adopting its own minimum market thresholds without specific direction from the Congress in this area.[14]

The Commission should adhere to Congress' clear voice on this matter -- and not adopt any pass or penetration test.

### C. Offering Comparable Programming

#### 1. Definition of "Comparable Programming"

The interim rules require cable operators to provide access to 12 channels of video programming, at least some of which are local broadcast signals. Our initial comments agreed that the Conference Report intended a modified definition of "comparable programming" for

13 NYS at 9-10.

14 Massachusetts Commission at 3.

purposes of the fourth effective competition test.[15] But we disagreed with the Commission's tentative conclusion that Congress intended to distinguish between local broadcast signals and other broadcast signals. Superstations, therefore, should be counted as television "broadcasting signals" that would meet the effective competition test.[16]

Several telcos have proposed that the Commission use this proceeding to redefine "comparable programming", and in so doing, to expand the existing program access provisions of the Cable Act. For example, USTA argues that in order to provide "comparable" programming, a LEC must obtain "parity of access to video programming."[17] BellSouth also argues that "unless the LEC has fair access to the programming that customers want, it will not be able to compete effectively against the incumbent, and its presence in the market should not be regarded as 'effective competition'."[18]

There is no support for the telcos' notion that Congress intended LEC access to identical programming to be a measure of whether effective competition exists. Rather, Congress expressed its explicit approval of the existing rule defining "comparable" programming,

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[15] The Conference Report states: "The conferees intend that 'comparable' requires that the video programming services should include access to at least 12 channels of programming, at least some of which are television broadcasting signals. See 47 C.F.R. § 76.905(g)." Conf. Rep. at 170.

[16] NCTA Comments at 4-6. The Independent Cable & Telecommunications Association ("ICTA") asserts that superstations should not be considered broadcast stations for purposes of the comparable programming definition. ICTA at 3-4. ICTA cites to nothing in the statue or its legislative history to support its assertion that Congress viewed superstations and non-satellite delivered broadcast stations differently for these purposes. The fact that the Act specifically distinguished between superstations and other broadcast stations in other contexts (such as tier placement) which the FCC incorporated into its rules (see ICTA at 4) undermines, rather than supports, ICTA's argument. Congress clearly knew how to carve out superstations from other broadcast stations. It expressed no such distinction here.

[17] USTA Comments at 4-5.

[18] BellSouth Comments at 2.

modified to include some broadcast signals, by specifically citing to the rule. That rule by definition presupposes access to a minimum number of program services -- not to all program services on identical terms -- as a means of ensuring a service that is "competitively comparable to a minimum basic service that an incumbent cable operator could offer."[19]

Like the telcos' similar efforts to reopen program access in the OVS area,[20] their attempt to use this proceeding as a back door to enlarge program networks' obligations under the program access rules should be rebuffed. Congress has demonstrated a clear preference for market competition, rather than governmental regulation, to control the multichannel video programming distribution marketplace. And there is simply no statutory basis or legislative history supporting the change to the "comparable programming" test suggested by the telcos.

Finally, some commenters urge that the Commission substitute its modified definition of "comparable programming" for its existing rule and apply it to the other effective competition tests.[21] The Commission should refrain from doing so. The FCC has already found that DBS is an MVPD that is technically available to subscribers throughout its footprint.[22] DBS provides significant competition to cable operators, even though it does not offer local broadcast signals, and is expected to garner over 6 million subscribers nationwide by year end.[23] Even if the

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19 Report and Order, 8 FCC Rcd. 5631, 5666 (rel. May 3, 1993).

20 See Second Report and Order, CS Docket No. 96-46 (rel. June 3, 1996) at ¶197-8 (refusing to expand program access rules or address general applicability in context of OVS rulemaking).

21 See, e.g., ICTA Comments at 3.

22 Report and Order, 8 FCC Rcd. at 5660-61.

23 Broadcasting, June 24, 1996 at 52.

Commission finds that local broadcast signal carriage is a necessary element of LEC effective competition, it should not extend that requirement to the other effective competition test.[24]

### 2. "Access" to Comparable Programming

The interim rules also provide that a LEC is offering comparable video programming services if an MMDS operator includes "access" to these channels of service. An MMDS operator is considered to be offering broadcast channels if the MMDS operator installs an A/B switch or includes broadcast channels in its marketing materials.[25] NCTA agrees with this determination.[26]

Several other commenters endorse the Commission's interim decision that access to broadcast stations -- rather than retransmission of those signals -- constitutes offering "comparable programming."[27] For example, the Wireless Cable Association agrees with the Commission's determination that a wireless cable operator is offering broadcast signals, explaining: "Because of the importance of local broadcast signals to consumers, wireless cable operators take great strides to assure that they are available to subscribers."[28] WCA notes that even when wireless operators do not retransmit local broadcast signals over microwave

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[24] See Cox Communications, Inc. Comments at 4 (describing competition to cable from DBS).

[25] Order at ¶ 14.

[26] NCTA agrees with several commenters that suggest that the Commission allow operators to establish the offering of comparable programming by producing a rate card showing the MVPD's channel offerings. Otherwise, operators would have to expend significant time and expense to determine whether A/B switches were provided or installed. See, e.g., Comments of Small Cable Business Assoc. at 31-32.

[27] See n.11, supra. Time Warner Comments at 21-23; Cox Comments at 4-6; TCI Comments at 10-11.

[28] WCA Comments at 12.

frequencies and instead rely on existing rooftop antennas at subscribers' homes, "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."[29] The Comments of New York State also agree with the Commission's approach, stating that "the Commission has presumed correctly that the reasonable availability to potential subscribers to MMDS of some local broadcast signals by any means is sufficient to satisfy the 'comparable video programming' element of the definition. Moreover, as a practical matter, it is simply not plausible that a LEC would enter the video programming market by wireless cable and not seek to ensure that its potential subscribers have access to at least some of the same local broadcast signals that its incumbent competitor -- the cable operator -- must provide."[30]

In a transparent effort to hamper competition, ICTA argues that the Commission should ignore the realities of cable's competitors' channel offerings, and the comparability of services that customers can obtain. ICTA instead alleges that because MMDS and SMATV operators are exempt from retransmission consent when they do not charge their subscribers to receive local broadcast signals, they are not "offering" such stations for effective competition purposes.[31]

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[29] Id. at 12.

[30] NYS Comments at 7.

[31] ICTA Comments at 5-7.

There are several reasons why the Commission should not adopt ICTA's unreasonable position. First, the legislative history of this section unambiguously provides that "access" to signals is all that is required. There is no indication that Congress was concerned about the relationship between the broadcast station and the MVPD, and whether the MVPD would need consent from that station or not. Instead, Congress was interested in whether from a customer's perspective, the MVPD offered access to comparable programming, not the method by which the MVPD delivered comparable programming to a customer.[32] Regardless of whether retransmission consent is required, a SMATV or MMDS operator affording access to broadcast signals clearly is providing access to a competitive programming package[33] -- the sole issue with which Congress was concerned in describing the comparable programming provision.[34] The Commission should adopt its interim rules on a permanent basis.[35]

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[32] New York City argues that an MMDS operator providing an A/B switch "is not 'physically able to deliver' a service that includes 'comparable programming' because under such circumstances its service does not include broadcast programming. In addition, in areas where reception of broadcast programming by over-the-air antennas is problematic, the provision of an A/B switch is meaningless, and therefore constitutes an impediment to households receiving comparable service within the meaning of the Commission's existing rule." NYC at 13. This ignores Congress' focus on access to comparable programming, not delivery of that programming. And in any event, an MMDS provider is clearly "physically able to deliver" service to a household in accordance with the Commission's rules, even if it does not retransmit a particular broadcast signal. See Report and Order, 8 FCC Rcd. at 5655. A wireless provider is technically able to deliver those signals, even if its delivery is accomplished through an over-the-air antenna. Moreover, if the provision of an A/B switch is "meaningless", as NYC claims, then there is no cause for concern -- no rational MMDS operator would provide a piece of equipment that performs no function whatsoever.

[33] MMDS operators themselves argued that provision of a VHF/UHF rooftop antenna service improved reception of local broadcast signals, a service without which they would be "unable to effectively compete in the marketplace." Memorandum Opinion and Order, MM Docket No. 92-259, 9 FCC Rcd. 6723, 6740 (rel. Nov. 4, 1994).

[34] ICTA claims that it would be "arbitrary and capricious" for the Commission to permanently adopt its interim rule because it is allegedly contradictory to the retransmission consent policy. ICTA Comments at 5 n.3. But the absurdity of this claim is patent. Under ICTA's reading, its members would not be offering a comparable programming service regardless of whether their customers obtained access to a channel line-up identical to that received by a competing cable operator's

### 3. Presumption of MMDS Service Offering

In its interim rules, the Commission recognized that an MMDS operator's signal is protected from harmful interference in a 35 mile zone around its transmitter.[36] NCTA urges the Commission in its final rules to adopt a simple presumption that MMDS service is technically available throughout that 35 mile radius. This will alleviate the need to perform unnecessary signal strength testing and other measures, and will provide an administratively easy test to apply.

WCA originally proposed this approach.[37] Now, however, WCA urges that the FCC clarify that "[r]egardless of the protected service area, wireless cable service will only be deemed 'offered' where interference-free service can actually be received."[38] WCA raises two arguments in support of its position. Neither has merit. First, it argues that the 35 mile circle is centered on a transmitter location as of September 1995 -- "regardless of whether the facility utilizes an omnidirectional antenna, and regardless of whether the facility is subsequently relocated."[39] But

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customer -- simply because the SMATV or MMDS operator did not charge its customers separately for obtaining the entire panoply of local broadcast signals. It makes no sense to read the statute in a manner that would require a finding of effective competition to hinge on the method by which customers make payments to their SMATV or MMDS operator, or on whether they can buy back their over-the-air antenna after they terminate service. Whatever relevance these distinctions may have for retransmission consent purposes, they have no relevance here.

35 The Commission also should provide that a customer-installed A/B switch provides "access" to broadcast signals. There is no policy reason for a cable operator's regulatory status to hinge on whether an MMDS operator, or the customer itself, hooks up a television set to a rooftop antenna. See Comments of TCI at 11. There is also no policy reason to require a cable operator to do the investigatory work necessary to ascertain who did the hookup.

36 Order at ¶10.

37 See Report and Order, 8 FCC Rcd 5681, 5658 n. 90 (1993).

38 WCA Comments at 14.

39 Id.

this argument hardly supports eliminating the presumption. The FCC rules allow MMDS operators to use omnidirectional antennas and protect existing licensees from interference within a 35 mile zone. WCA in any event provides no evidence that wireless operators are not in fact serving their 35 mile zone, even if they are not using omnidirectional antennas. Relocation is a non-issue, as well. If the facility is relocated, then the 35 mile circle would be around the new transmitter site, which would also provide the requisite effective competition.

Second, WCA argues that the protected area for new facilities is now based on Rand-McNally Basic Trading Area ("BTA") boundaries, rather than a 35 mile zone. But this observation leads nowhere, as well, since BTA boundaries are often times larger than the 35 mile zone. The Commission's modification of the 35 mile protected contour to move to a larger service area was based on its view that the BTA-wide authorization would best promote the region-wide development of wireless cable.[40] While at the moment the Commission might not presume for new licenses that service is technically available throughout the entire BTA, the FCC still can safely assume that licensees are at least serving a 35 mile circumference around each of their transmitters. The change to the BTA should have no effect on FCC rules defining service areas for purposes of the effective competition test, which at least at this point in time should at least encompass a 35 mile contour, to provide a simple, easy to measure area in which service is available.[41]

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[40] See 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 and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 10 FCC Rcd. 9589 at ¶¶28-32 (1995).

[41] The Commission should also make clear that operators may show that effective competition exists outside the 35 mile zone. An operator should be able to make a prima facie case that shows that a MVPD is marketing its service outside the 35 mile zone.

### D. SMATVs Are Not Direct-to-Home Satellite Services

The initial comments in this proceeding describe in detail why SMATVs are not "direct-to-home satellite services" under the Act.[42] This is supported both by an examination of the 1996 Act's definition of "direct-to-home ('DTH') satellite services" and Commission precedent.[43]

A few commenters dispute this determination, and in so doing ignore this relevant precedent. ICTA, for example, claims that SMATV MDU service is "equivalent to direct-to-home service,"[44] and therefore cannot support a claim of telco-affiliated effective competition. ICTA urges the Commission to ignore the statutory definition of DTH satellite service or, alternatively, to find that SMATVs fall within this definition. ICTA's attempt to shoehorn SMATVs into this definition is unpersuasive. NCTA's initial comments in this proceeding explain why SMATVs, which are local in programming and operation and whose customers do not receive a signal directly from a satellite, differ from the national service nature of DTH,[45] and the 1996 Act's definition of direct-to-home service.[46]

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42 See, e.g., Comments of TCI at 14-17; Comments of Time Warner at 16-18.

43 The absence of a reference to SMATVs in the illustrative list of services referenced in the legislative history by USTA is hardly dispositive of this question. See USTA Comments at 7. The legislative history makes clear that this list is merely illustrative, not all inclusive: "'by any means' includes any medium (other than direct-to-home satellite service) for the delivery of comparable programming...."Conf. Rep. at 170. (emphasis supplied)

44 ICTA Comments at 7.

45 NCTA Comments at 11-12.

46 1996 Act, Sections 205(b) and 602(b)(1).

## II. CPS TIER RATE COMPLAINTS

### A. Proposed Timetable

The initial comments of numerous cable operators filing in this proceeding explained why the Commission should limit the time in which local franchising authorities may file a complaint against an operator's CPS tier rates. The comments of several LFAs reflect a fundamental misunderstanding of this new complaint procedure and demonstrate why FCC-imposed limits are critical to a timely and orderly resolution of customer complaints.

Under the interim rules, LFAs are given 180 days from the date a rate increase goes into effect in which to file a complaint with the Commission. This is a full 90 days beyond the last date on which subscribers may complain to an LFA, an event that triggers its ability (although not an obligation) to file a complaint with the FCC. While NCTA's initial comments explained why this timeframe was too drawn out, several LFAs complain that it is not long enough.

For example, New York City and the Greater Metro Cable Consortium ("GMCC") argue that no time limit should be imposed on LFA complaints or, alternatively, that the Commission should allow 270 days from the date the rate increase is effective in which to file complaints.[47] That time period would be in addition to the 30 days notice of a rate increase that the LFA already has prior to that increase going into effect. In total, then, under NYC and GMCC's proposal, an LFA would have 300 days in which to consider whether to file a complaint with the FCC.[48] These inordinately prolonged timeframes would give operators none of the certainty that Congress intended in adopting new rules governing the filing and timely resolution of complaints.

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47 NYC Comments at 16-17; GMCC Comments at 2-4.

48 This is in contrast with the previous FCC rule limiting complaints to 45 days after a rate increase.

These commenters provide no legitimate reason to unreasonably extend the time period in which they must decide whether to file complaints with the Commission. After all, an LFA is under no duty to substantively review the rates to determine their accuracy -- that task for CPS tier rates is performed solely by the Commission. It makes little sense, then, to provide LFAs as much if not more time to decide whether to pass along subscriber complaints to the FCC than LFAs currently have for substantively reviewing basic rate justification forms (30 days, plus an additional 90 days in non-cost of service cases, if tolled).[49] It makes even less sense to give LFAs a longer period than Congress just imposed on the FCC itself for substantively reviewing the complaint under the Act (90 days).

Failure to adopt time limits, or to allow unreasonably long periods for LFAs to determine whether to file, also causes several practical problems. For example, an operator choosing to file a Form 1240 must file 90 days prior to its rate going into effect.[50] Under the LFAs' proposed timeframe, an operator might not know whether its existing rate was free from challenge before it would be time to file its next rate adjustment.

For all these reasons, the Commission should establish a reasonable period within which a franchising authority must decide whether to file a complaint with the Commission, after it has received the requisite number of complaints from subscribers. NCTA proposes that in most cases, 105 days from the effective date of the increase would be ample time for LFAs to make that determination.[51]

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[49] 47 C.F.R. §76.933.

[50] 47 C.F.R. §76.933(g).

[51] NCTA Comments at 25-27.

## III. SUBSCRIBER NOTICE REQUIREMENTS

The 1996 Act allows cable operators to provide "notice of service and rate changes to subscribers using any reasonable written means at its sole discretion."[52] The Act also eliminates the requirement that operators provide prior notice of any rate change resulting from "a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber."[53] The Commission's interim order amended Sections 76.309 and 76.964 to reflect these changes.[54]

The Comments filed on behalf of several cable operators and associations by Fleischman & Walsh seek Commission confirmation that its action in this area preempts state and local customer service and consumer protection requirements specifying the means by which cable operators must notify subscribers of rate and service changes.[55] The reason for explicitly preempting these inconsistent requirements is evident from the Comments of the New York State Department of Public Service. NYS seeks an FCC determination that state and local governments may require notice by specific means, such as inclusion on subscriber bills, notwithstanding the provisions of the new law.[56]

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[52] 1996 Act, Section 301(g).

[53] Id.

[54] 47 C.F.R. §76.309(c)(3)(B); id., §§76.964(b) and (c).

[55] F&W Comments at 41.

[56] NYS Comments at 14-15.

The Commission should decisively establish the preemptive nature of the new rules. Congress surely would not have given cable operators the right to provide notice "using any reasonable written means at its sole discretion"[57] if it intended state and local governments to freely restrict that latitude. Otherwise, state and local governments could use a back door way to impose precisely the requirements that Congress precluded by amending the statute.

Section 632(d) does not compel a different result, as NYS argues. That section provides in part that "nothing in this title shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any state law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section...."[58] But Congress here has prohibited the FCC from restricting operator freedom to provide notice by any reasonable written means. This prohibition differs significantly from one in which Congress granted the FCC freedom to impose customer service standards that are not specifically delineated in the statute.

For all these reasons, in order to avoid future disputes regarding the effect of the law, and to provide cable operators with the flexibility regarding notice that Congress clearly intended, the Commission should make explicit that its notice rules preempt any other rules adopted by state or local governments.

## IV. SMALL CABLE OPERATORS

With respect to the small cable operator proposals, two issues require further discussion in light of the initial comments. The first is the proposed inclusion of "passive" interests in the

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[57] Section 632(c) (emphasis supplied).

[58] 47 U.S.C. §552 (d).

20% equity test for small cable operators and the second is the appropriate scheme for transitioning a small cable operator from deregulated to regulated status if it exceeds one of the statutory thresholds established for small operator relief.[59]

### A. Passive Investment Interests

On the first point, the majority of those commenting agreed that "passive" interests should be excluded from the 20% equity interest test proposed to determine whether an entity is affiliated with a cable operator seeking small cable operator relief.[60] As NCTA urged in its initial comments, including passive investment interests in the small cable operator affiliation standard will serve as a disincentive for investment in small systems, further exacerbating the difficulties small cable operators are now facing in attracting capital needed to compete, particularly against DBS and wireless operators in rural and smaller markets.[61] Other

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[59] With respect to the procedures proposed for small operator certification, the comments support the adoption of a process which is straightforward and will advance regulatory simplicity. NCTA and others propose, in this regard, that the operator's certification consist of a short and simple declaration that the operator meets the small operator definition. In addition, operators should be given the opportunity to appeal unreasonable requests for information from LFAs in response to such certifications. See, e.g., NCTA Comments at 40-41; F&W Comments at 25; Small Cable Business Association ("SCBA") Comments at 27-28.

To further advance regulatory simplicity, to reduce small operator administrative burdens, and to avoid inconsistent LFA rulings, F&W also proposes allowing small operators to file these certifications directly with the FCC on a per system basis, indicating the relevant subscriber numbers for each franchise area covered. F&W Comments at 25.

[60] See Comments of the Cable Telecommunications Association ("CATA") at 4 (20% test excluding passive investments); Comments of Cole, Raywid & Braverman at 14 (passive investments by traditional passive investors and entities that assume a passive role with regard to the particular investment, such as holders of non-voting shares and limited partners, should not be attributable, provided the equity stake of each such investment remains below 50%); Comments of Frontiervision Operating Partners, L.P. at 5 (Passive investments by investors with limited ancillary oversight rights should not be deemed affiliations).

[61] NCTA Comments at 34.

commenters make the same point. Frontiervision observes that "the Commission's 'active or passive' test for equity investments, if applied to the statutory provision, would disqualify any small operators that received more than 20 percent of their equity capital from large institutional investors."[62] Similarly, CATA argues that in determining the level of affiliation that would exceed the 20 percent level, "the Commission should not create disincentives to such investment. If a small system attracts a lender who demands an equity interest in the company (not an uncommon occurrence), the Commission should not look at the amount of stock ownership, as much as it should examine the degree of control, if any, that the lending institution may have over the daily activities of the system."[63]

These positions correctly recognize that the purpose of the small cable operator statutory provision is "to provide regulatory relief to those companies that lack the capital and technical expertise necessary to comply with the Commission's rate regulations and to survive the substantial rate reductions imposed by the rules."[64] The proposal to attribute passive equity interests -- particularly of institutional investors -- flies in the face of Congressional intent since it would limit, rather than expand, the opportunities for small systems to survive and compete in the years to come. As one commenter put it: "Deregulating rates of small systems cannot attract investment capital if the investment of such capital will result in the reregulation of those

[62] Frontiervision Comments at 5.

[63] CATA Comments at 4.

[64] House Report at 110.

systems' rates. Congress could not have intended that the passive investment in small systems by large institutional investors would disqualify those systems from deregulation."[65]

With respect to passive institutional investments in particular, there is simply no policy reason to include such investments for purposes of determining affiliation. These investments do not eliminate the special problems faced by small cable operators and systems which the Commission has previously identified. Specifically, these investments do not provide the small operator with technical resources, operating efficiencies, or administrative economies of scale.[66] Contrary to the goals of both the statutory small operator provision and the Commission's current small system rules, including these types of investments for affiliation purposes would instead have the detrimental impact of denying the small operator access to additional capital and putting its current financial resources at risk.

For these reasons, the Commission should exclude passive investments from the 20% equity test it has proposed to determine affiliation in the small system context.[67] At a minimum, passive interests which account for less than 50% of the equity in the small operator should be

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[65] Frontiervision Comments at 5 (emphasis in original). For these reasons, the Commission should also make clear that the exercise of certain limited oversight rights by institutional investors when they invest in small cable systems should not convert an otherwise passive interest into an active one for purposes of the small system affiliation test. See also CATA Comments at 4-5 (Congress intended "to remove regulatory burdens from small cable systems precisely in order to encourage investment of capital in small systems."); SCBA Comments at 12.

[66] See Second Order on Reconsideration, 9 FCC Rcd. at 4119, 4225 n. 295; id. at n. 157, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd. 7393 (1995) ("Small System Order").

[67] As NCTA urged in its initial comments, including purely passive interests in the small operator affiliation standard would be largely superfluous, given the Commission's proposed 20% active equity interest rule, which proposes to consider a company to be affiliated with a small cable operator where that company exercises de jure or de facto control. NCTA Comments at 35.

excluded.[68] Finally, the Commission should adopt a flexible waiver procedure so that an otherwise ineligible operator could demonstrate that it has "other attributes" that warrant small cable operator relief, "notwithstanding the percentage ownership of the affiliate."[69] By so doing, the Commission will advance. rather than frustrate, the intent of Congress and its own small system and operator policy goals.

### B. Transition Issues

The majority of those commenting on issues regarding the transition from deregulated status to regulated status urged the Commission to adopt a transitional mechanism that minimizes subscriber confusion and disruption, particularly in light of the impending deregulation of CPST rates in less than three years, while granting small cable operators both an opportunity to grow and a viable exit strategy.[70] NCTA and others recommended that the Commission adopt an approach akin to the one adopted in its small system rules.[71] Specifically, NCTA proposed that when the subscriber base exceeds the 50,000 limit in a franchise area, the transition to regulation should begin promptly. Under this approach, the system in such a franchise area should be able to maintain its rates and service offerings at deregulated levels, while subsequent changes should be subject to the relevant Commission rate rules then in effect. Consistent with the small system cost-of-service rules, in other instances when a small operator

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68 See Comments of Cole, Raywid at 14.

69 NCTA Comments at 36; CATA Comments at 5-6.

70 See, e.g., CATA Comments at 6-7; Comments of F&W at 29-30; Comments of Small Cable Business Association at 10-11; Comments of Cole, Raywid at 16-17.

71 See, e.g., Comments of NCTA at 42-43; Comments of Cole, Raywid at 16-17; Comments of F&W at 29-30.