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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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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REPLY COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA

The Alliance for Community Media respectfully submits the following Reply Comments to the Notice of Proposed Rulemaking, FCC 96-154, in the above-captioned proceeding, released April 9, 1996 ("NPRM"). The Commission seeks comments on proposed final rules implementing certain provisions of the 1996 Telecommunications Act<sup>1</sup> ("1996 Act") affecting Title VI of the Communications Act of 1934.<sup>2</sup>

I. CONGRESS DEFINED "AFFILIATE" BROADLY FOR OPEN VIDEO SYSTEMS AND CABLE-TELCO BUYOUTS.

The Alliance urges as broad a definition as possible for "affiliate" in the context of the 1996 Act's OVS provisions.<sup>3</sup> Even though a definition of "affiliate" exists in Title VI of the 1984 Cable Act ("when used in relation to any person, means another person who owns or controls, is owned by or controlled by, or is under common ownership or control with, such person..."<sup>4</sup>), Congress added a new definition of the term "affiliate" to Title I in the 1996 Act. For purposes of the 1996 Act, an affiliate was defined as "... a person that (directly or indirectly) owns or controls, or 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."<sup>5</sup> This affirmative act by

<sup>1</sup> P.L. 104-104, 110 Stat. 56 et seq. (February 8, 1996).

<sup>2</sup> 47 U.S.C. §§ 521 et seq.

<sup>3</sup> 1996 Act, §§ 651-653, 47 U.S.C. §§ 751-753.

<sup>4</sup> 47 U.S.C. §522(2).

<sup>5</sup> 1996 Act, § 3(a)(2), *codified* at Communications Act, § 3(33).

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Congress recognized that to implement the provisions of the 1996 Act, particularly those pertaining to Open Video Systems (OVS) and cable-telco buyouts, a definition other than that used in Title VI should apply. The Alliance concurs with comments filed by the National League of Cities and the National Association of Telecommunications Officers and Advisors<sup>6</sup> urging that any relationship which exceeds the carrier-user relationship be defined as “affiliation” for OVS purposes. Like them, we believe that the only way to prevent indirect control of the platform by manipulating “unaffiliated” programmers is to define “affiliate” in this manner.

GTE Services Corporation (GTE)<sup>7</sup> and BellSouth Corporation (BellSouth)<sup>8</sup> argue that Congress' intentions can only be implemented by ignoring the text of the Act itself. Both argue that Congress was satisfied with the definition of affiliate under Title VI, and expected that definition to be used in this proceeding. We demur. Section 653(b)(1)(B) of the 1996 Act requires an OVS platform operator to limit its own use of the platform (including any use made by its affiliate) to one third of capacity, if demand exceeds supply. Applying the narrow definition of affiliate in Title VI to OVS would allow an operator to have a significant interest in its programmers, including editorial and financial control, yet the programmers would be legally "unaffiliated." The Alliance is concerned that OVS operators would be able to program the remaining two thirds of the capacity with legally "unaffiliated" programmers that in actuality represented the editorial choices of the OVS operator. Such an outcome would eliminate independent voices from OVS and ignore Congress' intention to ensure that diverse, independent voices are heard.

Congress recognized that to meaningfully implement the provisions of the 1996 Act, the definition of affiliate would have to be broadened. Congress provided a new, broader definition whose use would lessen the threat to independent voices. To ignore the text of the 1996 Act and the intention of Congress, as GTE and BellSouth suggest, would be an abrogation of the FCC's duties. The FCC should apply the broadest definition possible to the OVS provisions of the 1996 Act.

## II. SECTION 506 OF THE 1996 ACT IS UNCONSTITUTIONAL.

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<sup>6</sup> Comments of the National League of Cities and the National Association of Telecommunications Officers and Advisors (June 4, 1996) at 7 et seq.

<sup>7</sup> Comments of GTE (June 4, 1996) at 4.

<sup>8</sup> Comments of BellSouth (June 4, 1996) at 3.

On June 28, 1996, the Supreme Court struck down Section 10(c) of the 1992 Cable Act<sup>9</sup> as unconstitutional. The plurality opinion found the provision unconstitutional on the grounds that the government could not show that the section was necessary to protect children and appropriately tailored to meet that end.<sup>10</sup> The section would “enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.”<sup>11</sup> Section 506 of the 1996 Act<sup>12</sup> is virtually identical to Section 10(c) in structure and effect: Section 506(a) states that “a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency or nudity.”<sup>13</sup> Like Section 10(c), Section 506(a) is not the least restrictive means to achieve a compelling governmental interest. Consequently, the rule in Denver Area prohibits the Commission from enforcing Section 506. The Alliance urges the Commission to explicitly rule that Section 506 cannot lawfully be implemented, based on the Supreme Court’s decision.

Respectfully Submitted

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<sup>9</sup> Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1486, § 10(c), 47 U.S.C. § 531.

<sup>10</sup> Denver Area Educational Television Consortium v. FCC and Alliance for Community Media v. FCC, Nos. 95-124 and 95-227, Decided June 28, 1996, slip op. at 37 (Breyer, J.).

<sup>11</sup> 47 U.S.C. § 531(e).

<sup>12</sup> Codified at 47 U.S.C. §§ 531(e), 532(c)(2).

<sup>13</sup> Id.