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

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 INDEPENDENT
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SUMMARY

In these reply comments, ICTA urges the Commission to adopt the definition of "affiliate" under Title VI of the Communications Act for the new LEC effective competition test. This definition would require a degree of control by the LEC over the competitive entity, either through equity ownership or actual control. The low percentage ownership interest set forth in Title I is inappropriate to govern the test of effective competition, the presence or absence of which determines whether much of Title VI regulation will apply at all.

With respect to the MDU bulk discount exception to the uniform rate structure requirement, ICTA welcomes the agreement from segments of the franchised cable industry that federal antitrust law does not provide the proper standard to guide the Commission in making predatory pricing determinations. Not only is federal antitrust law too uncertain in this area to offer sure direction, but such cases are typically drawn-out and expensive. ICTA instead suggests a bright-line test to steer the Commission, as it proposed in its opening comments. Such a standard should not be based on the "average cash flow margin" but rather should focus on the price percentage differential. In order to effectuate congressional intent and not allow the exception to swallow the rule for MDUs, the Commission should respect the definite industry usage of the term "bulk discount." Moreover, the Telecommunications Act of 1996 does not expressly afford the "meeting competition" defense to cable operators. Absent any such congressional direction, the Commission should not insert one. Finally, the 1996 Act offers no basis to exclude small cable operators from the uniform rate structure requirement, and the Commission should not do so.

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To: The Commission

REPLY COMMENTS OF INDEPENDENT
CABLE & TELECOMMUNICATIONS ASSOCIATION

INTRODUCTION

The Independent Cable & Telecommunications Association ("ICTA"), by its attorneys, hereby submits reply comments to the Order and Notice of Proposed Rulemaking (the "NPRM") in the above-referenced proceeding.

DISCUSSION

I. THE COMMISSION, CONSISTENT WITH CONGRESSIONAL INTENT, SHOULD DEFINE THE LEC EFFECTIVE COMPETITION TEST SO THAT THE STANDARD OF COMPETITION ACTUALLY HAS A RESTRAINING EFFECT ON CABLE RATES

A. For The LEC Effective Competition Test, The Commission Should Adopt The Definition Of "Affiliate" Under Title VI, Which Encompasses A Degree Of Control By The LEC, Either Through Equity Ownership Or Actual Control, Rather Than Relying On The Low Percentage Ownership Interest Set Forth In Title I

The new effective competition test added under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)("1996 Act"), comprises video services offered by a LEC or its *affiliate*. The Commission seeks comment as to how the term "affiliate" should be defined for purposes of this test. As recognized in the NPRM, the 1996 Act does not modify in any way the

definition which applies generally under Title VI of the Act. NPRM ¶ 74. This definition provides that:

> the 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). In contrast, the more specific Title I definition adopted temporarily by the Commission does not strictly apply to Title VI.[1/] The Commission does not offer a convincing explanation as to why the Title I definition of "affiliate" should govern in this context. Indeed, it should not. The effective competition test is a quintessential part of Title VI, given that the presence or absence of effective competition determines whether much of the Title VI regulation applies at all. See, e.g., 47 U.S.C. § 543(a)(2). This is precisely the situation contemplated by Title I -- where the context requires the application of a different definition. 47 U.S.C. § 153.

Accordingly, the Commission should utilize the definition of "affiliate" contained in Title VI, emphasizing actual ownership or control. Ownership in the form of de jure control should consist of ownership of 50% or more of the entity's stock. The Commission should measure de facto control by looking to the influence the LEC actually wields over the competing MVPD. See, e.g., BBS License Subsidiary L.P. and SF Green Bay License Subsidiary, Inc., 10 FCC Rec. 7926, 7931 (1995). The Commission should not recognize beneficial or passive interests for this purpose, as they do not indicate a sufficient measure of ownership or control by the LEC. Moreover, the Commission should not aggregate the interests of different LECs for purposes of determining LEC

[1/] The definition adopted for purposes of Title I in the 1996 Act states: "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." 1996 Act, §3(a)(2), *to be codified at* 47 U.S.C. § 153(33).

affiliation under the effective competition test. Merely because an entity has attracted the investments of two or more LECs does not mean that the LECs are acting in concert, or that any one is in control of the entity. Finally, it is imperative that upon the sale by a LEC of its interest in a competing MVPD, the Commission revisit whether effective competition remains in that market. If there no longer is effective competition, regulation of the dominant cable operator must be reinstated in order to protect consumers and competitors from the very injuries sparking Congress to adopt rate regulation in the first instance.

Establishing a firm affiliation standard is essential to effectuating the intent of Congress and setting the proper parameters for the test of "effective competition." An effective competition standard which is too lax will unleash cable operators from regulation prematurely, harming consumers and the prospects for genuine competition in the multichannel video services marketplace.[2/] The Commission can further Congress's underlying policy goals only by regulating entrenched operators until genuine competition governs the market, thereby avoiding the problems which resulted from the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (the "1984 Cable Act"). Accordingly, the Commission should utilize a definition of "affiliate" which recognizes that the LEC must have significant ownership or actual control in order for entrenched franchised cable operators to be subject to a degree of truly effective competition. As many commenters have argued, in not setting an explicit pass or penetration rate for this fourth prong of the effective competition test, Congress relied on the muscle that LECs would inherently

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[2/] Indeed, given that the uniform rate structure requirements discussed herein do not apply at all in the presence of effective competition, prematurely releasing cable operators from regulation will invite finely tuned predatory tactics because the cable operator will remain too dominant for the market to prevent such predation and the operator will perceive little risk in such activities.

bring to the provision of video services. However, this strength is only relevant if the competitive entrant is truly subject to the LEC's control. Otherwise, the LEC muscle presumed by Congress to be behind the entity is absent and the level of competition present will not have the effect of restraining cable rates.[3/]

II. THE COMMISSION SHOULD CONSTRUE THE MDU BULK DISCOUNT EXCEPTION TO THE UNIFORM RATE STRUCTURE REQUIREMENT NARROWLY SO AS NOT TO ALLOW THE EXCEPTION TO SWALLOW THE RULE

A. The Commission Should Recognize That Federal Antitrust Law Offers An Inappropriate And Uncertain Standard By Which To Measure Predatory Pricing Under The Uniform Rate Structure Requirement, And Adopt A Bright-line Test Designed To Enforce This Provision

ICTA welcomes the franchised cable operator community's agreement that federal antitrust law is not the proper standard to guide the Commission in adjudicating predatory pricing claims under the uniform rate structure requirement. As acknowledged by Time Warner Cable ("Time Warner"), among others, federal predatory pricing claims are notoriously lengthy and expensive. Comments of Time Warner at 38. A full-blown antitrust claim would serve the interests of neither the Commission, which must efficiently use limited resources to implement the tremendous reforms present in the 1996 Act, nor the parties before the Commission, who seek an expeditious resolution of the claim. An efficient resolution of such claims benefits consumers by fostering competition in the marketplace, while continuing to offer protection from anticompetitive practices where marketplace forces remain too meager to restrain such activity.

[3/] Moreover, the use of the Title I definition here will lead to a glaring inconsistency, as cable operators' affiliations for purposes of the second prong of the effective competition test will still be evaluated under the Title VI definition.

Moreover, as agreed by Time Warner in its opening comments, federal antitrust law is far from uniform on the issues of predatory pricing. Comments of Time Warner at 39. Accordingly, the Commission cannot simply state that it intends to follow the principles of federal antitrust law, because such principles do not exist to guide the Commission. Instead, as previously advocated by ICTA, the most logical reading of the 1996 Act is that Congress did not mean to parrot the Sherman Act in this provision, but offered competitors in the video services marketplace a higher degree of protection by simplifying claims of "predatory pricing."[4/] Opening Comments of ICTA at 13-16. Thus, notwithstanding that Time Warner is correct to recognize that federal antitrust standards are inappropriate, its proposal that the Commission address only the most egregious cases is completely wrong-headed. Congress clearly banned all predation, not just the worst predation. In this regard, Time Warner's "average cash flow margin" test proffered for purposes of establishing a prima facie case of predatory pricing is a transparent attempt to exempt the vast majority of predatory activity from scrutiny. That margin is derived from a combined single family-MDU base, including revenues not relevant to the MDU environment which serve to swell the revenue component of the margin. This is especially true given that the revenue derived from single-family homes is typically higher than that from MDUs due to factors such as less competition and churn. The margin further reflects a lower cost structure, given the absence of effective competition in most markets and the fact that costs are normally significantly lower in a monopolistic setting. Moreover, the test elects a "below cost" principle and thus does exactly what Time Warner cautions the Commission not to

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[4/] Of course, in accordance with the use of this simplified procedure and accompanying reduced burden, the complainant does not receive antitrust remedies, such as treble damages, under this provision.

do, i.e., "pick [ ] and choos[e] among the various tests different Courts of Appeals (much less different states) have adopted." Comments of Time Warner at 39.

In addition, there is no statutory support for the proposal by Adelphia Communications Corp. et. al. ("Adelphia"), Time Warner and Cole, Raywid & Braverman ("CRB") to require a finding of "competitive significance." This proposal appears to be founded upon the fact that predatory pricing as such is not prohibited under federal antitrust law, but is an element of unlawful monopolization and attempted monopolization -- which involve an examination of market share. See Time Warner Comments at 39-40. Presumably, Time Warner, Adelphia and CRB derive the concept of a "competitive significance" test from this notion. However, a measure of market share may be presumed (not in the strict antitrust sense) by the very fact that effective competition must be absent for this provision to apply at all. Moreover, in contrast to federal antitrust law, this section does proscribe predatory pricing *per se* -- and leaves it to the Commission to determine what that means herein. Congress gave no indication whatsoever that the Commission should impose such a severe burden on a competitor seeking to bring a predatory pricing claim before the Commission.

The imposition of an additional requirement of "competitive significance" is not merely groundless, it would render the statutory protection against predatory pricing largely meaningless, because in many situations such a standard could never be met. For example, in many markets all the MDUs taken together would not comprise 15% of the total number of homes. In other markets, while a "15% share is not significant" to a dominant monopoly player like Time Warner or Adelphia, see Comments of Time Warner at 41, such a share is extremely significant to nondominant MVPDs. To potential competitors of the entrenched franchised cable industry, this percentage obviously represents a tremendous number of properties. This burdensome requirement would harm

consumers who would be forced to forego the benefits of competition as cable operators remain free to engage in the practice of temporarily undercutting competitors at MDUs so long as the total number of units never rises to 15% of the operator's franchised area. These tactics would likely be sufficient to drive potential competitors out of the market, yet never reach the requisite level to bring a predatory pricing claim. Meanwhile, consumers would be left with the same monopolistic choice of a single franchised cable operator. Surely this was not Congress's intent. Thus, the Commission should reject the suggestion of a mandatory showing of "competitive significance."

B. The Exception To The Uniform Rate Structure Requirement Must Be Limited To Genuine Bulk Discounts To MDUs, As The Long-standing Industry Definition Was Understood By Congress

The franchised cable industry advocates that the Commission distort the term "bulk discounts" to an unrecognizable form, merely because cable operators seek complete flexibility to bill subscribers in MDUs in any way they choose. See, e.g., Comments of Time Warner at 35-36; Comments of CRB at 17-18; Comments of the National Cable Television Association, Inc. ("NCTA") at 44-46. However, that is not what Congress intended, and the Commission is accordingly barred from establishing such a scheme. If Congress had wanted to institute an entirely flexible system, it would not have deliberately employed the term "bulk discounts" but simply would have exempted the MDU market in its entirety from the uniform rate structure requirement. Congress did not do so. Instead this exception was purposefully limited to "bulk discounts" -- a term with a well-established, uniform meaning -- that is, until the present proceeding. It is only logical that Congress understood the term to mean what the Commission has understood the term to mean in its earlier rulemakings, as well as the definition put forth by the cable industry itself until now. See Implementation of Sections of the Cable Television Consumer Protection and Competition Act

of 1992, Rate Regulation, 8 FCC 5631, 5897-98 (1993); Opening Comments of ICTA at 9-10 (citing to comments filed in that proceeding on behalf of large MSOs). Simply put, by definition "bulk discounts" must be negotiated and paid for by the property ownership or management on behalf of all residents pursuant to a single agreement between the MVPD and the property owner or manager.[5/]

The reason that this exception to the uniform rate structure requirement is narrowly drawn is that the underlying regulation is merely a temporary restraint until the market is competitive. At such time, the regulation will cease and the cable operator will have the complete flexibility it seeks, restrained only by the competitive marketplace. It is especially important therefore that the Commission remain vigilant in narrowly construing this exception, given that the new LEC test for effective competition will release cable operators from regulation even faster than the tests in place prior to the passage of the 1996 Act.

C. The 1996 Act Does Not Afford Cable Operators The "Meeting Competition" Defense To Predatory Pricing And The Commission Should Not Insert One Absent Explicit Congressional Direction To That Effect

Pursuant to the D.C. Circuit's decision in Time Warner Entertainment Co., L.P. v. FCC, 56 F.3d 151 (D.C. Cir. 1995) the Commission does not have the authority to incorporate a "meeting competition" defense to allegations of predatory pricing absent explicit statutory language to that effect. As that court recognized, "meeting competition" is not required under all rate

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[5/] The attempt on the part of franchised cable operators to distort the definition of "bulk discount" beyond recognition is a thinly veiled effort to back into a "meeting competition" defense to predatory pricing through complete flexibility in billing arrangements. As discussed in Section II.C., infra, the 1996 Act does not grant a "meeting competition" defense to cable operators under this section, and the Commission may not insert one or define "bulk discount" so loosely as to create, in effect, a "meeting competition" defense.

nondiscrimination schemes, id. at 191-92, and the institution of such a defense without an explicit congressional provision to that effect (such as in the Robinson-Patman Act) is highly questionable and most likely reversible. Id.[6] Where the statute bars discrimination of any type, the Commission is justified in denying "meeting competition." Id. at 192. The statute at issue, even with the modifications contained in the 1996 Act, continues to proscribe all discrimination (not only "unjust or unreasonable" discrimination) and merely permits a narrow exception for nonpredatory bulk discounts to MDUs. Contrary to TCI's claims, Comments of TCI at 22, at the time of the Time Warner decision, the Commission had already exempted bulk discounts to MDUs based on a predatory pricing standard. Therefore, the D.C. Circuit must have thought that such an exemption did not alter the fundamental prohibition in the statute against all discrimination in pricing, because the exemption was itself non-discriminatory.

Congress clearly was aware of and understood the Time Warner decision, given its codification of the holding of that case. See House Report to the 1996 Act, H.R. 104-204 at 109 (July 24, 1995) (stating that Congress meant only to clarify that uniform rate structure requirement applied only to regulated services, citing to Time Warner). Therefore, Congress must have known that in order to ensure a "meeting competition" defense it needed to provide for one expressly -- and Congress did not do so. Thus, this Commission should retain its present rejection of any defense to a uniform pricing violation that is grounded in claims of "meeting competition", Congress has undoubtedly determined there is no real "competition" to "meet".

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[6] TCI's reliance on the Robinson-Patman Act in support of its argument for a "meeting competition" defense is singularly misplaced, given that the D.C. Circuit focused on the express provision of a "meeting competition" defense in the Robinson-Patman Act, in stark contrast to the Communications Act -- then or now. Comments of TCI at 21.

D. There Is No Basis In The 1996 Act For Excluding Small Cable Operators From The Uniform Rate Structure Requirement

The 1996 Act offers no basis for the Commission to exempt small cable operators from the uniform rate structure requirement, as suggested by the Small Cable Business Association. Comments at 40. Section 301(c) of the 1996 Act by its plain language clearly exempts small cable systems only from the application of 47 U.S.C. §§ 543(a), (b) and (c) (which relate to other aspects of rate regulation), but leaves application of the uniform pricing requirement of section 543(d) wholly intact. 1996 Act, § 301(c), *codified at* 47 U.S.C. § 543(m)(1). The Commission may not arbitrarily create an additional exception for small cable systems. Indeed, the very fact that 47 U.S.C. § 543(m)(1) affords small cable operators a greater ability to raise rates free of regulatory constraints underscores why Congress specifically chose not to also exempt small operators from Section 543(d), which contains the uniform rate structure provision. To release exempted small cable operators from uniform pricing restraints in the absence of effective competition would merely enable such operators to raise rates as a means to subsidize predatory activity. Even if deregulated, a small cable operator can still have market power, the abuse of which harms consumers.

The result in Time Warner can only accord with ICTA's position. Therein, the court reasoned that it is the presence of effective competition and not simply the lack of rate regulation that warrants exemption from the uniform rate structure requirement. Id. at 191. This decision therefore does not stand for the proposition that systems otherwise freed from rate regulation are exempt from uniform rate structure requirements in situations where they are not faced with effective competition. Indeed, the 1996 Act adopts the reasoning of this decision by amending section 543(d) to exclude from its coverage only those systems actually subject to effective competition. Thus, the logical reading of section 301(c) of the 1996 Act is that it was not intended

to exempt such operators from uniform rate structure requirements unless they are faced with effective competition.[7]

III. THE COMMISSION SHOULD NOT, AS PART OF THIS PROCEEDING OR ANY OTHER PROCEEDING BEFORE THE COMMISSION, PROHIBIT EXCLUSIVE CONTRACTING BY MULTICHANNEL VIDEO SERVICE PROVIDERS SERVING MDUS

In the event the Commission considers Bell Atlantic's suggestion that the Commission bar exclusive agreements between owners and managers of MDUs and MVPDs, which ICTA believes not to be at issue in the present proceeding before the Commission, ICTA opposes such a prohibition for the reasons it has explained in other proceedings. See Comments of Bell Atlantic at 3. ICTA incorporates those arguments herein by reference to its opening and reply comments in Telecommunications Service Inside Wiring Customer Premises Equipment, CS Docket No. 95-184 (filed March 18, 1996 and April 17, 1996).

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[7] Indeed, according to the NPRM, neither the Commission's interim rules for implementation of the provisions of the 1996 Act regarding regulatory relief for small cable operators, nor its proposed rules in this area, even raise the issue of whether small operators are exempt from the uniform rate structure requirement. Thus, the Commission has heretofore properly treated small cable operators as subject to the requirement unless faced with effective competition, just as are other cable operators. NPRM ¶¶ 23-27, 80-94.

CONCLUSION

In light of the foregoing and ICTA's initial comments, ICTA believes that the Commission should adopt rules and regulations consistent with ICTA's comments to the NPRM.

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I hereby certify that on this 28th day of June, 1996, a true copy of the foregoing Reply Comments of Independent Cable & Telecommunications Association was served via first-class mail, postage prepaid on the following:

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