BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

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

REPLY COMMENTS

Cole, Raywid & Braverman ("CRB"), on behalf of the cable operators identified on Attachment A, hereby submits these Reply Comments in the above-referenced proceeding.

I. EFFECTIVE COMPETITION

A. Definition of "Offer"

With very few exceptions, the Comments submitted in this proceeding argue against imposing numerical thresholds on the new effective competition test for LEC-affiliated video offerings. Such thresholds are disparaged by cable operators and telephone companies alike as inconsistent with the statute.[1] While a few Commenters express concern that the absence of numerical thresholds could leave cable subscribers without the benefit of either

[1] *See, e.g.,* NCTA Comments at 8-10; Bell Atlantic Comments at 1-2; US West Comments at 3-5; SBC Communications Comments at 1-3; USTA Comments at 7-8. The attempt by BellSouth to graft a "program access" requirement on to the "effective competition" test, BellSouth Comments at 2, lacks any statutory support, and the Commission lacks any evidence that such a requirement is necessary

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regulation or real competition, most Commenters acknowledge that LEC-entry as a multichannel video programming distributor ("MVPD"), however modest, will have a substantial deterrent effect on cable prices. Indeed, the New York State Department of Public Service ("NYSDPS") acknowledged, "LEC identity is key." NYSDPS Comments at 4. The Department correctly noted:

> Congress has emphasized the identity of the competitor -- as opposed to the scope or success of the competitive programming venture -- as the dispositive element in determining the impact on cable operators.
>
> There is a reasonable basis for this conclusion [Based on the special resources of LECs], 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. [*Id.* at 9-10.]

B. Definition of "Comparable Programming"

There is, unfortunately, less agreement about the definition of "comparable programming." A number of Commenters support the Commission's tentative conclusion that "comparable programming" must include at least one broadcast signal, and several of those Commenters argue that superstations should not be treated as a "broadcast signal" for purposes of this regulatory definition. None of these Comments, however, offers a convincing explanation as to why Congress wanted to abandon the FCC's existing definition of comparable programming (which requires inclusion of at least one non-broadcast channel, but establishes no minimum requirement for broadcast channels).

Given the obvious conflict in the Committee Report, CRB continues to believe that the most sensible solution for the Commission is to maintain its existing definition of "comparable programming." The existing definition -- with its emphasis on non-broadcast (as opposed to broadcast) programming -- has the added practical benefit of avoiding the need to resort to additional regulations (already advanced by the Commission) to ensure that competing MVPDs do not contort their broadcast offerings so as to avoid liberating their cable competitors from the burdens inherent to rate regulation.

Of all the participating Commenters, the Independent Cable & Telecommunications Association ("ICTA") (whose membership is composed largely of SMATV providers) stands out as particularly rigorous in its attempt to minimize the likelihood that LEC-affiliated MVPDs will be recognized as "effective competition" for purposes of cable rate regulation. ICTA argues, for example, that the Commission should define "comparable programming" to require the offering of local broadcast signals, ICTA Comments at 2-3, and then contends that a competing MVPD should **not** be treated as "offering" the signals, unless the signals are transmitted directly over the MVPD's own facilities. *Id.* at 5-7. Similarly, ICTA argues that SMATV providers should not count towards the fourth prong of the effective competition test, because they fall within the "direct-to-home satellite" exemption. *Id.* at 7-8.

CRB explained in its Comments why the interpretative approach advanced by ICTA should be rejected and will not restate that explanation here. It urges the Commission, however, to carefully consider the practical consequences of ICTA's arguments. ICTA openly admits that it is committed to maintaining cable's uniform rate requirement, ICTA at iv, which would disappear upon a finding of "effective competition." The question for the Commission, however, is not how to avoid cable deregulation, but how to sensibly implement the 1996 Act's regulatory reformation. The loopholes advanced by ICTA disregard real competition and would eviscerate the deregulatory intent of the newest effective competition test.

II. SMALL OPERATOR RELIEF

A. Definition of "Gross Revenue"

In its Initial Comments, CRB disputed the Commission's tentative conclusion that the statutory revenue cap on "small operator" eligibility was intended to include non-cable revenue. Several commenters shared CRB's views. C-TEC Cable Systems, for example, agreed with CRB that the simultaneous use of a subscriber cap and a revenue cap in the statute was intended as a "belt-and-suspenders" approach to ensure sensible application of rate deregulation. C-TEC Comments at 2. C-TEC explained:

> [I]t seems clear that Congress intended the $250 million to cap revenues from cable service generated by 600,000 subscribers. Congress was apparently concerned that if it relied solely on one of these numbers, a sudden change in either cable subscribers nationally or cable revenues could significantly change the breadth of deregulation . . . . By relying on both numbers -- subscribers and revenues -- Congress could help to ensure the stability in the reach of rate deregulation. [*Id.* at 4-5.]

A number of local exchange carriers reached this same conclusion. *See, e.g.*, BellSouth Comments at 4-5; USTA Comments at 14.

While numerous Commenters evidently share the Commission's assumption that the revenue cap was meant to include non-cable revenue, none advanced a compelling justification for the assumption. There is, in fact, nothing compelling in the statute, the legislative history, or public policy supporting the Commission's assumption. Yet, the

Commission's proposal to subject non-cable revenue to the $250 million revenue is likely to disqualify a substantial number of cable operators, who would otherwise appear to be precisely the sort of independent entity Congress sought to help.

As CRB explained in its initial Comments, relief in this instance should be liberally extended. The rates at issue generally will be limited to the CPST, rather than "lifeline" BST service. And the relief sought is only temporary, because "large" operators soon will have precisely the same freedom from CPST regulation now afforded "small" operators. It makes little sense to unnecessarily restrict small operator eligibility, as doing so will have no lasting impact on subscriber rates. A restrictive definition is likely, however, to discourage many of the nation's remaining independent cable operators, who do not share the operating efficiencies enjoyed by the largest MSOs, but happen to be associated with other businesses earning substantial gross revenues. Given all the concern expressed about consolidation in the cable industry, these are exactly the sort of entities the Commission should be encouraging through regulatory forbearance.

B. <u>Definition of "Affiliate"</u>

In practical terms, a blanket exclusion of non-cable revenue from the statutory revenue cap would avoid the majority of difficult ownership attribution questions that are likely to otherwise surround small operator relief. If the Commission decides against excluding all non-cable revenue, it is critical that the Commission at least adopt ownership attribution standards that accommodate customary equity relationships between small operators and large institutional investors.

Several cable commenters joined CRB in emphasizing the need to establish attribution standards with a comparatively high ownership threshold and a complete exemption for passive investments. Frontiervision, for example, noted that adoption of the proposed standards

> would disqualify any small operators that receive more than 20 percent of their equity capital from large institutional investors. This result is directly at odds with the statutory purpose of encouraging the flow of capital into small systems. Deregulating rates of small systems cannot attract investment capital if the investment of such capital will result in the *re*regulation of those systems' rates. [Frontiervision Comments at 5.]

CRB supports the arguments advanced by Frontiervision, the Cable Telecommunications Association, and the Small Cable Business Association ("SCBA") that passive investments (regardless of their size) should **not** be attributed for purposes of small operator relief. Like CRB, these Commenters all note that smaller operators have frequently secured financing by offering equity to large investors. The Small Cable Business Association properly warns that:

> [e]xcluding otherwise qualified small cable companies because they have passive institutional investors with more than $250 million of gross annual revenues will substantially shrink the list of qualifying cable companies. Such a limiting interpretation is inconsistent with the overarching policy objectives articulated by Congress. [SBCA Comments at 14-15]

CRB joins the cable Commenters suggesting that "[p]assive interests, irrespective of degree, should never trigger the existence of an affiliation." *Id.* at 15. It also agrees that the Commission should broadly construe the definition of "passive interests" in this context to accomplish its deregulatory objective. For example, large institutional investors that hold limited partnership interests in cable companies should be regarded as "passive" investors, even if the existing partnership agreement lacks the insulating mechanisms typically required for such investors to avoid ownership attribution.

If the Commission is not prepared to define all passive investors as categorically nonattributable, the Commission should at least follow its traditional practice and establish a higher ownership threshold for passive investors. CRB also supports NCTA's proposal for a "liberal waiver procedure" so that "an otherwise ineligible operator could demonstrate that it has 'other attributes' that warrant small cable operator rate relief." NCTA Comments at 36. Finally, CRB agrees with those Commenters urging adoption of a generous transitional mechanism for cases where a small operator loses its eligibility status. A mechanism preserving some or all of rate benefits for this class of operator is particularly appropriate in light of the imminent sunset of CPST regulation for all operators. If those operators are not categorically "grandfathered," they should at least be allowed to maintain any rates established during their deregulated period and take additional rate increases consistent with either conventional rate justifications or the special Form 1230 established under the *Eleventh Order on Reconsideration*.

The Commission should not overlook the rather conspicuous absence of Comments filed in this proceeding seeking to impose an aggressive regulatory approach on small cable operators. In the absence of compelling evidence of pervasive rate problems involving small operators, the Commission should pursue the deregulatory, pro-competitive objectives underlying the 1996 Act and forbear from active regulation whenever possible.

III. UNIFORM RATE EXEMPTION

A. Definition of the Exemption

Numerous commenters (including CRB) urged the Commission to reject its tentative conclusion that the "bulk billing" exemption from the uniform rate requirement should apply only in cases where the operator renders a single bill to the development's owner or manager. The proposed restriction lacks any logical basis. As Cablevision Systems stated in its Comments, "Limiting the scope of the bulk rate exception only to instances where the MDU owner or manager is billed for services would serve no useful policy purpose and severely hamstring cable operators' ability to respond to competition in MDUs." Cablevision Systems Comments at 16. Cablevision's Comments go on to explain that "management and owners of most MDUs that negotiate bulk discounts prefer to have the MVPD provider bill residents individually for service, because they do not wish to be responsible for serving as the central billing agent for MVPD services." *Id.* The assertion by ICTA that "bulk discounts" are invariably negotiated and paid for by the property ownership or management, ICTA Comments at 9, simply is not true.

The underlying justification for the "bulk billing" exemption is not how the bills are rendered, but whether the site is particularly susceptible to existing competitive pressures. MDU complexes are, in fact, attractive targets for SMATV competition. The sensible policy decision for the Commission to pursue here is applying the exemption, regardless of the billing method applied, provided that the cable operator does not unduly discriminate among customers within an MDU complex.

As CRB explained in its Comments, the bulk billing exemption should also be applied outside the context of traditional MDU complexes, so as to include all building complexes and developments subject to SMATV competition. Now that the 1996 Act has changed the cable system definition so that SMATVs can serve single family planned unit developments without a local franchise, logic dictates that the bulk billing definition should be similarly broadened. While ICTA predictably offers a host of legal reasons why the definition should not be broadened, its filing is bereft of logical reasons to limit the bulk billing exemption to traditional MDU complexes.

B. Definition of "*Prima Facie*"

Finally, with regard to establishing a *prima facie* case for predatory pricing in bulk accounts, several Commenters proposed using a numerical threshold to review a contested discount. *See, e.g.*, Time Warner Comments at 40 (a *prima facie* case would occur where the discount exceeds the average cash flow for the industry). Based on the historic 2 to 1 ratio of revenue to cash flow in the cable industry, CRB suggested that a *prima facie* case should require the petitioner to show that the "bulk" rate for regulated services was reduced more than 50% from the "standard" rate.[2] Adopting this fixed cut-off (regardless of how cash flow for a particular company or the general industry might vary year-to-year) avoids the problem of having the presumptive legality of a contract shift in mid-term. In any event, CRB urges the Commission to resist suggestions that the discount figure be set at a level where virtually every "bulk" arrangement would automatically constitute a *prima facie*

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[2] In fact, in cases where the operator's bulk discount is predicated on 100% penetration, logic suggests that the "permitted" discount should increase as the penetration level in the surrounding franchise area decreases.

case of predatory pricing. The suggestion by ICTA that the *prima facie* discount be set at 10%, ICTA Comments at 17, is picked out of thin air and has no logical basis. It is unwarranted and unworkable.[3]

IV. TECHNICAL PREEMPTION.

Several franchising authorities submitted Comments essentially arguing that the 1996 Act had little or no effect on their right to regulate cable technology. *See, e.g.*, New York City Department of Information Technology and Telecommunications Comments at 20-21. The City and County of Denver, for example, states that "the City does not agree. . . that the 1996 Act prohibits LFAs from mandating specific system transmission technologies or subscriber terminal equipment." Denver Comments at 17. Denver, of course, fails to offer an alternative meaning for the new statutory provision, which simply states, "No state or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." 47 U.S.C. 554(e). The eagerness Denver displays to continue its involvement in cable technology is the best evidence of why the Commission should affirm the preemptive sweep of the 1996 Act.

Franchising authorities may be reluctant to surrender regulatory powers, but they cannot wish away the dramatic shift in the regulatory paradigm inherent to the 1996 Act. The Commission has an excellent opportunity in this proceeding to foreclose a great deal of debate across the country by affirming the deregulatory intent of Section 301(e) of the 1996

[3] CRB also supports the traditional "meeting competition" defense advocated by TCI

Act. It is imperative that the Commission do so now to ensure the unfettered technological development sought by Congress.

Respectfully submitted,

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EXHIBIT A

Bresnan Communications Company, L.P.
Charter Communications, Inc.
Daniels Communications, Inc.
Halcyon Communications Partners
James Cable Partners, L.P.
Jones Intercable, Inc.
Rifkin & Associates, Inc.
TCA Cable TV, Inc.