



UNITED STATES
TELEPHONE
ASSOCIATION

HAND DELIVERED

William Caton
Secretary
Federal Communications Commission
1919 M Street
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Washington, DC 20054

Dear Mr. Caton:

**RE: United States Telephone Association
Reply Comments on Cable Reform (CS Docket No. 96-85)**

Enclosed is an original and 11 copies of the Reply Comments of the United States Telephone Association in CS Docket No. 96-85. Please date-stamp the extra copy of this filing and return to the messenger. Should you have any questions please call 326-7310.

Sincerely,

Keith Townsend
Director
Regulatory Affairs & Counsel

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JUN 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

June 28, 1996

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Before the
Federal Communications Commission
Washington, D.C. 20554

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JUN 28 1996

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

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

REPLY COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

UNITED STATES TELEPHONE ASSOCIATION

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June 28, 1996

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SUMMARY

USTA believes that the single most important issue before the Commission in this proceeding is to make explicit the linkage between effective competition for cable operators and LEC access to programming. LEC access to comparable programming, including local broadcasts, is an essential precondition to the development of actual competition in the video marketplace. The Commission should require that any cable operator seeking to show that it is subject to effective competition first demonstrate that the cable operator has afforded access to the programming owned or controlled by the operator or its affiliates to competitors.

Moreover, the record supports a Commission ruling that "superstation" broadcasts are not local broadcasts for purposes of the effective competition test. The Commission should confirm that superstations do not count as local broadcasts for the comparable programming standard in the effective competition test.

The introduction of SMATV service in a franchise area should not be viewed as effective competition, thereby justifying de-regulation of the cable operator. Attempts to use the introduction of SMATV service in a local franchise area as a "hair trigger" to find that effective competition exists is similarly at odds with the Congressional intent that market forces and competition protect consumers.

The Commission should apply the Title VI definition of affiliate to the Title VI issues being considered in this proceeding. Congress deliberately chose not to modify or change the existing definition of affiliate in Title VI when crafting the new definition in Title I. The Commission should defer to this Congressional decision. In addition, retention of the Title VI definition is consistent with existing jurisprudence and experience. Using the Title VI

definition, the Commission can focus on issues of control, which lie at the heart of the transition to a competitive video marketplace.

Before the
Federal Communications Commission
Washington, D.C. 20554

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| Implementation of Cable Act Reform |) | CS Docket No. 96-85 |
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| Act of 1996 |) | |

REPLY COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

I. INTRODUCTION

USTA respectfully files reply comments in the above-captioned rulemaking regarding Cable Act reform. On many issues, commenters in this proceeding fall into two distinct groups: those that urge the Commission to adopt flexible, streamlined rules implementing the video programming provisions of the Telecommunications Act of 1996 (the "1996 Act")^{1/} and those that request the Commission to impose unjustified regulatory burdens on new market entrants beyond the obligations Congress set forth in the 1996 Act.

The Commission should resist the call of the incumbent cable operators seeking to lure the Commission into adopting needless regulations and obstacles to competition. Congress chose to rely on competition in the video marketplace when crafting the 1996 Act. The Commission likewise can usher in a new era of innovative services and lower prices for consumers by introducing flexible rules that will jump-start competition and market forces in the video industry.

^{1/} Telecommunications Act of 1996, amending the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

II. THE COMMISSION SHOULD PROTECT CONSUMERS BY ADOPTING A MEANINGFUL STANDARD FOR COMPARABLE PROGRAMMING THAT SUPPORTS EFFECTIVE COMPETITION.

A. Parity Of Access To Programming Remains A Critical Issue.

USTA believes the Commission should make explicit the linkage between effective competition and program access. Many commenters suggested that the Commission adopt streamlined procedures for certifying that a cable operator is subject to effective competition. USTA believes that a necessary component of this process is a finding that the cable operator has afforded access to programming owned or controlled by the operator, or its affiliates, to competitors. Congress historically has stated that access to programming fosters competition and promotes new market entry.^{2/}

In the past, the Commission responded to Congress' direction to support competition by adopting rules governing program access.^{3/} The program access rules have at their heart the objective of making programming available to existing or potential competitors of traditional cable systems so that the public may benefit from the development of competition.^{4/}

^{2/} See Communications Act § 628, 47 U.S.C. § 548; Comments of the National Telephone Cooperative Assoc. at p. 2 (noting that Congress intended in the Cable Television Consumer Protection and Competition Act of 1992 to promote competition).

^{3/} See 47 C.F.R. §§ 76.1000-76.1003.

^{4/} The focus on programming access is crucial to determining appropriate standards for comparable programming and effective competition. In its initial comments, USTA and the majority of commenters agreed with the Commission that with regard to the number of channels provided, Congress indicated that at least 12 channels must be provided, including television broadcast signals. Joint Explanatory Statement, Conference Report at p. 170 ("The conferees intend that 'comparable' requires that the video programming services should

(continued...)

As the Commission noted in the *Open Video Systems* proceeding, cable operators continue to have significant interests in programming, and control a large percentage of nationally delivered programming services.^{5/} This control thwarts new entrants' access to the programming that is essential for them to compete with cable operators.

The Commission's rules should be modified to require incumbent cable operators to make an affirmative showing that, prior to deregulation, they have provided parity of access to programming under their direct or indirect control to the LECs in their service areas. LECs' access to programming that is comparable to that available to incumbent cable operators is a foundation of the Congressional decision to deregulate incumbent cable operators in the event of effective competition in their markets.^{6/} Absent LEC access to comparable programming, there is no legitimate means to provide the competition needed for deregulation to occur.

Comparable, nondiscriminatory access to programming is crucial for LECs to provide effective competition for incumbent video providers. As stated in its initial comments, USTA therefore requests that the Commission make further modifications to Rules 76.915 and

^{4/}(...continued)

include access to at least 12 channels of programming, at least some of which are television broadcast signals.")

^{5/} See *Implementation of Section 302 of the Telecommunications Act of 1996, Second Report and Order*, CS Docket No. 96-46 ¶ 189 (May 31, 1996) ("*OVS Order*") (noting Congress' "deep concern" with the cable industry's "stranglehold" over programming).

^{6/} See Comments of BellSouth at p. 2-3 (recommending language to be added to 47 C.F.R. § 76.905(4) to ensure that access to programming is accomplished before finding effective competition and deregulating cable service).

76.1003 to clarify LECs' ability to obtain programming and provide for adjudicatory proceedings should such access be frustrated.^{2/}

B. The Commission Should Rule That "Superstations" Are Not Local Broadcasters For Effective Competition.

The record supports a Commission ruling that superstation signals are not local broadcasts for purposes of the effective competition test. USTA supports the view that the number of channels offered, while important, must be analyzed in conjunction with the types of programming carried on those channels. The *Notice* appropriately acknowledged that Congress intended that "comparable programming" should include local broadcast signals.^{8/}

Cable incumbents' arguments that so-called "superstations" constitute programming of local origin are incorrect and self-serving.^{9/} ICTA is correct that Congress required that consumers have traditional local programming available from another source before the

^{2/} See Comments of USTA at pp. 4-6 (urging the Commission specifically to condition elimination of cable rate regulation on a prerequisite showing by the cable operator that the LEC and its affiliates have parity of access to programming).

^{8/} See, e.g., Comments of Independent Cable & Telecommunications Association at p. 2-5 ("ICTA") (stating that the standard established by Congress "unquestionably" requires that local broadcast channels be part of a "comparable programming" package); Cable Telecommunications Association at p. 2 (comparable programming should include some broadcast signals).

^{9/} See, e.g., Comments of Adelphia Communications at p. 3 (noting that superstations often carry programming similar to local offerings); Cable Telecommunications Association at p. 2 (claiming that because superstations must be licensed and carry other public interest obligations, they are local broadcast programming); Comcast at p. 10 (claiming that the Conference Report made no distinction between local broadcast and superstations); Cox at p. 5 (claiming that because non-broadcast programming is so important, competition exists when an operator demonstrates that some broadcast signals are available over-the-air in a franchise area).

incumbent cable operator is entitled to deregulation.^{10/} The inclusion of local broadcast programming in this standard, as recognized by the Commission, is appropriate for a market-oriented approach because it focuses on the actual programming choices available to consumers.

The Commission should reject the recycled arguments of incumbent cable operators that superstation signals are the equivalent of local broadcast programming. The Commission repeatedly has seen through this smokescreen. When promulgating its cable rate regulations, the Commission specifically did not require the basic service tier ("BST") to include superstations, although the BST must include all local broadcast signals that the cable system distributes.^{11/} The Commission rightfully recognized the importance of local broadcast signals, as opposed to superstations, to consumers.^{12/} It should do so again in this proceeding.

Comcast and Cox advance an even more aggressive argument. Notwithstanding the clear language of the 1996 Act and the Conference Report cited by the *Notice*, these commenters suggest that the Commission should create out of thin air a standard based on competitive non-broadcast offerings.^{13/} This invitation to the Commission to ignore the statutory directive is made even more dubious by the attempt to re-argue the applicability of direct-to-home and DBS offerings to the video market.^{14/} Congress has already decided these matters in the text of the statute.

^{10/} See Comments of ICTA at p. 4.

^{11/} 47 CFR § 76.901(a).

^{12/} See Comments of Wireless Cable Association at p. 12.

^{13/} See Comments of Comcast at p. 8.

^{14/} *Id.* at pp. 8-11 (arguing that effective competition comes from non-broadcast offerings and DBS); Cox at p. 4-5 (same).

C. SMATV Should Not Constitute An Element
Of The New Effective Competition Test.

The Notice sought comment "as to whether the type of service provided by, or over the facilities of, the LEC or its affiliate should be relevant" to the effective competition test.^{15/}

Cable incumbents argue that SMATV service should be part of the new prong of the "effective competition" test in order to expedite deregulation.^{16/} Time Warner, for example, claims that SMATV constitutes effective competition, unlike direct-to-home satellite services, because SMATV service may include local programming content.^{17/}

USTA reiterates that Congress deliberately omitted SMATV from the list of services that it did include in the 1996 Act when discussing effective competition.^{18/} USTA respectfully submits that this statutory silence is entitled to deference by the Commission. Congress directed that direct-to-home satellite broadcast services be excluded from the effective competition test. SMATV services are functionally similar to such satellite services provided to multiple dwelling units through a single antenna

^{15/} Notice at ¶ 71.

^{16/} See Comments of Adelphia Communications at p. 6-7.

^{17/} See Comments of Time Warner at pp. 17-18 (arguing that SMATV signals are essentially local services).

^{18/} Joint Explanatory Statement, Conference Report at p. 170.

III. THE COMMISSION SHOULD APPLY THE TERM "AFFILIATE" CONSISTENT WITH CONGRESS' INTENT TO FOSTER COMPETITION.

USTA urges the Commission to apply the Title VI definition of "affiliate" to the Title VI issues being considered in this proceeding. USTA supports those commenters that note Congress' decision not to alter the existing Title VI definition of affiliate when enacting the new Title I definition evinces an intent to preserve the Title VI definition in context of cable service.^{19/} The Commission should recognize and defer to this Congressional decision. Moreover, as a matter of sound statutory construction, the most appropriate definition of affiliate for the substantive provisions of Title VI, including those at issue in this proceeding, should be the definition specifically included in that Title.

The Commission's retention of the Title VI definition for affiliation is also consistent with established precedent. The Commission has experience applying the Title VI definition with flexibility. USTA believes that such flexibility will permit the Commission to address realistically the Title VI provisions governing effective competition, cable-telco buy-outs and small systems. Using the Title VI definition of affiliates, the Commission can direct its focus to the crux of the matter -- control, both *de facto* and *de jure*.

USTA supports the view of Residential Communications that the Commission would create an uneven playing field by adopting the Title I definition.^{20/} Cable operators therefore would be able to gain advantages through regulation that they apparently fear may elude them

^{19/} See Comments of GTE at p. 4; BellSouth at p. 3; Bell Atlantic at p. 2.

^{20/} See Comments of Residential Communications at p. 4

in open competition in the video marketplace.^{21/} For example, if the Title I definition of "affiliate" were to be used in the effective competition test established by Section 623(l)(1)(D) of the Act, the presence of any competitive multichannel video programming distributor ("MVPD") in which a LEC has only a passive, non-controlling 10% or greater equity investment would permit a cable operator to claim the existence of effective competition. The result would be a mockery of the Congressional intent to foster meaningful competition.^{22/}

Some commenters attempt far-fetched analogies between the Title I definition and the rules of the Securities and Exchange Commission (the "SEC").^{23/} The cable operators' reliance on SEC Rule 13d-3 and assertions that wide definitions of passive and active investments are needed to restrain LECs are misplaced. The SEC rule, for example, is a tool

^{21/} Some parties argue that as a matter of policy, the Commission should ignore the clear Congressional decision to leave unaltered the Title VI definition of affiliate. Indeed, the New England Cable Television Association ("NECTA") invites the Commission to disregard both the Title I and Title VI definitions of affiliate and create out of whole cloth a new 5% definition because allegedly that number, while unsupported in the 1996 Act, is more realistic. Comments of NECTA at pp. 6-8.

^{22/} As the Commission correctly stated, "[t]he new test for effective competition requires that the LEC-delivered programming be 'comparable' to that of the cable operator." *Notice* at ¶ 69 (emphasis added). Congress clearly focused on the delivery of programming to subscribers by a LEC or its programming affiliate in establishing the new effective competition test. Contrary to the assertions of some cable commenters focusing on Bell Atlantic and NYNEX's investment in CAI Wireless, LEC investment in a MVPD does not by itself satisfy the new test for effective competition. *See* Comments of NTCA at pp. 16-21; Time Warner at pp. 6-14; Cox at p. 15, n. 37; Comcast at p. 16, n. 42; NECTA at pp. 4-6, 11-12; Adelpia at p. 10, n.24. The investments by these two LECs in CAI Wireless, Inc. is for the provision of MMDS transport in markets where Bell Atlantic and NYNEX will select the video programming. In other markets where CAI Wireless, Inc. provides MMDS video programming which CAI delivers to its customers, the effective competition test is not met. This would not relieve the incumbent cable operator of rate regulation as the programming at issue is not "LEC-delivered programming."

^{23/} *See, e.g.* Comments of Adelpia at pp 12-15; National Cable Television Association at pp. 15-20; Time Warner at pp. 5-11.

designed to establish disclosure thresholds to ensure the integrity of the securities markets, not a means of implementing telecommunications policy. Cable operators seek to distort the purpose and effect of this rule to justify use of the Title I definition of affiliation. The result would be only to retard routine business relationships needed to provide the competition envisioned by Congress. USTA recommends that the cable operators' attempt to enmesh the Commission and LECs in needless regulation be rejected.

The National League of Cities ("NLC") goes even further than merely advocating the Title I standard. NLC states that OVS operators, if not prevented by the Commission, will be able to influence program selection through indirect, non-equity relationships.^{24/} The NLC solution is to define any relationship exceeding the carrier-user relationship as "affiliation" for OVS purposes. The 1996 Act struck down the video dialtone requirements and eliminated the cable-telco cross-ownership ban that tracked NLC's definition of "affiliation." By NLC's definition, any unaffiliated programmer that would ask the OVS operator to market its services would become affiliated with that operator. This would narrow the presumptive conditions available to the OVS operator that its rates are presumed reasonable based on the presence of unaffiliated programmers on its system.^{25/} As the Commission is aware, truly independent programmers with a few channels may not have the resources to market their services. Thus, OVS operators may potentially provide a valuable service for independent programmers. By

^{24/} Comments of NLC at p. 7. NLC asserts that "any relationship" that gives an OVS operator any influence over program selection should be counted as affiliation. *Id.* USTA does not believe it to be procedurally proper for NLC to re-argue OVS issues in this proceeding. USTA, however, is compelled to address the extreme nature of NLC's proposed "affiliation" standard, which would not allow any relationship beyond the carrier-user relationship.

^{25/} *OVS Order* at ¶ 122.

so doing, however, under NLC's proposal, the OVS operator would be hindered in reaching the safe harbor for rate reasonableness because it would be marketing services for these putatively affiliated programmers. Certainly, the Commission did not intend to create this conundrum for OVS operators.^{26/}

IV. THE COMMISSION SHOULD ENSURE THAT TRULY SMALL CABLE OPERATORS BE ACCORDED PROMPT REGULATORY RELIEF.

The Commission should, consistent with its discretion in applying the Title VI definition of affiliate and its "small system" rules, further Congress' goal of assisting relief for small operators by construing eligibility standards with flexibility.^{27/} Commenters have amply demonstrated that Congress intended the \$250 million figure to provide a stable yardstick for deregulation prior to the sunset of regulation in March 1999.^{28/} This threshold should only include cable-related revenues.

In construing the applicability of the \$250 million threshold, USTA also urges the Commission to adhere to Congress' intent to expand the scope of relief for small operators. If the Commission includes in the \$250 million definition non-cable revenues from any affiliated company, the Commission may reduce the number of operators to which small system relief is available. Small operators frequently secure financing through a variety of mechanisms from

^{26/} NLC also argues that should the Commission decide to ignore non-ownership interests, it should adopt an affiliation standard that recognizes any ownership of one percent or more as affiliation. NLC alone advances this position and does not provide adequate justification for adopting its proposals.

^{27/} See Comments of Cole, Raywid & Braverman at p. 8.

^{28/} See Comments of C-TEC at p. 2.

large institutional investors whose annual revenues exceed \$250,000,000.^{29/} These arrangements are necessary to permit small operators to modernize and offer the technology and programming desired by consumers. The record correctly notes that the Commission has previously recognized that small companies must generate a minimum level of revenue in order to attract financing to upgrade their networks, to provide new programming to subscribers and to introduce new services.^{30/}

USTA urges the Commission to adopt rules designed to promote and support flexibility for small operators. Accordingly, proper determination of gross revenue in this context should consider gross income from the cable operator's (or its affiliates' -- as defined in Title VI) provision of cable services.^{31/} USTA agrees that such an approach is an essential step in fostering opportunities for small cable systems to participate fully in the newly competitive video market.

V. CONCLUSION

The Commission has the opportunity in this proceeding to speed the introduction of new services and innovative technologies for consumers by fostering competition. This is clearly the result intended by Congress. The Commission can best achieve this outcome by focusing on the impact of its decisions on the video programming actually available to

^{29/} See Comments of FrontierVision at p. 3 (noting that its investors have included J.P. Morgan & Co., Brown Brothers Harriman, Olympus Partners and First Union Capital Partners).

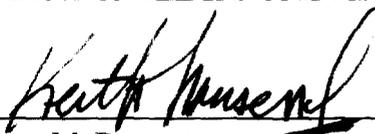
^{30/} *Id.* at p. 4.

^{31/} C-TEC at pp. 2-5; Bell South at p. 5

consumers. Ultimately, it is the consumer and the actual results in the market that will determine the success of the Commission's undertaking. The Commission should accordingly address parity of programming access for LECs. In addition, the Commission should make effective competition a meaningful standard by making sure that SMATV is not used by incumbents to achieve deregulation before competition exists in the franchise area to protect consumers. Finally, the Commission should adopt flexible and market-oriented approaches for defining affiliate and gross revenues for small cable operators.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

By:  _____

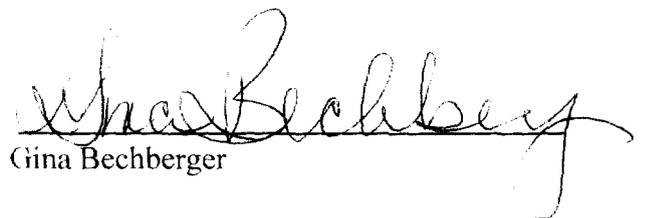
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June 28, 1996

CERTIFICATE OF SERVICE

I, Gina Bechberger, do certify that on June 28, 1996 copies of the Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the person on the attached service list.


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