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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

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1 415 of the Commission's Rules, hereby submits its reply to certain of the comments submitted in response to the *Order and Notice of Proposed Rulemaking* ("*Order & NPRM*") released by the Commission on April 9, 1996 in the above-captioned proceeding.[1]

I. THE CABLE INDUSTRY OFFERS NO SOUND REASON FOR THE FCC TO DEVIATE FROM THE 1996 ACT'S LANGUAGE ON BULK DISCOUNTS.

As initially recognized by the Commission and subsequently noted by WCA and others, the uniform pricing provisions of the 1996 Act lend themselves to only one reasonable interpretation: the "bulk discount" exception applies only where cable service is sold in bulk to multiple dwelling units ("MDUs"), not on an individual basis to MDU residents.[2] The

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[1] *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154, CS Docket No. 96-85 (rel. Apr 9, 1996)[hereinafter cited as "*Order & NPRM*"].

[2] Comments of Wireless Cable Ass'n Int'l, CS Docket No. 96-85, at 3-4 (filed June 4, 1996) [hereinafter cited as "Comments of WCA"]; Comments of Independent Cable &

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plain language of Section 301(b)(2) of the Telecommunications Act of 1996 (the "1996 Act") specifically authorizes departures from uniform pricing only to reflect discounts provided for bulk accounts at MDU properties. Moreover, the Commission has historically used the term "bulk discount" when referring to reduced rates offered on a bulk contract basis directly to owners and managers of MDU properties There is nothing in the 1996 Act or its legislative history to suggest that Congress intended to depart from the FCC's long-standing interpretation of the "bulk discount" concept.

The cable industry almost uniformly urges the FCC to ignore the language of the statute and apply the "bulk discount" exception where cable service is sold directly to individual subscribers rather than in bulk [3] As already pointed out by ICTA, however, the cable industry appears to be contradicting itself here,[4] and further investigation indeed reflects that the cable operators are doing an almost complete "about face" from their original position

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Telecommunications Ass'n, CS Docket No. 96-85, at 10 (filed June 4, 1996) [hereinafter cited as "Comments of ICTA"]; Comments of United Wireless Cable, Inc., CS Docket No. 96-85, at 3-4 (filed June 4, 1996) [hereinafter cited as "Comments of U.S. Wireless"]; Comments of Optel, Inc., CS Docket No. 96-85. at 6 (filed June 4, 1996) [hereinafter cited as "Comments of Optel"]

[3] *See, e.g.*, Comments of Nat'l Cable Television Ass'n, Inc., CS Docket No. 96-85, at 44-45 (filed June 4, 1996) [hereinafter cited as "Comments of NCTA"]; Comments of Time Warner Cable, CS Docket No. 96-85, at 35 (filed June 4, 1996) [hereinafter cited as "Comments of Time Warner"]; Comments of Cox Communications, Inc., CS Docket No. 96-85, at 10-11 (filed June 4, 1996) [hereinafter cited as "Comments of Cox Communications"]; Comments of Comcast Cable Communications, Inc., CS Docket No. 96-85, at 11-12 (filed June 4, 1996) [hereinafter cited as "Comments of Comcast Cable"].

[4] Comments of ICTA at 10, *citing* Comments of Continental Cablevision in MM Docket No. 92-266, at 64 (filed Jan. 27, 1993)

on the definition of "bulk discount." TCI's comments in the FCC's original cable rate rulemaking are exemplary on this point:

> Even in the face of a discrimination ban, cable operators should be allowed to maintain *bona fide* service categories. [T]he different cost structures of different categories of customers justify such a rate structure. This is particularly true of multiple subscriber agreements, including rates charged to seasonal or transient customers (such as the hotel/motel industry); long term contracts to serve a multiple dwelling unit . or planned unit development. Cable operators negotiate these service contracts with commercial businesses, MDU management companies and developers. *By their very nature, these commercial situations differ from the cable operator's relationship with individual subscribers.*[5]

WCA agrees. Simply put, bulk means bulk, and therefore "a 'bulk' discount is meaningless unless the service being purchased is acquired on a 'bulk', rather than individual, basis."[6] Neither the 1996 Act nor common sense permit the Commission to conclude otherwise.

II. THE COMMISSION SHOULD REAFFIRM THAT THE BULK DISCOUNT EXCEPTION IS NOT AVAILABLE IN NON-MDU PROPERTIES.

Congress and the Commission historically have defined a "multiple dwelling unit" as being a single building that contains multiple residences.[7] WCA and various alternative multichannel video distributors have pointed out that neither the 1996 Act nor its legislative

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[5]Comments of Tele-Communications, Inc., MM Docket No. 92-266, at 61-62 (filed Jan. 27, 1993) (emphasis added). *See also* Comments of Cablevision Industries Corp., MM Docket No. 92-266, at 88 (filed Jan. 27, 1993); Comments of Comcast Cable, MM Docket No. 92-266, at 64 (filed Jan. 27, 1993); Comments of Cox Cable Communications, MM Docket No. 92-266, at 84-85 (filed Jan. 27, 1993).

[6]Comments of New York City Department of Technology and Communications, CS Docket No. 96-85, at 19-20 (filed June 4, 1996).

[7]Comments of WCA at 4, n.10. *See also* Comments of ICTA at 12-13.

history reflect any intent by Congress to deviate from the historical definition of MDUs, and that the FCC thus has no basis for permitting departures from uniform pricing in non-MDU properties merely because the residents can be served under the new, expanded "private cable" exemption.[8]

Not surprisingly, the cable industry asks the Commission to extend the "bulk discount" exception to non-MDU properties (*e.g.*, mobile home parks, planned communities), on the theory that such relief is necessary to allow cable operators to compete fairly with unfranchised private cable operators in those areas.[9] Indeed, NCTA goes so far as to suggest that the definition of MDU should be expanded to include single family dwellings.[10] Once again, the cable industry ignores the clear mandate of the statute: Congress extended the "private cable" exemption, *not* the "bulk discount" exception, to non-MDU properties, and thus the FCC is not authorized to allow non-uniform pricing in non-MDU properties merely because the residents of those facilities can be served under the expanded "private cable"

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[8]Comments of WCA at 5; Comments of ICTA at 11-13; Comments of U.S. Wireless at 4-5; Comments of Optel at 7.

[9]*See, e.g.*, Comments of NCTA at 45-47; Comments of Time Warner at 36-37; Comments of Tele-Communications, Inc., CS Docket No. 96-85, at 25 (filed June 4, 1996) [hereinafter "Comments of TCI"]; Comments of Cox Communications at 11-12; Comments of Comcast at 12-13

[10]Comments of NCTA at 45-47; *see also* Comments of Time Warner at 36-37; Comments of Adelphia Communications Corporation, et al., CS Docket No. 96-85 at 31-32 (filed June 4, 1996) [hereinafter "Comments of Adelphia, et al."].

exemption.[11] Moreover, the cable industry's concerns about competition ring hollow, as there is no evidence that cable systems need to offer bulk discounts in non-MDU properties to compete effectively with non-franchised private cable operators. Indeed, to allow the cable industry to evade its statutory uniform pricing obligations by virtue of the expanded "private cable" exemption would negate the exemption's overriding purpose of fostering competition *to* the cable industry. Thus, as a matter of statutory interpretation and sound regulatory policy, the FCC should interpret the 1996 Act as written and limit the bulk discount exception to MDU properties only

III. THE COMMISSION SHOULD NOT FORECLOSE ENFORCEMENT OF STATE PREDATORY PRICING LAWS, AND SHOULD NOT INCORPORATE A "MEETING COMPETITION" DEFENSE INTO ITS BULK DISCOUNT RULES.

WCA supports the comments submitted by the New York State Department of Public Service insofar as they urge the Commission to clarify that State antitrust laws may be enforced notwithstanding the rate uniformity provisions of the 1996 Act.[12] Nothing in the 1996 Act precludes enforcement of State antitrust laws with respect to uniform pricing, and in fact such enforcement may be necessary to thwart anticompetitive practices either not covered by federal law or which cannot be addressed by the Commission in a timely manner due to limited administrative resources

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[11] Comments of WCA at 5.

[12] Comments of New York State Department of Public Service, CS Docket No. 96-85, at 31-32 (filed June 4, 1996).

WCA does not, however, support TCI's recommendation that the Commission allow cable operators to use a "meeting competition" defense when faced with a predatory pricing claim under the 1996 Act.[13] In particular, WCA disagrees with TCI's contention that the FCC's regulation of predatory pricing *must* recognize a "meeting competition" defense.[14] As the United States Court of Appeals for the District of Columbia Circuit stated in *Time Warner v. FCC*,[15] "[T]here is no authority requiring a 'meeting competition' defense whenever a statute prohibits discrimination in pricing."[16] However, in the event that the Commission does elect to adopt a "meeting competition" defense into its predatory pricing rules, it should also explicitly adopt any exceptions to the defense, *e.g.*, a seller may cut prices

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[13]Comments of TCI at 20. The "meeting competition" defense is codified in Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. Section 13(a) and (b), which states that discriminatory pricing is prohibited, and that once a *prima facie* case of price discrimination has been made, the seller may rebut the *prima facie* case "by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." According to the Supreme Court, the statute requires the seller "to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC v. Staley Man. Co. et al.*, 324 U.S. 746, 759-60 (1945)

[14]Comments of TCI at 20, n.43

[15]56 F.3d 151 (1995).

[16]*Id.*at 191. In *Time Warner*, the FCC rejected a "meeting competition" defense in the context of the 1992 Cable Act despite the inclusion of a "meeting competition" defense in 47 U.S.C. Section 202(a). The Court noted that Section 202(a) prohibits only unjust and unreasonable rate discrimination -- which leaves room for a "meeting competition" defense - - while the 1992 Cable Act prohibits all rate discrimination - - leaving no room for discriminatory pricing, even if it is to meet a competitor's price. *Id.* at 192.

to meet the lower price of its own competitor, but he or she may not initiate price cuts to meet the lower price of a customer's competitor [17]

IV. WCA'S PROPOSAL FOR PROCEDURES TO GOVERN UNIFORM PRICING COMPLAINTS HAS SUPPORT WITHIN THE CABLE INDUSTRY.

In its initial comments, WCA recommended that the Commission adopt its program access model for adjudication of uniform pricing complaints, and in particular recommended that the Commission apply the program access discovery rules, which require discovery only on a case-by-case basis and allow the FCC's staff to manage situations where only a relatively small amount of discovery is required, with only the most complex cases being referred to the Administrative Law Judges.[18] At least one major cable operator similarly supports use of the program access discovery model,[19] and WCA once again strongly urges its adoption.

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[17] *FTC v. Sun Oil*, 371 U.S. 505 (1963)

[18] Comments of WCA at 9-10

[19] Comments of Adelphia, et al. at 35

V. CONCLUSION.

For the foregoing reasons, the Commission should adopt the rules proposed in the *Order & NPRM*, modified to reflect the concerns addressed by WCA in its initial comments and above.

Respectfully submitted,

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