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June 28, 1996

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FEDERAL COMMUNICATIONS COMMISSION
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VIA HAND DELIVERY

DOCKET FILE COPY ORIGINAL

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

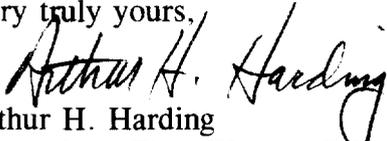
**Re: CS Docket No. 96-85: Implementation of Cable Act
Reform Provisions of the Telecommunications Act of 1996**

Dear Mr. Caton:

Enclosed for filing with the Commission please find an original and eleven copies of the Reply Comments of Time Warner Cable in the above-referenced proceeding.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Very truly yours,


Arthur H. Harding
Counsel for Time Warner Cable

AHH:kma:41251

Enclosure

cc: ITS
Nancy Stevenson

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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

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JUN 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

REPLY COMMENTS OF TIME WARNER CABLE

TIME WARNER CABLE

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Dated: June 28, 1996

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SUMMARY

The "cable reform" provisions of the Telecommunications Act of 1996 ("1996 Act") reflect Congressional intent "for a pro-competitive, de-regulatory national policy framework." Accordingly, Time Warner and other commenters agreed with the Commission that the 1996 Act's new "effective competition" test should employ the 1996 Act's new Title I definition of "affiliate," such that (1) both passive and active ownership interests would be attributable, and (2) beneficial interests such as options, warrants, and convertible debentures should be deemed the "equivalent" of equity. Commenters who advocated the Title VI definition of "affiliate" for effective competition ignore the 1996 Act's provision giving the Commission the discretion to choose the definition that best effectuates the relevant public interest policy. Here, the effective competition test reflects Congress' view that affiliation with a local exchange carrier ("LEC") confers special advantages, due to the size and financial resources of many LECs. Likewise, most commenters supported using the Title VI definition of "affiliate" in the context of open video systems and cable-telco buyouts. However, the word "ownership" must not be read out of the statutory definition to alter the statute's plain meaning.

As the first cable operator to file effective competition petitions under the 1996 Act's new provision, Time Warner is in a unique position to attest that the procedures governing such showings, including the Commission's 1992 Cable Act demonstration that a competitor is "offering" service, are burdensome and must be streamlined to reflect the 1996 Act's deregulatory intent. The Commission should adopt a rebuttable presumption that competing service is "offered" in each community or area where the cable operator demonstrates that the competitor is marketing the service. Furthermore, competitors should be required to cooperate reasonably in providing ownership affiliation information requested by cable

operators. In addition, the Commission should modify FCC Form 430 to require wireless cable licensees to certify whether they and their programmers are LEC-affiliated.

Furthermore, the Commission should deem an effective competition petition granted if either (1) all relevant certified LFAs concur, or (2) the petition is unopposed after close of the public notice period. Even an opposed petition should be deemed granted if not acted upon within 90 days.

Many commenters, including the New York State Department of Public Service, agreed with Time Warner that, in analyzing effective competition situations under the new test, the Commission should aggregate the interests of more than one LEC in a competing MVPD. These commenters correctly noted that many LECs, including Bell Atlantic and NYNEX, are forming joint ventures in wireless cable and other competitors, which increase their clout and resources. The few commenters who argued against aggregating LEC interests fail to recognize that the new effective competition provision is based on Congress' concern about the unique competitive pressures resulting from LEC-backed MVPDs, and the fact that such pressures increase with the addition of more LECs. Similarly, commenters agreed with the Commission that LECs need not be owner or licensee of MVPD facilities to provide effective competition. The 1996 Act reflects this intent, recognizing that LECs may provide service using another's facilities. In such cases, the LEC controls the entity providing effective competition, regardless of the owner or licensee of the underlying facility.

Almost all commenters agreed with Commissioners Quello and Chong that Congress deliberately declined to include a percentage pass or penetration rate factor in the new effective competition test, and no such requirement can be read into the statute.

Additionally, Time Warner and other commenters agreed with the Commission that, consistent with current Commission policy, MMDS service should be deemed "offered" for effective competition purposes to those subscribers residing in the MMDS operator's 35-mile protected zone that defines its "interference-free contour." Such information would not even be necessary if Time Warner's suggestions for streamlining the effective competition petition process are adopted. However, numerous commenters disagreed with the Commission's conclusion that SMATV should be treated as direct-to-home satellite service such as DBS or home satellite dish service. The Commission and Congress have previously recognized that the two services are very different, and the plain language of the 1996 Act reinforces the view that SMATV cannot be considered to be direct-to-home service.

In analyzing whether a competitor's programming is "comparable" to that provided by the cable system in order for effective competition to exist, Time Warner and other commenters stated that the legislative history can easily be read to reflect Congress' intent that at least one nonbroadcast signal be provided. As commenters argued, however, if the broadcast signal standard is adopted, it should include superstations. Moreover, commenters noted that affirmative acts by MVPDs to facilitate reception of off-air broadcast signals, including listing such signals on the channel lineup, is sufficient evidence that the signals are being "offered" by a wireless operator.

As several commenters stated, it is essential to establish a deadline for a local franchising authority ("LFA") to file a cable programming services tier ("CPST") complaint with the Commission after receiving the requisite two or more subscriber complaints. The Commission's proposed 180 deadline is too long. Time Warner agrees with commenters who advocate a maximum deadline of no more than 135 days. This would help avoid stale

complaints, and would minimize the period of rate uncertainty for cable operators and subscribers. Moreover, during this period, the LFA and the cable operator could come to an agreement, eliminating the need for a complaint to be filed with the Commission.

Time Warner and other commenters agreed with the Commission's proposal to eliminate the requirement that cable operators include the address and phone number of the Cable Services Bureau on monthly bills, since subscribers may no longer file complaints directly with the Commission. Commenters also concurred with the Commission's actions allowing notice of rate and service changes to be provided by any reasonable written means, including newspaper ads or on-screen announcements. However, based on some comments, the Commission should clarify that the statute preempts any state or local laws which would dictate the manner in which such notice is provided, or require cable operators to give prior notice of rate increases resulting from increases in franchise fees, taxes or assessments.

Most commenters agreed that bulk discounts should not be contingent on 100% MDU penetration. Likewise, most commenters agreed that the bulk discount exception should apply regardless of the billing method. Many commenters also urged that, for purposes of allowing discounts, "MDU" should be defined consistent with the current expanded private cable exemption to the definition of a cable system. Additionally, Time Warner and many commenters agreed with the Commission that allegations of predatory pricing should be informed by principles of federal antitrust law. Time Warner proposed an administratively feasible threshold showing of predatory pricing, based on the average "cash flow margin" for the cable industry as set forth in the Commission's annual report to Congress on the status of competition in the video distribution business. Commenters who opposed applying federal antitrust principles to predatory pricing allegations often proposed unrealistically complex

prima facie showings of predatory pricing, which would bog down what Congress intended to be an administratively simple, "quick look" procedure

Commenters supported the Commission's efforts to ease financial and administrative burdens on small cable operators. For example, the preponderance of commenters argued that small operators that subsequently grow or are acquired by large companies should not be subject to reregulation upon exceeding statutory thresholds. Regulatory authorities who opposed rate relief for small cable operators ignored the 1996 Act's deregulatory thrust. If the Commission decides to reregulate small cable operators after acquisition by larger companies, the allowable small system rate in effect should be grandfathered.

Some LFAs have asked the Commission to allow them to be the primary enforcers of cable technical standards. However, The 1996 Act clearly reflects Congressional intent to eliminate day-to-day LFA oversight and enforcement of technical standards compliance as part of the franchise process. The Commission should also take action to implement Congress' goal of promoting the development of advanced interactive broadband telecommunications networks and services, by creating incentives for new broadband entrants to deploy advanced networks, and for incumbent providers to upgrade their networks to provide such services. However, this proceeding is not the appropriate place to decide whether such services should be included in universal service policies.

BEFORE THE
Federal Communications Commission

WASHINGTON, DC 20554

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

REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby submits the following reply comments in the above-captioned proceeding.^{1/}

I. EFFECTIVE COMPETITION

The Telecommunications Act of 1996 adds a new test to the definitions of effective competition contained in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), whereby a cable system is considered to be subject to effective competition (and therefore exempt from rate regulation) where

a local exchange carrier ["LEC"] or its affiliate (or any multichannel video programming distributor ["MVPD"] using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video

^{1/} ___ FCC Rcd ___, FCC 76-154, released April 9, 1996 ("Cable Reform NPRM").

programming services provided by the unaffiliated cable operator in that area.^{2/}

The Cable Reform NPRM sought comment on numerous issues regarding implementation of the new test.

A. Definition Of "Affiliation."

1. The effective competition test should employ the new Title I definition of "affiliate."

As the Commission notes, prior to adoption of the 1996 Act, Title VI of the Communications Act already contained a definition of "affiliate."^{3/} However, the 1996 Act incorporates a new definition of "affiliate" into the general definitions contained in Title I of the Communications Act. Under the new definition, "the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent."^{4/} According to the Communications Act, the definitions contained in Title I apply "unless the context otherwise requires. . . ."^{5/}

The Commission asks whether, for purposes of the effective competition test, "the context requires" a different definition of "affiliate" than that established in Section 3(a)(2) of the 1996 Act. The Commission has tentatively concluded that the new Title I definition

^{2/}Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, approved February 8, 1996 ("1996 Act"), at Sec. 301(b)(3)

^{3/}*Id.* at ¶ 74, citing 47 U.S.C. § 522(2).

^{4/}47 U.S.C. § 153(33).

^{5/}*Id.* at § 153.

should apply.^{6/} Time Warner agreed that the Title I definition would effectuate Congressional intent that effective competition exists whenever a telephone company, due to its unique economic strengths and competitive advantages, has made a significant investment in a competing multichannel video programming distributor.^{7/} Numerous other commenters, including the Massachusetts Cable Television Commission and the New York State Department of Public Service, also agreed with the Commission's proposal.^{8/} As Time Warner stated, "Congress expressly included the phrase 'unless the context otherwise requires' in recognition of the Commission's discretion to tailor differing affiliation tests to comport with the policy goals in the context of each applicable FCC rule."^{9/} Several commenters urged adoption of a "5% voting stock" ownership threshold, as the Commission typically uses for its media cross-ownership rules.^{10/} While Time Warner agrees that the Commission has ample discretion to adopt such a threshold, Time Warner continues to believe that the "10% equity or its equivalent" test is more appropriate to effectuate Congressional intent to cover situations where MVPDs have been fortified through capital infusions from LECs in forms other than traditional equity, such as passive or beneficial interests.

^{6/}Cable Reform NPRM at ¶ 77.

^{7/}Time Warner comments at 3.

^{8/}See, e.g., Massachusetts Cable Television Commission comments at 6; State of New York Dept. of Public Service ("NYDPS") comments at 7-8, Cable Telecommunications Association ("CATA") comments at 3; Cox Communications, Inc. ("Cox") comments at 12-13.

^{9/}Time Warner comments at 3-4.

^{10/}New England Cable Television ("NECTA") comments at 6-7; Cole, Raywid & Braverman comments at 6-7

Implicit in the new test is a recognition by Congress that LEC involvement in the video distribution business will provide particularly robust competition to existing cable operators.^{11/} For example, as noted by the principal author of the Senate bill which led to the 1996 Act:

Looming large on the fringes of the [video programming distribution] market are the telephone companies. The telephone companies pose a very highly credible competitive threat because of their specific identities, the technology they are capable of deploying, the technological evolution their networks are undergoing for reasons apart from video distribution, and, last but by no means least, their financial strength and staying power.^{12/}

Accordingly, in order to properly effectuate Congressional intent, it is essential for the Commission to adopt an affiliation test which not only captures situations where the MVPD is operated or controlled by LECs, but situations where LECs have provided significant capital backing to MVPDs, even where operation or control rests with an independent entity.

BellSouth Corporation and several other commenters argued that the FCC should employ the Title VI definition of affiliate, because "[t]he Commission should assume that the Congress was satisfied with the definition that it had already given the term in Title VI."^{13/}

^{11/}"[T]he provision of video programming services by a telephone company subjects a cable operator to effective competition that will ensure reasonable rates and high quality service more effectively than government micromanagement." H.R. Rep. No. 204, 104th Cong., 1st Sess. ("House Report") 109 (1995).

^{12/}141 Cong. Rec. S8243 (daily ed. June 13, 1995) (statement of Sen. Pressler, emphasis added).

^{13/}BellSouth comments at 3-4. See also, GTE comments at 4; United States Telephone Association ("USTA") comments at 8-9. Several LECs advocating a Title VI test claim that it would be limited to situations where a LEC was found to "control" the affected MVPD.

(continued...)

Similarly, Residential Communications Network, Inc. ("Residential") argued that the Commission's proposal to use the new Title I definition would result in LECs being subject to a lower ownership threshold for affiliation than cable operators, contrary to Congressional intent that LECs and cable operators be treated consistently.^{14/} However, both views ignore the new statutory phrase "unless the context otherwise requires." Likewise, the New York City Department of Information Technology and Telecommunications ("NYCDOITT") argued that the Commission should adopt an affiliation standard requiring at least a 50% ownership interest.^{15/} This proposal fails to reflect current business realities, where LECs have made substantial investments in wireless cable operations, even if well short of 50% ownership, providing the capital resources for such competitors to be even more intense.

The 1996 Act's new effective competition test reflects Congress' view that an affiliation with a LEC gives an MVPD advantages over an unaffiliated competitor.^{16/} Congress has recognized in the 1996 Act that telephone companies represent a unique and formidable competitor whose very presence within an operator's service area would ensure reasonable, market-based rates for cable service.^{17/} Even OpTel, Inc. ("Optel"), a

^{13/}(...continued)

This view ignores the plain language of the Title VI test which covers situations where an entity either "owns or controls" another entity. The Commission has consistently defined the "ownership" prong of the Title VI test to include, at a minimum, ownership of 5% or more of the voting stock. See, e.g., 47 C.F.R. § 76.501. Note 2(a).

^{14/}Residential comments at 3-4.

^{15/}NYCDOITT comments at 8-9.

^{16/}Time Warner comments at 3.

^{17/}Cablevision Systems Corp. ("Cablevision") comments at 4-5.

competitor to "established franchised cable operators."^{18/} concedes that LECs have "extensive financial resources, network facilities, and consumer marketing expertise."^{19/} This recognition is based on two principal factors. First, LECs have financial resources and revenue many times that of the cable industry.^{20/} Second, LECs have a penetration in their principal business of well over 90%, far more than most cable operators.^{21/} Accordingly, it is perfectly reasonable to adopt a broad affiliation standard for the new effective competition test which takes into account the abundant economic strength of LECs.

As Time Warner and other commenters stated, it is important to avoid a definition of "affiliate" that is too narrow to capture the massive investments currently being made by LECs in MVPDs.^{22/} A prime example is CAI Wireless Systems, Inc. ("CAI"), which operates MMDS systems in numerous markets. Bell Atlantic and NYNEX have agreed to invest hundreds of millions of dollars in CAI, in return for term notes, senior preferred stock, warrants to purchase common stock and voting preferred stock, as well as conversion

^{18/}OpTel comments at 1.

^{19/}Id. at 3.

^{20/}See id. at 5;

^{21/}See Cablevision comments at 5;

^{22/}Time Warner comments at 6; NECTA comments at 3-6; Cole, Raywid & Braverman comments at 6-7; Comcast Cable Communications ("Comcast") comments at 13-16; Cox comments at 12-13.

rights over these securities.^{23/} These interests, at a minimum, constitute the "equivalent" of equity and reflect the substantial financial infusions by Bell Atlantic and NYNEX in CAI.

Time Warner and other commenters, including the State of New York Department of Public Service, agreed with the Commission's tentative conclusion that, assuming that the statute's new definition of "affiliate" should apply in the context of the new effective competition test, "both passive and active ownership interests" should be attributable,^{24/} and beneficial interests should be deemed "equivalent" to an equity interest for the purposes of the statutory test.^{25/} As Time Warner stated, non-voting stock and insulated limited partnership interests are "passive" ownership interests that should be included as "equity or its equivalent" because such interests reflect circumstances where a LEC has made a significant financial investment in a competing MVPD. Similarly, beneficial interests such as options, warrants, convertible debentures and interests held in trust should properly be deemed the "equivalent" of equity because inclusion of such interests is consistent with the purposes of the new effective competition test

As Time Warner and other commenters explained, such a reading of the statute is consistent with recent Commission cases taking a broader view of ownership and control,

^{23/}Time Warner comments at 6; NECTA comments at 4-5; California Cable Television Association ("CCTA") comments at 2-5; Cox comments at 15.

^{24/}Cable Reform NPRM at ¶ 15.

^{25/}*Id.* at ¶ 77; Time Warner comments at 6-7; NYDPS comments at 8; NECTA comments at 10-12.

where consistent with statutory policies.^{26/} Similarly, the affiliate definition added by Section 3(a)(2) of the 1996 Act is consistent with Congressional intent because "a simple 'count the shares' methodology"^{27/} is not sufficient to effectuate the goal of the new effective competition test to identify significant LEC investments which have fortified competing MVPDs but which may be evidenced by instruments other than traditional common shares.

SBC Communications Inc./Southwestern Bell Video Services, Inc. ("SBC") argued that "a 'beneficial interest,' as that term is commonly understood, does not constitute ownership, and thus it cannot be considered the equivalent of an equity interest under the Title I definition of affiliate."^{28/} However, SBC cites no authority for the contention that beneficial ownership is not ownership. To the contrary, it is evident that Congress included the "equity or equivalent" language to cover situations beyond pure legal ownership. Moreover, SBC fails to take into account that both the Title I and the Title VI definitions of "affiliate" are based not solely on ownership, but on either ownership or control. Thus, SBC's narrow view contravenes the express language of the statute.

NYCDOITT states that only active, not passive, ownership interests should be attributable, so that the 1996 Act's new effective competition test does not "swallow the

^{26/}Time Warner comments at 5, citing Fox Television Stations, Inc., Memorandum Opinion and Order, File No. BRCT-940201KZ, 10 FCC Rcd 8452 (1995) at ¶ 45 (footnote omitted) ("Fox 1"); Fox Television Stations, Inc., File No. BRCT-940201KZ, 78 RR 2d 1294 (1995) ("Fox 2"). See also Cox comments (erratum) at 13-15.

^{27/}Fox 1 at ¶ 43.

^{28/}SBC comments at 3-4

existing rule."^{29/} However, NYCDOITT's desire to maintain the status quo of the 1992 Cable Act ignores the explicit deregulatory thrust of the 1996 Act.^{30/}

The Commission also asks how "beneficial interest" should be defined for the purposes of determining affiliation in connection with the new effective competition test.^{31/} In order to effectuate Congressional policies properly, Time Warner recommended that the FCC adopt the definition of "beneficial ownership" promulgated by the Securities and Exchange Commission in Rule 13d-3 under the Securities Exchange Act of 1934, as amended, which takes into account voting power, investment power (including the power to dispose of securities), and the right to acquire beneficial ownership of securities (through the exercise of any option, warrant or right or through the conversion of the security) all as beneficial ownership interests.^{32/} As Time Warner explained, Rule 13d-3 and the 1996 Act's new effective competition test stem from similar policies.^{33/}

2. Procedures governing effective competition showings.

As has been reported, Time Warner was the first cable operator to file an effective competition petition under the new statutory provision, and is the first cable operator to have

^{29/}NYCDOITT comments at 11.

^{30/}See H.R. Conf. Rep. No. 458, 104th Cong., 2d. Sess. (1996) ("Conference Report") ("to provide for a pro-competitive, de-regulatory national policy framework"); Cable Reform NPRM at ¶ 2; *id.* at Separate Statement of Commissioner James H. Quello.

^{31/}Cable Reform NPRM at ¶ 77.

^{32/}Time Warner comments at 8-9, citing 17 C.F.R. § 240.13d-3.

^{33/}Time Warner comments at 9.

had such petitions placed on Commission public notice.^{34/} Thus, Time Warner is in a unique position to discuss the procedures for filing such petitions. First, the process established by the Commission's interim rules is overly burdensome and must be streamlined.^{35/} In order to assemble and file effective competitions that meet the Commission's current requirements, Time Warner was required to spend considerable amounts of time and money, for example, to investigate the financial structure of certain wireless competitors (including researching SEC documents), determine the coverage area of such competitors, collect voluminous marketing materials distributed by the competitor, obtain addresses of actual subscribers in the relevant communities, and determine local newspaper circulation in such communities.

Other cable operators agree that this process is too burdensome. According to the Small Cable Business Association ("SCBA"),

under the interim rule, to establish effective competition, a cable operator must gather evidence concerning how a competitor provides access to broadcast stations. Commission rules provide no authority for cable operators to request such information. Presumably, small cable companies would have to invest in analysis of marketing information, subscriber interviews and other means of gleaning the necessary evidence. Competitors will have the incentive to remain uncooperative so as to make more difficult a cable company's effort to liberate itself from the costs and burdens of regulation.^{36/}

^{34/}See, e.g., CSR-4748-E (Bakersfield, CA et al.); CSR-4753-E (Columbus, OH et al.); CSR-4758-E (Albany, NY et al.); Ted Hearn, "Time Warner Seeks Deregulation in Calif. -- First to File," Multichannel News, May 27, 1996 at 1.

^{35/}See also NECTA comments at 15-17; CCTA comments at 7-9.

^{36/}SCBA comments at 31-32.

Surely, Congress did not intend that its new effective competition standard, obviously designed to increase the circumstances where effective competition is to be found, to be unattainable for many cable operators due to the huge costs and administrative burdens involved.

Accordingly, Time Warner has several suggestions for streamlining the effective competition certification process: First, the burdensome and contentious information gathering requirements necessary to satisfy the Commission's pre-existing definition of "offer" are obsolete. The Commission established the definition of "offer" in its 1993 Order implementing the 1992 Cable Act's rate regulation provisions.^{37/} However, the 1992 Cable Act was designed to increase cable rate regulation.^{38/} In contrast, the 1996 Act is specifically designed to deregulate cable operators.^{39/} The addition of a new effective competition test, clearly designed to be self-executing and to result in substantial rate deregulation, is evidence of this fact. Thus, it is inappropriate for the Commission to apply its pre-existing definition of "offer," which was written for a very different purpose, to the new effective competition test.

Instead, the effective competition showing should focus on the LEC-affiliated competitor's marketing efforts. Specifically, the Commission should adopt a rebuttable presumption that a competitor "offers" service in a given community or cable franchise area

^{37/}See 47 C.F.R. § 76.905(e); Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993) ("Rate Order") at ¶¶ 27-36.

^{38/}See, e.g., H.R. Rep. No. 628, 102d Cong., 2d Sess. 33-34 (1992).

^{39/}See Conference Report at 1.

where the cable operator demonstrates that the competitor is marketing its service in such areas, through advertisements in national, regional or local media, direct mail, or other marketing outlets. Given the high cost of such marketing efforts, it is reasonable to presume that competitors will not make such efforts unless they in fact offer the service. If this presumption turns out to be inaccurate or premature in individual cases, the presumption can be rebutted with the appropriate facts. This streamlined definition of "offer" better reflects the deregulatory intent of the 1996 Act in two important ways: (1) it shifts the burden to the competitor (who is in the best position to know the facts) to demonstrate that its service, though marketed, is not being offered; and (2) it eliminates much of the cable operator's costly and burdensome information-gathering requirements, such as subscribership and signal strength, thus allowing many cable operators who otherwise would not have the resources to establish a valid effective competition showing to do so.

In addition, the Commission can modify FCC Form 430 to require wireless cable licensees to certify (1) whether the licensee is LEC-affiliated and (2) whether the entity offering service over the wireless facilities is LEC-affiliated.^{40/} Other commenters made similar suggestions.^{41/} As Time Warner explained, this simple requirement could save considerable resources and administrative burdens for all parties, who might otherwise need to undertake costly investigations of the wireless operator's ownership and affiliation relationships.^{42/}

^{40/}See Time Warner comments at 10.

^{41/}See Cole, Raywid & Braverman comments at 3, 7.

^{42/}Time Warner comments at 10.

Similarly, Time Warner and other commenters suggested that competitors should be required to cooperate reasonably in the provision of ownership affiliation, subscriber counts, coverage and other relevant information requested by the cable operator, as is the case with the Commission's current effective competition rules.^{43/} Of course, if the Commission adopts Time Warner's suggestion of a rebuttable presumption that a competitor's service is offered wherever marketed, much of this information will be unnecessary, saving time and reducing administrative burdens for the cable operator, the competitor and the Commission. Time Warner also suggested that, in reviewing effective competition petitions, the Commission should rule that such petitions are deemed granted if they are either (1) accompanied by a concurrence from all certified LFAs; or (2) unopposed after the close of the applicable 30-day public notice period. If the petition is opposed, the Commission should issue a ruling within 90 days after the petition was filed.^{44/} Thus, if the matter is not acted upon within 90 days, it should be deemed granted.

NECTA urged the Commission to act on a cable operator's effective competition petition within 90 days or, alternatively, deem such petition automatically approved within 45 days, subject to Commission action tolling the review period or a conditional grant subject to a reasonable refund liability period.^{45/} According to NECTA, such treatment would be

^{43/}Time Warner comments at 10; Cole, Raywid & Braverman comments at 3, 7.

^{44/}Time Warner comments at 25.

^{45/}NECTA comments at 15-17.

consistent with the Commission's review of cable operator rate justifications.^{46/} Time Warner agrees that such streamlined review would effectuate the 1996 Act's intent.

Many commenters, including the Massachusetts Cable Television Commission and the State of New York Department of Public Service, also agreed with Time Warner that, consistent with the Commission's current effective competition rules, cable operators should be able to aggregate the interests of more than one LEC for purposes of applying the affiliation criteria.^{47/} Aggregation is necessary to encompass situations where, as in the case of CAI described above, LECs such as Bell Atlantic and NYNEX purchase equity interests (or their equivalent) in an MVPD. As Time Warner explained, failure to aggregate such ownership interests could result in anomalous situations, which would ignore business realities.^{48/}

Several commenters, including NYCDOITT, argued that LEC interests should not be aggregated in determining the existence of effective competition.^{49/} These commenters failed to recognize that the policy goal behind Sec 301(b)(3) of the 1996 Act is to find effective competition based on the unique competitive pressures which result from MVPDs with financial backing from deep-pocketed LECs. Such a result exists regardless of whether

^{46/}Id. at 16-17.

^{47/}See Time Warner comments at 10; Massachusetts Cable Television Commission comments at 7; NYDPS comments at 8-9; NECTA comments at 13; Cox comments at 16; Comcast comments at 16-17

^{48/}Time Warner comments at 10-11, citing Fox 1, BBC License Subsidiary, L.P., 10 FCC Rcd 7926 (1995) (Separate Statement of Commissioner Susan Ness).

^{49/}See NYCDOITT comments at 11-12;

the investment comes from a single LEC or an aggregated group of LECs. Indeed, as one commenter noted, Congress' concern about LEC-backed MVPDs, which is the basis for the new effective competition test, becomes even more acute when several LECs, instead of merely one, invest in a MVPD, even if no individual LEC has a majority interest.^{50/}

3. A LEC need not be the owner/licensee of a multichannel video programming facility to provide effective competition.

The Commission "tentatively conclude[s] that the new test for effective competition applies with equal force whether the LEC or its affiliate is merely the video service provider, as opposed to the licensee or owner of the facilities."^{51/} The Massachusetts Cable Television Commission agreed with Time Warner that the effective competition test can be met whether the LEC or its affiliate is the owner/licensee of the facilities, the service provider over others' facilities, or both.^{52/} NYCDOITT stated that the facilities must be owned by the LEC or its affiliate for effective competition to be found.^{53/} The fallacy of this position is demonstrated by the language from the August 25, 1995 Joint Proxy Statement-Prospectus of CAI Wireless Systems, Inc. and ACS Enterprises, Inc, which Time Warner included in its initial comments. The Prospectus included a Business Relationship Agreement giving NYNEX and Bell Atlantic the rights to be the wireless video service provider in certain areas, using the facilities of CAI. Even without being the outright owner

^{50/}Cox comments at 16.

^{51/}Cable Reform NPRM at ¶ 71.

^{52/}Time Warner comments at 11-13; Massachusetts Cable Television Commission comments at 6.

^{53/}NYCDOITT comments at 5-6.

or licensee of such facilities, NYNEX and Bell Atlantic would be entitled to provide the service, have a direct relationship with customers, and clearly control the facilities under the Title I definition. Therefore, after meeting the other elements of the effective competition definition, a LEC clearly would provide effective competition to incumbent cable operators in the communities served by both competitors, regardless of whether the LEC is the owner or licensee of the facility. Indeed, the express statutory language clearly provides that effective competition exists regardless of whether the LEC "offers video programming directly to subscribers by any means," e.g., including over facilities owned by or licensed to an unrelated entity, or whether any independent MVPD uses "the facilities of such carrier or its affiliate" to offer the service.^{54/}

B. Definition Of Competition.

1. Congress did not intend any pass or penetration test for effective competition.

As the Commission accurately noted, new Section 301(b)(3) of the 1996 Act "does not, unlike the other three effective competition tests, include a percentage pass or penetration rate."^{55/} Not surprisingly, therefore, nearly all commenters agreed with the views of Commissioners Quello and Chong that the question of whether LEC-affiliated competition "is sufficient to have a restraining effect on cable rates" has already been decided

^{54/}47 U.S.C. § 543(D)(1)(D).

^{55/}Cable Reform NPRM at ¶ 72.