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

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In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

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PETITION FOR RECONSIDERATION

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 2

I. CABLE OPERATORS SHOULD NOT BE REQUIRED TO WAIT UNTIL THEIR EXISTING FRANCHISES EXPIRE TO CONVERT THEIR FACILITIES TO OPEN VIDEO SYSTEMS. 5

II. CABLE OPERATORS SHOULD NOT BE FORCED TO PROVIDE THEIR ACCESS PROGRAMMING TO OVS OPERATORS. 8

CONCLUSION 12

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PETITION FOR RECONSIDERATION

Comcast Cable Communications, Inc. ("Comcast") hereby petitions the Commission for reconsideration of two aspects of its Second Report and Order in the above-captioned proceeding. Specifically, Comcast requests that the Commission reconsider its decisions (1) that cable operators that choose to become OVS operators will remain fully subject to their existing franchise obligations, and (2) that OVS operators should not be required to negotiate the terms and conditions of public, educational, and governmental ("PEG") access with franchising authorities or to negotiate the terms and conditions on which they may receive and use the PEG access feeds of competing cable operators.

INTRODUCTION AND SUMMARY

Congress intended, in enacting the Telecommunications Act of 1996, to enhance competition in the provision of video programming and telecommunications services by removing existing barriers to the provision of the former by telephone companies and the latter by cable television operators. To facilitate competition in the video marketplace, Congress created a new alternative to the provision of franchised cable service. Facilities-based video programming providers that opted to operate "open video systems" would be relieved of the need to obtain franchises from state or local governments and of many of the requirements imposed by franchising authorities pursuant to Title VI of the Communications Act of 1934, as amended.

Congress believed not only that those requirements could be so burdensome as to deter local exchange carriers from entering the video marketplace but also that requiring facilities-based video programming distributors to cede control over up to two-thirds of their available channels might be viewed by LECs as a preferable, <u>less</u> burdensome way to provide video programming. The point of the OVS option was, thus, not to give LECs an artificial competitive advantage over incumbent cable operators but simply to provide an alternative regulatory approach to the provision of video programming, which might be more attractive to some providers. Indeed, Congress clearly contemplated that the OVS option would be available to incumbent cable operators as

well as LECs, "to the extent permitted by such regulations as the Commission may prescribe consistent with the public interest, convenience, and necessity."[1/]

The Commission has properly construed the Act as authorizing the operation of OVS systems by cable operators, but, in many respects, its regulations do not adequately ensure that the OVS option will promote rather than frustrate fair facilities-based competition.[2/] In this petition, we focus on two specific provisions that unlawfully and arbitrarily create an unfair competitive imbalance.

First, the Commission has ruled that "[c]onversion to an open video system would not relieve a cable operator of its existing contractual obligations to the local franchising authority, programming providers, or others."[3/] To the extent that it is more efficient and competitively attractive to operate an OVS system pursuant to the provisions of Part V of Title VI than to provide cable service under the full panoply of Title VI requirements, this ruling could severely -- and unfairly -- handicap an incumbent cable operator.

1/ 47 U.S.C. § 573(a)(1).

2/ In a petition for reconsideration with which we concur, the National Cable Television Association identifies several aspects of the Second Report and Order that unfairly -- and, in some cases, unlawfully -- may foster anticompetitive rather than pro-competitive results.

3/ Second Report and Order, ¶ 26.

Prior to adoption of the 1996 Act, cable operators could not provide cable service or gain access to public rights of way without entering into franchise agreements -- and franchising authorities were entitled by law to insist on the inclusion in such agreements of a wide range of obligations. The point of the OVS option is to relieve facilities-based video programming distributors from many of these franchise obligations in return for relinquishing programming control over a substantial portion of their systems. The Commission's rules allow a cable operator to become an OVS operator only if it relinquishes control over two-thirds of its capacity <u>and</u> continues to comply with its franchise requirements -- which effectively renders the option meaningless.

Second, while the statute does not relieve OVS operators of the public, educational and governmental access requirements of Section 611 and requires that the access obligations of OVS operators be equivalent to those imposed on cable operators, the Commission's rules do not, in fact, impose such equivalent burdens. By forcing cable operators to provide <u>their</u> PEG access feeds to OVS operators, the rules relieve OVS operators of the obligation to negotiate and deal with local franchising authorities and access program providers and to undertake the tasks required by franchises in connection with the creation and provision of an access channel.

I. CABLE OPERATORS SHOULD NOT BE REQUIRED TO WAIT UNTIL THEIR EXISTING FRANCHISES EXPIRE TO CONVERT THEIR FACILITIES TO OPEN VIDEO SYSTEMS.

In a brief two sentences, without further explanation, the Commission summarily states that its

> decision to permit cable operators to become open video system operators in their franchise areas if they are subject to effective competition pursuant to Section 623(l)(1) does not affect the terms of any existing franchising agreement or other contractual agreements. Conversion to an open video system would not relieve a cable operator of its existing contractual obligations to the local franchising authority, programming providers, or others.[4/]

This ruling means that for cable operators whose long-term franchises do not expire in the near future, the OVS option is no option at all.

Title VI gives franchising authorities power to impose upon cable operators a wide range of obligations and regulations. As discussed above, open video systems are a meaningful option precisely because, in return for relinquishing control over up to two-thirds of their channels, OVS operators are relieved of many of these Title VI obligations and regulations. Under the Commission's approach, however, cable operators that opted to become OVS operators would, until their franchises expired, be subject to <u>both</u> the non-discriminatory access obligations of OVS operators <u>and</u> all the obligations and regulations that franchising authorities are entitled to impose under Title VI.

4/ <u>Id</u>., ¶ 26 (footnote omitted).

The Commission's approach assumes that once a regulatory obligation authorized by Title VI is codified in a franchise agreement, that regulatory obligation remains contractually enforceable even if the underlying Title VI provision no longer applies. But what Title VI specifically deals with is the extent to which a franchising authority may enforce various franchise provisions. For example, Section 624, specifically authorizes franchising authorities to "enforce any requirements contained within the franchise" for facilities and equipment, and for broad categories of video programming or other services.[5/] Therefore, in making Section 624 inapplicable to OVS operators, Congress effectively rescinded the authority of franchising authorities to "enforce" certain franchise provisions regulating services, facilities and equipment, notwithstanding their contractual status.

To hold otherwise -- i.e., to allow franchising authorities to continue to enforce Title VI-authorized franchise obligations even after a cable operator has opted to become an OVS operator -- would frustrate rather than promote the public interest. The Commission has determined that it is in the public interest to make the OVS option available to incumbent cable operators, at least to the extent that such operators are subject to effective competition:

5/ 47 U.S.C. § 544 (emphasis added).

> We agree with UTC that Congress did not intend the 1996 Act, which is designed to eliminate outdated regulatory distinctions, to be used as the basis for creating new ones. Similarly, we agree with CATA's general argument that all entities should "have the option to make the same choices, unconstrained by artificial regulations based on their historic regulatory classification." As Comcast argues, any benefits gained through open video systems would also generally result from open video systems owned by non-LECs.[6/]

The Commission's ruling effectively denies incumbent cable operators the same choices as competing facilities-based providers, and it effectively denies consumers any benefits that may result from the conversion of such operators' facilities to open video systems.

Moreover, these adverse and anticompetitive effects are meted out in a wholly arbitrary manner, based solely on when each operator's franchise was entered into and when it expires. An operator whose franchise is about to expire will have to decide immediately whether to become an OVS operator. An operator whose franchise was only recently renewed will be denied the option to convert its facility to an OVS for as long as 15 years. For others, the narrow window of decision-making will open at some time in between these two extremes. The public interest in promoting facilities-based competition by allowing cable operators to become OVS operators is in no way diminished simply because an operator's franchise expired last year instead of next year, and there is no reason why the availability of the OVS option should turn on such an arbitrary factor.

6/ Id., ¶ 18 (footnotes omitted).

In sum, the only meaningful way to make the OVS option available to incumbent cable operators is to confirm that any franchise requirements adopted pursuant to those provisions of Title VI that do not apply to OVS operators are unenforceable when a cable operator opts to become an OVS operator. Both the letter and the intention of the law compel precisely this result.

II. CABLE OPERATORS SHOULD NOT BE FORCED TO PROVIDE THEIR ACCESS PROGRAMMING TO OVS OPERATORS.

Although OVS operators are relieved of many of the obligations that apply to cable operators under Title VI, they remain subject to PEG access requirements. Specifically, Section 653 directs the Commission to craft regulations that, "to the extent possible, impose obligations that are no greater or lesser than" the PEG access obligations imposed on cable operators by Section 611.[7] The regulations adopted by the Commission do not comply with this directive. They require OVS operators to share some of the monetary costs but not the full burden incurred by cable operators in complying with Section 611.

Section 611 gives franchising authorities the right to determine each cable operator's PEG access obligations, effectively forcing the operator to negotiate such obligations before obtaining or renewing its franchise. The obligations to be negotiated may include not only the setting aside of channel capacity but also the provision of services, facilities or

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7/ 47 U.S.C. § 573(c)(2)(A).

equipment that relate to the use of such capacity.[8] In the Commission's view, the public interest would best be served if the access obligations of OVS operators were also established through similar negotiations:

> PEG access obligations as a general matter should focus on the needs and interests of the local community. We believe that . . the local franchising authority is often in the best position to determine the needs and interests of the local community. For instance, in some areas, the local franchising authority may believe that simple connection to the cable operator's PEG feeds adequately satisfies the local community's needs. In other areas, the local authority may prefer that the open video system operator provide separate or different PEG access channels. <u>We believe that the local communities and the public interest will best be served when the parties discuss and reach an agreement regarding all of the PEG issues that pertain to the particular community</u>.[9]

But the Commission has inexplicably refused to <u>require</u> such negotiations. Instead, because "the parties may be unable to reach agreement," the Commission has established a "default mechanism" for establishing an OVS operator's PEG access

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8/ <u>See</u> 47 U.S.C. § 531(c).

9/ <u>Second Report and Order</u>, ¶ 137 (footnotes omitted) (emphasis added).

obligations.[10] Specifically, in the absence of an agreement with the local franchising authority, the OVS operator's access obligations will be the same as the local cable operator's -- and it will be permitted to satisfy those obligations simply by "connect[ing] to the cable operator's PEG access channel feeds and by sharing the costs directly related to supporting PEG access."[11] Moreover, the cable operator is required to permit such connection.[12]

If the public interest would be best served by requiring OVS operators to negotiate the terms of their PEG access obligations with franchising authorities, then the Commission should require such a negotiated agreement. Cable operators have no "default mechanism" to rely upon in the event that they are unable to reach agreement with franchising authorities on PEG access requirements; franchising authorities may refuse to grant or renew a franchise in the absence of such agreement. There is no reason why an OVS operator cannot be subject to the same condition.

Moreover, because cable operators have no such default mechanism and must reach agreement with franchising authorities, the Commission's rules fail to ensure that OVS operators' obligations are "no greater or lesser" than those imposed on

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10/ Id., ¶ 141.

11/ Id.

12/ Id., ¶ 145.

cable operators, as the Act requires. It is not mandatory under the rules that OVS operators comply with the same PEG access requirements imposed on competing cable operators; they are free to negotiate less onerous requirements with franchising authorities. But they need never agree to more burdensome obligations than the cable operator and can avoid the costs of negotiating altogether simply by accepting the same terms as the cable operator. Worse, if the OVS operator does accept the terms imposed on the cable operator, it need not even negotiate with the cable operator to obtain the cable operator's access programming. It can rely on the cable operator's implementation of the access obligations and interconnect with the operator's access feed so long as it pays half the costs.

If the Commission and telephone companies believe that this is an obligation equivalent to the cable operator's, then Comcast would frankly prefer that the Commission require competing OVS operators to negotiate and implement PEG access obligations and allow us to decide whether simply to take their feed at half their costs or negotiate our own less stringent obligations. We doubt, however, that the telephone companies would be indifferent to such a reversal of obligations -- because the obligations obviously are not equivalent.

To create the level playing field required by Congress, the Commission should require OVS operators to negotiate the terms of their access obligations with franchising authorities, pursuant to Section 611, just as cable operators do. To the extent that

it is efficient and mutually desirable for competing cable and OVS operators to meet their access obligations by agreeing to interconnect and/or sharing the costs and tasks associated with those obligations, they should be permitted to do so. But the terms and conditions of such interconnection and sharing should be negotiated, not mandated -- and neither party should be required to enter into such an agreement.

CONCLUSION

For the foregoing reasons, the Commission should reconsider its decision that a cable operator that opts to convert its facility to an OVS remains fully subject to its existing franchise obligations. And it should reconsider its decision to allow an OVS operator to meet its PEG access obligations simply by interconnecting with a competing cable operator's PEG access feed -- without being required to negotiate with either the

franchising authority or the cable operator. In both cases, the statute and the public interest compel a contrary result.

Respectfully submitted,

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