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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Implementation of Section 302 of )  
the Telecommunications Act of 1996 )  
 )  
Open Video Systems )

CS Docket No. 96-46

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**PETITION OF THE JOINT PARTIES<sup>1</sup> FOR  
RECONSIDERATION OF THE SECOND REPORT AND ORDER**

<sup>1</sup> The Joint Parties are the Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; and SBC Communications Inc. and Southwestern Bell Telephone Company.

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## SUMMARY

The Commission's Order generally comports with the spirit and intent of the Telecommunications Act of 1996 to encourage competition in the provision of video programming by establishing open video systems (OVS) as a delivery option subject to reduced regulatory burdens. In a few instances, however, the Commission's new rules should be modified or clarified to implement Congress' intent fully.

The Commission's Order appears to subject the OVS operator's programming affiliate to nondiscrimination obligations in the provision of navigational devices or program menus. The 1996 Act, however, requires the Commission's rules to "prohibit an operator of an open video system from unreasonably discriminating in favor of the operator or its affiliate" with respect to information provided for the selection of programming. The Commission should clarify that its rules impose the nondiscrimination obligation on the OVS operator.

The Commission's new rule defining the fee an OVS operator must pay in lieu of a franchise fee also is inconsistent with the 1996 Act. The rule should be modified to make it consistent with the Act.

The conditions established by the Commission for application of the "strong presumption that carriage rates are just and reasonable" could have the effect of penalizing OVS operators for using more advanced technologies that increase the capacity available for unaffiliated programmers. In addition, they appear to require that unaffiliated programmers market their programming in competition, rather than in cooperation, with the OVS operator. Both results are contrary to the intent of the 1996 Act. Therefore, the Commission should modify its rule to establish conditions that comport with the Act's goals.

The Commission also adopted the Efficient Component Pricing Rule (ECPR) to determine the justness and reasonableness of OVS carriage rates in those instances where the presumption does not apply. Such a rule is not necessary, however, in the case of new entrants into a competitive market. Nevertheless, if the Commission decides to apply the ECPR, it should clarify the description of the rule to ensure that OVS operators can recover both their incremental cost and their opportunity cost.

The Commission should not require OVS operators to obtain approval of their certification before beginning construction. Cable operators are not required to obtain similar federal certification before beginning construction of cable facilities, and whether existing rights-of-way permit construction of particular facilities by a local exchange carrier or other OVS operator is a matter between the LEC and the local government or other owner of property over which the LEC has obtained easements.

The specific exception allowing small, rural, in-region cable operators to seek carriage on an open video system should be modified to make clear that it applies only to truly small, rural operators. As written, the exception could allow large cable operators to circumvent the intent of the Commission's Order.

The Commission should modify its rules to increase the time between reallocations of open capacity from three to five years. Programmers of new channels are seeking longer term carriage arrangements (five to ten years) and a reallocation period consistent with such contracts would enable more independent programmers to obtain carriage.

The Commission's Order expresses a preference that OVS operators negotiate with local franchise authorities concerning the fulfillment of the obligation to offer PEG access, but

establishes a default mechanism if negotiations fail. The default mechanism, however could undermine the negotiation approach. As a result, if OVS operators are unable to reach a mutually satisfactory arrangement with the local franchising authority, they should be allowed to demonstrate, in arbitration or in a complaint proceeding, that its proposal to meet PEG access requirements is “no greater or lesser” -- even though different -- than the PEG access provided by the incumbent cable operator.

**Before the  
Federal Communications Commission  
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Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	

**PETITION OF THE JOINT PARTIES<sup>1</sup> FOR CLARIFICATION  
OR RECONSIDERATION OF THE SECOND REPORT AND ORDER**

The Commission's Order in the above-captioned matter generally comports with the spirit and intent of the Telecommunications Act of 1996 ("1996 Act") in seeking to encourage competition in the video marketplace. The Commission's rules will provide open video system (OVS) operators with substantial flexibility in designing systems to compete with cable television systems and other video programming distribution media. In a few respects, however, the Commission's Order misreads the 1996 Act, is unduly regulatory, or would undermine the viability of open video systems.<sup>2</sup> The Commission should modify or clarify those aspects of its Order, as discussed below.

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<sup>1</sup> The Joint Parties are the Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; and SBC Communications Inc. and Southwestern Bell Telephone Company.

<sup>2</sup> Local exchange companies (LECs) may differ in their view of the best technology for addressing their respective markets. At least one of the Joint Parties has determined that all-digital systems are the best approach to the markets it is planning to serve. Other members of the Joint Parties believe that their markets require strong analog packages. The Commission's determination that analog and digital portions of an open video system must be treated independently for purposes of allocating system capacity to video programming providers will make it difficult to assemble strong analog packages. *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46, Second Report and Order, FCC No. 96-249 at ¶77 (rel. June 3, 1996) ("Order").

**I. The Commission's Order Misreads The Act In Certain Key Respects.**

**A. The Act's Nondiscrimination Requirement Applies To The OVS Operator, Not The Affiliated Programmer.**

The Commission's Order appears to require that both the OVS operator and its programming affiliate provide nondiscriminatory navigational devices on the open video system.<sup>3</sup> Such a requirement would be inconsistent with the language of the 1996 Act and could undermine technological and market developments that are already occurring in the industry. Accordingly, the Commission's rule should be modified.

The Act provides that the Commission's rules must "prohibit an operator of an open video system from unreasonably discriminating in favor of the operator or its affiliates" with respect to information provided for the selection of programming.<sup>4</sup> The 1996 Act thus places the requirement not to discriminate squarely, and solely, on the OVS operator. The operator's programming affiliate has no similar obligation, and for good reason: requiring the programming affiliate effectively to be the servant of competitive programmers would subject the affiliate to substantial costs and a significant competitive disadvantage. There is no basis in the Act to impose such an obligation on it. Instead, the Commission should allow the affiliate to take steps to differentiate itself from other program providers on the system, through the provision of a proprietary program guide and other means.

Moreover, to the extent that the Commission's decision is based on an assumption that there will only be a single navigational device, and that device will be provided by the OVS operator, the

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<sup>3</sup> See Order, ¶231.

<sup>4</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 11 Stat. 56, §653(b)(1)(E)(i) ("1996 Act") (emphasis added). Subsection (iv) of this section similarly requires the Commission to "prohibit an operator of an open video system" from omitting unaffiliated programming from any navigational device, guide, or menu.

rule proceeds from an incorrect assumption. The Joint Parties agree that consumers do not want multiple set top boxes on their televisions, but this does not mean that only the OVS operator can provide a set top box on the system. A number of multichannel video programming providers (MVPDs) have created their own navigational devices, and the OVS operator may choose to allow programmers obtaining carriage on its system to provide such devices by making the necessary technical information available as part of the information provided in the open enrollment period.

If a nondiscrimination requirement is imposed on the OVS operator's programming affiliate, it could have the unintended result of (1) creating a "closed" system in which all video programming providers must use the hardware and software selected by the operator or its affiliate; and (2) stifling the significant progress already achieved by industry standards-setting bodies toward an open, technology-independent, digital set top unit. This result can be avoided by limiting the nondiscrimination requirements to the OVS operator, as described below, and by allowing program providers and consumers to determine the features and functions they desire in the set-top boxes and associated software.

The Commission should clarify that the nondiscrimination obligation with respect to programming selection guides rests with the OVS operator. The operator should be able to choose whether to provide the navigational device itself or allow MVPDs on the OVS to provide their own navigational devices. If the OVS operator chooses the latter route, it should be permitted to offer a system-wide menu or guide to all end user subscribers to fulfill its obligations under subparagraphs (i) and (iv) of §653 (b)(1)(E). This guide, whether paper or electronic, would provide a nondiscriminatory listing of all video programming providers that offer service on the system. The guide also would provide instructions to consumers on how to contact a particular provider to

subscribe to that provider's programming. If electronic, the system-wide menu or guide would be part of the mandatory package of PEG and must-carry channels that the OVS operator would require, as a condition of carriage, that all video programming providers deliver to all subscribers on the system. In this case, programming providers on the open video system, including the operator's programming affiliate, should be permitted to provide their own differentiated electronic or paper programming guides that are limited to their own program lineups and, if they choose, those of programmers with whom they co-package.

**B. The Act Permits Application Of The Fee In Lieu Of Franchise Fee To The Gross Revenues Of The Operator, Not The Affiliate.**

The Commission's new rule defining the fee an OVS operator must pay in lieu of a franchise fee is inconsistent with the 1996 Act in two significant respects. Section 653(c)(2)(B) provides that "an operator of an open video system . . . may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service . . ." The new rule, however, goes beyond the Act and contemplates the imposition of fees that Congress did not authorize.

First, while the 1996 Act authorizes fees on OVS operator revenues, the rule seeks to impose fees on the revenues of the operator's affiliates as well, by defining the "gross revenues of the operator" to include the gross revenues of the operator's affiliates. Had Congress wanted to authorize fees on an affiliate, it could have done so, and, in fact, the bill passed by the House

did exactly that.<sup>5</sup> The bill enacted into law, however, limits the imposition of fees to the OVS operator. Congress' elimination of this provision evinces an intent to exclude affiliate revenues.<sup>6</sup>

Second, the statute authorizes fees only on revenues from the provision of "cable service." Cable service is defined as the "transmission [of video programming] to subscribers." 47 U.S.C. §522(6). Therefore, fees can be assessed only on revenues the OVS operator receives from subscribers. The new rule, however, would authorize fees not only on cable service provided to subscribers but also on "all carriage revenues received from unaffiliated video programming providers."<sup>7</sup> As "carriage revenues" are not revenues from the "provision of cable service," the Act does not permit such fees. Therefore, the Commission should modify its rule to make it consistent with the 1996 Act.

## **II. Certain Of The Commission's Rules Should Be Clarified Or Modified To Be Consistent With The 1996 Act's Preference For "Reduced Regulatory Burdens."**

### **A. The Commission Should Modify The Conditions Under Which The Presumption That Carriage Rates Are Just And Reasonable Applies.**

The Order establishes "a strong presumption that carriage rates are just and reasonable for open video system operators where at least one unaffiliated video programming provider, or unaffiliated programming providers as a group, occupy capacity equal to the lesser of one-third of the system capacity or that occupied by the open video system operator and its affiliates, and where the rate complained of is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the open video system operator."<sup>8</sup> The Joint Parties

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<sup>5</sup> "A video programming affiliate of any common carrier that establishes a video platform . . . shall be subject to the payment of fees . . ." H.R. Rep. No. 104-204, 104th Cong. 1st Sess., pt. 1 at 200 (1995).

<sup>6</sup> Moreover, imposing such a fee on the programming affiliate's revenues, but not on revenues of other programmers, discriminates against the operator's affiliate by effectively increasing the affiliate's charges to consumers by approximately 5%.

<sup>7</sup> Order, ¶220.

<sup>8</sup> Order, ¶114.

support the Commission's effort to design a presumption for addressing potential complaints concerning rates, but the conditions set forth in the Order are unnecessarily rigid and onerous.

First, the condition that unaffiliated providers "occupy capacity equal to the lesser of one-third of the system capacity or that occupied by the open video system operator and its affiliates . . ." is illogical and would penalize OVS operators for using more advanced technologies. The Order bases this condition on the 1996 Act's limitation of an operator to one-third of the capacity when demand exceeds capacity because it "assum[es] that one-third of the channels will enable the operator and its affiliates to offer a viable video programming package to subscribers."<sup>9</sup> Whether one-third of the channels allow an operator or its affiliate to offer a viable video programming package,<sup>10</sup> however, has nothing to do with whether the rates charged to carry programming on the remaining channels are just and reasonable.

Moreover, a system may have as few as 60 channels or as many as 384 channels or more. In the former case, unaffiliated programmers would have to occupy only 20 channels for the presumption to apply, while in the latter case occupancy of 126 channels would be required. On switched digital systems or systems where "capacity is plentiful as compared to demand,"<sup>11</sup> there would be no way to show that unaffiliated programmers have taken one-third of the capacity, and the OVS operator would be denied the benefit of the presumption. Thus, OVS operators would be penalized for deploying more advanced technology that increases the capacity available for unaffiliated programmers. That result is inconsistent with the public interest.

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<sup>9</sup> Order, ¶122.

<sup>10</sup> As the Joint Parties explained in their Comments, it may or may not, depending on the system and the particular market. Comments of Bell Atlantic, BellSouth, GTE, Lincoln Telephone, Pacific Bell, and SBC Communications at 18-19.

<sup>11</sup> Order, ¶62.

Second, when combined with the underlying assumption just discussed, the Commission's description of the condition -- that "unaffiliated programming providers as a group" must occupy one-third of the capacity -- could suggest that unaffiliated programmers must market their programming as a package in competition with the operator's package in order for the presumption to apply. But such a condition also is unrelated to whether the rates for carriage are just and reasonable. If unaffiliated programmers purchase carriage on an open video system and also decide to co-package with the system operator, the rates charged to unaffiliated programmers are no less just and reasonable. If the Commission's rule were to deny the presumption in such a case, the Commission would discourage the very kind of cooperative arrangements that the 1996 Act expressly refuses to limit, and the Commission itself elsewhere expressly recognizes.<sup>12</sup>

To avoid an arbitrary and unintended result, the Commission should modify the requirements for applying its strong presumption. As the Commission noted, the Joint Parties previously argued that a presumption should apply if one unaffiliated programmer purchased carriage, while the National League of Cities argued that a minimum of four unaffiliated programmers that together occupied one-third of the capacity were required.<sup>13</sup> As just discussed, there is no basis for a requirement that unaffiliated programmers occupy one-third (or any proportional amount) of the capacity on an open video system. The Commission could, however, determine that a presumption of reasonableness will apply if two unaffiliated programmers purchase carriage on the OVS, without specifying any particular level of capacity

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<sup>12</sup> 1996 Act, §653(b)(1)(B); Order, ¶108.

<sup>13</sup> Order, ¶121.

they must buy.<sup>14</sup> In addition, the Commission should clarify that the presumption applies whether or not the unaffiliated programmers market their programming in competition or in cooperation with the OVS operator's programming.

**B. The Commission Should Not Use The Proposed "Imputed Rate" Approach To Evaluate The Reasonableness Of Carriage Rates.**

In those cases where a party who has sought carriage on an open video system challenges the reasonableness of rates and the presumption of reasonableness does not apply, the Order adopts an "imputed rate" approach to evaluate the reasonableness of the challenged rate. The Order states that this approach is an "application of the Efficient Component Pricing Rule to open video systems" and cites articles by certain prominent economists.<sup>15</sup> As discussed in the attached Declaration of William E. Taylor -- an author of one of the articles cited by the Commission -- the Commission has appropriately eschewed some of the more regulatory approaches suggested by other commenters, but it has misstated and misapplied the Efficient Component Pricing Rule ("ECPR").

First, the articles relied on by the Commission established the ECPR as an appropriate method of setting the price for essential facilities provided by incumbents; the ECPR was not intended to state the pricing rule for new entrants in a competitive market.<sup>16</sup> Open video systems

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<sup>14</sup> The National League of Cities, in its Reply Comments in this docket and in comments file in the Commission's Cable Act Reform docket (Reply Comments at 24, Att. at 7; Comments, CS Docket No. 96-85 at 7-13) has argued that a programmer is an "affiliate" of the OVS operator if it has any business relationship other than a carrier-user relationship. As the Joint Parties and others have explained, that definition of affiliate is inappropriate and contrary to the 1996 Act. *See, e.g.*, CS Docket No. 96-85, Reply Comments of Bell Atlantic at 2-3; Reply Comments of the United States Telephone Association at 9-10. In suggesting a compromise between their earlier position and the League's, the Joint Parties do not agree with the League's proposed definition of affiliate, and instead reiterate their views that the definition of affiliate for OVS should focus on ownership or control.

<sup>15</sup> William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. Reg. 171 (1994); Alfred E. Kahn & William E. Taylor, *The Pricing of Inputs Sold to Competitors: A Comment*, 11 Yale J. Reg. 225 (1994).

<sup>16</sup> Taylor Decl. at 4-5 and n. 15

will be new entrants in markets in which the incumbents are known for responding aggressively to new entrants.<sup>17</sup> Start-up enterprises frequently show no net earnings in the early years of operation, in part because of high start-up costs and the necessity to offer price discounts to attract customers from the established incumbent. The experience of open video systems, particularly given the environment they will be entering, is likely to be the same. The ECPR, as described by the Commission, could produce a zero rate, or less, for carriage in this situation. It makes no sense for the operator to be required to bear all of the costs of the system during start-up if it cannot demonstrate earnings on its programming sales.<sup>18</sup>

Second, the ECPR states that the rate for the essential facilities should be the incumbent's incremental cost plus the opportunity cost -- the contribution included in the retail service -- that the provision of access to the essential facilities implies.<sup>19</sup> As written, however, the Order appears to limit the rate the operator can charge only to the contribution -- i.e., the opportunity cost. The Order states "We will require the operator to show that it charges the unaffiliated programmer no more for carriage than it earns from carrying its own affiliates' programming" and "[i]f the carriage rate to an unaffiliated program provider surpasses what an operator earns from carrying its own programming, the rate can be presumed to exceed a just and reasonable level."<sup>20</sup> This focus on what the operator "earns" from providing service to itself or its affiliate, would preclude the operator from recovering its costs, as required by the ECPR.<sup>21</sup> In a competitive market, such as the video distribution market OVS operators are entering, there is no

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<sup>17</sup> See, e.g., Thomas W. Hazlett, *Predation in local cable TV markets*, Antitrust Bulletin, Vol. XL, No. 3, 609 (Fall 1995).

<sup>18</sup> Taylor Decl. at 6-7.

<sup>19</sup> See Baumol & Sidak at 202.

<sup>20</sup> Order, ¶¶114, 127 (emphasis added).

<sup>21</sup> Taylor Decl. at 6-7.

need for a pricing rule to be applied to new entrants. If the Commission nevertheless determines that such a rule is required, it should clarify its description of the ECPR to ensure that OVS operators can recover their incremental cost in addition to their opportunity cost (i.e., contribution).

**C. There Is No Reason To Require Certification Before Construction.**

The Commission should not require an OVS operator to “obtain Commission approval of its certification prior to the commencement of construction . . . if new physical plant is required.”<sup>22</sup> Cable operators are not required to obtain similar federal certification before beginning construction of their cable facilities in public rights-of-way. The Commission’s sole basis for imposing this requirement on OVS operators is to “ensure that the public rights-of-way are disrupted only by those who are authorized to operate open video systems.”<sup>23</sup> Whether existing rights-of-way permit construction of particular facilities by a local exchange carrier (or other OVS operator) is a matter between the LEC and the local government or owners of private property over which the LEC has obtained easements. If such permission exists, LECs should be allowed to construct even if subsequent certification is necessary to operate the system. Therefore, the Commission should modify its rules and eliminate the pre-construction certification.<sup>24</sup>

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<sup>22</sup> Order, ¶34.

<sup>23</sup> *Id.*

<sup>24</sup> Even under the §214 regime, which has been eliminated, 1996 Act, §651(c), the Commission was clear that §214 approval of a video dial tone system was not required for the construction of the telephony aspects of an integrated system. *Application of New Jersey Bell Tel. Co. for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain advanced fiber optic facilities and equipment to provide video dialtone service within a geographically defined area in Dover Township, Ocean County, New Jersey*, File No. W-P-C-6840, Order and Authorization, 9 FCC Rcd 3677, 3688-89 (1994). Now that Congress has eliminated the §214 requirement for video services, there is no reason for any pre-construction certification requirement.

**III. The Commission Should Modify Those Rules That Could Undermine The Viability Of Open Video Systems.**

**A. The Commission Should Clarify That The Exception Allowing Small Incumbent Cable Operators To Seek Carriage On Open Video Systems Applies Only To Truly Small, Rural Cable Operators.**

The Commission's grant of discretion to OVS operators to deny carriage on the system to competing, in-region cable operators or any programmer affiliated with such an operator is well-reasoned and necessary to ensure the viability of open video systems. In allowing a waiver for certain small cable operators, however, the Commission may have created an exception that could swallow the rule.

The Commission provided a "specific exception" to the rule where (1) the cable operator's system(s) serve less than 20 percent of the homes passed by the open video system, and (2) the cable operator has less than 17,000 subscribers in the open video system's service area.<sup>25</sup> The Joint Parties request that the Commission modify the 17,000-subscriber prong of the test to make it consistent with the Act.

The 17,000-subscriber prong is based on §652(d)(4) of the 1996 Act, which excepts small, rural cable systems from the cable/telco cross-ownership rules. The exception applies only to small, rural cable systems that have no more than 17,000 subscribers in total and that are not owned by one of the 50 largest cable system operators. The Commission's rule, however, does not incorporate these limits. As a result, an OVS operator whose system overlaps a small portion of a cable system might be required to allow the cable operator to gain access to the system even though the cable operator is owned by, e.g., TCI, and even though TCI could also own the incumbent cable system that overlaps the majority of the OVS operator's system. To

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<sup>25</sup> Order, ¶56.

avoid such circumvention of the intent of the Commission's rules, the Commission should clarify that the small cable operator exception applies only to cable systems that are truly rural, have no more than 17,000 subscribers in total, and are not owned by one of the 50 largest multiple system operators.

**B. The Commission Should Increase From Three To Five Years The Period For Reallocation of Open Capacity.**

The Order requires OVS operators to reallocate open capacity on the system every three years -- including channels in excess of one-third of the capacity used by the operator or its affiliate if demand exceeds supply. The Commission should modify its Order to increase the reallocation period to five years. A longer reallocation period would be consistent with the requirements of independent programmers launching new channels. Because competition for channel capacity is fierce, and because it typically takes five years before a new channel becomes viable, new programmers, such as Food TV Network and TV Land have sought longer term carriage arrangements (such as five to ten year contracts) with operators in order to survive. If the OVS operator or its affiliate knows it may have to reduce its capacity on the system to accommodate demand from other programmers in three years, however, it is unlikely to offer newer channels long term contracts because it would run the risk of having to push established popular programming off the system in the reallocation period. Because a key goal of OVS is to provide an outlet for independent programmers, the reallocation period should be at least five years, consistent with programming contracts for new channels.<sup>26</sup>

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<sup>26</sup> See HBO Comments at 7, which suggest a five-year time frame for reallocation.

**C. The Commission Should Modify Its Order To Allow OVS Operators A Third Option For Meeting Their PEG Obligations.**

In carrying out the 1996 Act's requirement that open video systems be subject to PEG obligations that are "no greater or lesser" than those to which cable is subject, the Commission expressed a preference that OVS operators negotiate with local franchising authorities, but established a default mechanism if negotiations fail.<sup>27</sup> The default mechanism, however, could undermine the negotiation approach. Rather than providing OVS operators with the freedom to accommodate PEG requirements in the most efficient and cost effective manner, the default mechanism places control in the hands of local franchising authorities.

First, under the Commission's order, if negotiations with the local franchising authority fail, and the OVS operator resorts to the default mechanism, it must agree with the incumbent cable operator on the sharing of costs. If the OVS operator and the incumbent cable operator cannot agree, then the local franchising authority -- with whom the OVS operator previously was unable to reach agreement -- must resolve the differences.<sup>28</sup>

Second, the default mechanism as currently framed removes whatever incentives local franchising authorities have to negotiate any PEG arrangement that does not replicate or exceed that required of the incumbent cable operator. Rather than encouraging the negotiation of flexible arrangements, therefore, the default mechanism gives local franchising authorities the incentive to demand absolute duplication of the cable operator's PEG obligations simply by refusing to consider any other alternative. Moreover, the default mechanism positions local franchising authorities to extract other concessions from OVS operators. For example, the local

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<sup>27</sup> Order, ¶141.

<sup>28</sup> Order, ¶¶141, 145.

franchising authority might agree to alternative PEG arrangements only if the OVS operator agrees to other cable-like obligations.

In addition, the Order abandons its usual approach of leaving to OVS operators how best to fulfill a certain requirement from a technical standpoint<sup>29</sup> and simply accepts the comments of a number of cable operators who claim they are able to configure their systems that overlap several franchise areas to satisfy multiple PEG obligations.<sup>30</sup> In so doing, the Commission fails to take into account the potentially significant differences between traditional cable network build-outs and OVS networks, which could result in technical difficulty and a potentially enormous cost of duplicating each local franchising authority's PEG requirements where an open video system serves more than one franchise area.

In order to construct cost-effective and efficient distribution networks, OVS build-outs typically will mirror existing telephone network designs. As open video systems are built out within local telephone serving areas spanning multiple communities, however, insertion of PEG channels at typical node locations will not ensure that each local franchise area automatically receives its own PEG channels, since telephone remote central office serving areas themselves overlap individual cable franchise boundaries. In some cases, this may mean it is more efficient and cost effective for the OVS operator to meet its PEG obligations in some way other than duplicating exactly the cable requirements. Therefore, if OVS operators are unable to reach a mutually satisfactory arrangement with the local franchising authority, the operator should have the ability, either in a complaint proceeding before the Commission or in arbitration, to demonstrate that its proposal to meet the PEG access requirements is "no greater or lesser" --

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<sup>29</sup> *E.g.*, Order, ¶153.

<sup>30</sup> *E.g.*, Comments of Telecommunications, Inc. at 18; Comments of Time Warner Cable at 25.

even though different -- than the PEG access provided by the cable operator, or that it is not possible for the OVS operator to satisfy the demands of the franchising authority or to duplicate the PEG obligations of the incumbent cable operator exactly.<sup>31</sup>

Such an approach can reasonably be expected to produce results that meet the needs of local communities, encourage the development of more innovative and efficient PEG support mechanisms, and meet the condition established by Congress that the PEG obligations of OVS operators “to the extent possible” be “no greater or lesser” than those of the cable operator.<sup>32</sup>

### **Conclusion**

The Commission has crafted an Order that, overall, implements Congress’ intent to encourage competition in the provision of video programming by establishing a delivery option subject to reduced regulatory burdens. As discussed above, however, a few issues addressed by the Order require modification or clarification to implement Congress’ intent fully. Therefore, the Joint Parties request that the Commission modify or clarify its Order in the manner specified.

Respectfully submitted,

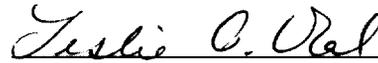
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<sup>31</sup> This opportunity for resolution by the Commission or an arbitrator would encourage franchising authorities to negotiate in good faith. Because of the potential for delay, OVS operators can be expected to resort to this option only in extreme circumstances. Thus, its availability should not generate excessive litigation.

<sup>32</sup> 1996 Act, §653(c).

BELL ATLANTIC TELEPHONE COMPANIES  
and BELL ATLANTIC VIDEO SERVICES  
COMPANY

By their Attorney:

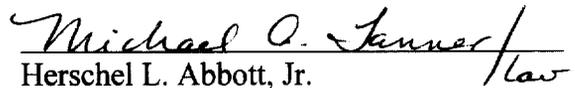


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GTE SERVICE CORPORATION and its  
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companies and GTE MEDIA VENTURES, INC.

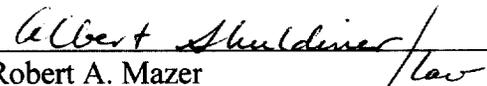
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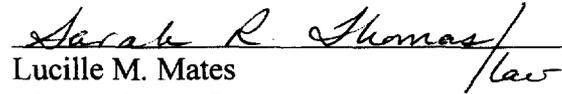
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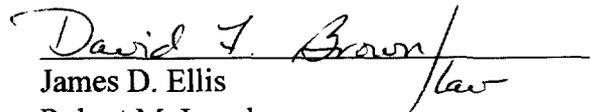
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**DECLARATION OF WILLIAM E. TAYLOR**

**Before the Federal Communications Commission**

**CS Docket No. 96-46**

**July 5, 1996**

## **DECLARATION OF WILLIAM E. TAYLOR, PH.D.**

### **I. INTRODUCTION AND SUMMARY.**

My name is William E. Taylor. I am Senior Vice President of National Economic Research Associates, Inc. (NERA), head of its telecommunications economics practice and head of its Cambridge office. My business address is One Main Street, Cambridge, Massachusetts 02142.

I have been an economist for over twenty years. I received a B.A. degree in economics (Magna Cum Laude) from Harvard College in 1968, a master's degree in statistics from the University of California at Berkeley in 1970, and a Ph.D. in Economics from Berkeley in 1974, specializing in industrial organization and econometrics. I have taught and published research in the areas of microeconomics, theoretical and applied econometrics, and telecommunications policy at academic institutions (including the economics departments of Cornell University, the Catholic University of Louvain in Belgium, and the Massachusetts Institute of Technology) and at research organizations in the telecommunications industry (including Bell Laboratories and Bell Communications Research, Inc.). I have participated in telecommunications regulatory proceedings before state public service commissions and the Federal Communications Commission (FCC) concerning competition, incentive regulation, price cap regulation, productivity, access charges, pricing for economic efficiency, and cost allocation methods for joint supply of video, voice and data services on broadband networks.

I have prepared this declaration at the request of the Joint Parties<sup>1</sup> to appraise the FCC's proposed application of the Efficient Component Pricing Rule (ECPR) to the determination of imputed Open Video Systems (OVS) carriage rates when certain conditions for the application

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<sup>1</sup> Bell Atlantic, BellSouth, GTE, I incolin Telephone, Pacific Bell, and SBC Communications.