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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

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

OPPOSITION TO PETITIONS FOR RECONSIDERATION

The Alliance for Community Media, the Alliance for Communications Democracy, and the Center for Media Education ("Alliance et al ") respectfully express their opposition to Petitions for Reconsideration filed by various parties in reference to the Second Report and Order, FCC 96-249, in the above-captioned proceeding, released June 3, 1996 ("Second Order"). With respect to the issues discussed below, the Alliance et al. believes that the Commission found the correct balance between creating incentives for the expedited development of OVS while protecting the public interest. The Commission should not reconsider these portions of its rules on "open video systems" ("OVS").

I. THE COMMISSION SHOULD NOT RECONSIDER ITS DECISION TO REQUIRE OVS PROGRAMMING PROVIDERS TO MAKE NON-DISCRIMINATORY NAVIGATIONAL DEVICES AVAILABLE.

Various local exchange carriers ("LECs") have asked the Commission to reconsider its requirement of non-discrimination in the provision of "navigational devices" at the programmer level.[1] The Commission should not reconsider this requirement; as the Commission notes, permitting OVS programming providers to

[1] Petition of the Joint Parties for Reconsideration of the Second Report and Order ("Joint Parties") at 2 (July 5, 1996); NYNEX Petition for Reconsideration ("NYNEX") at 10; Petition of Tele-TV for Reconsideration ("Tele-TV") at 1; See also US West Petition for Clarification ("US West") at 6.

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discriminate in the provision of services on navigational devices while applying the non-discrimination requirement only to the platform operator would render Section 653(b)(1)(E)(iv) meaningless.[2] The LECs' preferred interpretation would not only render that provision meaningless, but would severely undermine the entire non-discriminatory regulatory scheme of OVS.

We share the Commission's concern that the OVS operator may evade the navigational device non-discrimination/non-omission requirements of the provision by stating that all programming is managed by its programming affiliate.[3] We have particular concerns that neither OVS operators nor programmers discriminate with regard to PEG access programming, and believe that Section 653(b)(1)(e)(iv) clearly applies, not only to broadcasters, but to PEG access centers to the exact same degree (prohibiting an OVS operator from omitting "broadcasting stations or other unaffiliated video programming services" from any navigational device).

However, the Alliance et al. recognizes concerns raised by Tele-TV[4] that the exact configuration of navigational devices, including set-top boxes, is currently unknown, both by the Commission and by the potential OVS operators/programming providers themselves. The Alliance et al. recommends that the Commission modify its rule by stating that the non-discrimination/non-omission standards will continue to apply, but will be revisited by the Commission as systems are developed, to ensure that OVS systems are truly non-discriminatory with respect to all PEG and third-party unaffiliated programmers.

II. CABLE OPERATORS CANNOT BE ALLOWED TO UNILATERALLY ABROGATE THEIR CONTRACTUAL OBLIGATIONS BEFORE THEY EXPIRE.

Comcast Corp. petitions the Commission to allow cable operators to abrogate their franchise agreements in order to take advantage of the deregulatory OVS provisions.[5] There is nothing in either the statute or under

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[2] Second Report and Order, In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, FCC 96-249, ("Second Order") at ¶ 231.
[3] Id.
[4] Tele-TV at 3.
[5] Petition for Reconsideration of Comcast Cable Communications, Inc. ("Comcast") at 5.

general principles of contract law that permits this outcome. While contracts are often effectively "rewritten" to comply with mandatory federal regulations (i.e., statutes that make specific provisions of the contract illegal or unenforceable), the Alliance et al. is aware of no legal principle which permits unilateral abrogation of existing contractual commitments to permit an entity to take advantage of an elective deregulatory option.

Moreover, nothing in the 1996 Telecommunications Act generally impairs the ability of cable operators to fulfill the terms of their franchise agreements, both now and in the future, because Title VI was not repealed. In fact, Congress' substantial amendment of Title VI provisions in the 1996 Act indicates Congress' intention that cable operators continue to provide cable service over cable systems. Cable operators cannot avoid their contracts simply by opting out of them.

Comcast's argument that Section 624 of the Cable Act (giving franchise authorities the power to enforce contracts) does not apply to OVS begs the question. Franchise authorities still have the power to enforce their contractual rights under Section 624 (as well as under state contract law) because franchise agreements bind the corporate entity to perform under Title VI for the term of the agreement. Comcast attempts to use rhetorical sleight of hand by stating that "the underlying Title VI obligation no longer applies."[6] But it does apply. Title VI has not been rescinded, and the corporate entity is bound by the terms of the contract to be a cable system providing cable service until the franchise agreement expires. The cable operator cannot have "opted to become an OVS operator"[7] unless it is operating an additional facility; its contract binds it to providing services specified. Unless and until Title VI is itself repealed, cable operators are constrained to provide services according to its provisions for the entire length of the franchise.

[6] Comcast at 6.
[7] Id.

III. THERE IS NO NEED FOR BINDING ARBITRATION TO RESOLVE DISPUTES REGARDING PROVISION OF PEG ACCESS FACILITIES, EQUIPMENT AND SERVICES; THE 'NEGOTIATE OR MATCH" PARADIGM ENSURES COMPLIANCE WITH THE STATUTE.

The Joint Parties have suggested a third alternative to the Commission's well-considered and sensible "negotiate or match" paradigm[8] -- a Commission complaint proceeding or binding arbitration.[9] The Alliance et al. believes that neither is necessary or desirable. The Joint Parties attempt to suggest that franchise authorities will attempt to use the default mechanism provided in the law to arrange deals that exceed the provisions in the incumbent cable operator's franchise agreement -- an outcome prohibited by law. Moreover, the Alliance et al. and the National League of Cities have expressly endorsed a procedure which would allow the cable operator, the OVS operator, and the franchise authority to meet on a trilateral basis to reach an agreement which would result in a gain to the franchise authority, while potentially reducing the obligations of both the cable operator and the OVS operator. It seems that the OVS operator would have much more incentive to negotiate a favorable agreement under these circumstances, than to accept the default mechanism or a Commission proceeding.

The Alliance et al. is opposed to binding arbitration in the event of a stalemate. As the Commission knows, arbitration is not required to produce a result consonant with law -- it is only a quasi-judicial proceeding which has traditionally favored the party with greater resources. PEG access centers, many with yearly budgets in the tens of thousands of dollars, simply do not have the resources to defend their interests in a proceeding brought by a complaining LEC or to challenge an unfavorable binding arbitration result if that result is substantially less than what an incumbent cable operator is providing. The "negotiate or match" provision sensibly resolves the issue of achieving the requirements of Section 653(c)(2)(A) that the obligations imposed on OVS operators to provide PEG access, facilities, and services be "no greater or lesser" than that provided by

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[8] Second Order at ¶ 141.
[9] Joint Parties at 13.

cable operators. It avoids wasteful dispute resolution processes by offering OVS operators a binary choice, either one of which is authorized by the letter of section 653(c)(2)(A).

The Joint Parties also ask the Commission to reconsider its decision to require that OVS operators match the geographic configuration of PEG signal distribution by franchise authority.[10] In defense of this request, the Joint Parties merely state that "the Commission fails to take into account the potentially significant differences between traditional cable network build-outs and OVS networks."[11] The reason the Commission has failed to take this into account is because the Joint Parties have provided no evidence that such is the case. If the Joint Parties were to provide the Commission some evidence for the record of the substantial technological differences involved, then the Commission might have grounds for reconsidering its decision. However, in the absence of any factual record which demonstrates any sort of technical difficulty the Joint Parties might encounter, their petition for Reconsideration of this requirement should be denied.

IV. THE COMMISSION CORRECTLY DECIDED THAT FRANCHISE EQUIVALENCY FEES MUST BE PAID ON ALL GROSS REVENUES OF THE OVS OPERATOR

The various LEC commenters have asked the Commission to reconsider its decision to define "gross revenues" as "all gross revenues received by an open video system operator or its affiliates, including all revenues received from subscribers and all carriage revenues received from unaffiliated video programming providers."[12] Specifically, the LECs ask that gross revenues be assessed only on their revenues from carrying signals, not from the revenues derived from video programming, whether or not the programmers are affiliated with the operator.

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[10] Id. at 14.
[11] Id.
[12] Second Order at ¶ 220; see Joint Parties at 5; Nynex at 3

The LECs misread the law, both its letter and its intent. The law, by its use of the term "cable service" instead of "carriage",[13] clearly intends to encompass video programming within the understanding of what may be subject to the "franchise equivalent fee" provided pursuant to that section. It was the intent of Congress to impose a fee on OVS operators which would create competitive equivalency between the cable operator and the OVS operator. To limit imposition of these fees to carriage rates would both create a fee which is not nearly equivalent to the franchise fees imposed on cable operators, and is not consonant with the law passed by Congress. The Commission should not reconsider its decision in this matter.

V. CONCLUSION

For the above-stated reasons, the Alliance et al. respectfully requests that the Commission not reconsider its decisions with respect to the matters stated above

Respectfully Submitted,

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[13] § 653(c)(2)(B)