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August 5, 1996

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Ex Parte

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, DC 20554

Re: Implementation of Section 302 of the Telecommunications Act of 1996;  
CS Docket No. 96-46

Dear Mr. Caton:

This notice of a written *ex parte* presentation in the above-referenced proceedings is provided for inclusion in the public record in accordance with the Commission's *ex parte* rules.

Pursuant to a question from Cable Services Bureau Chief Meridith Jones, the attached letter was provided to her and to the other individuals identified as copy recipients of the letter.

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VARNUM, RIDDERING, SCHMIDT & HOWLETT<sup>LLP</sup>  
ATTORNEYS AT LAW

August 5, 1996  
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Please direct any questions relating to these matters to the undersigned.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT<sup>LLP</sup>



Patrick A. Miles, Jr.

mdh

c: Meredith Jones  
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August 5, 1996

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AUG - 7 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Ms. Meredith Jones  
Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Room 918  
Washington, DC 20554

**Re: OVS Rulemaking - Institutional Networks, Franchising**

Dear Ms. Jones:

Thank you for taking the time to meet with representatives of the Michigan, Illinois, and Texas ("MIT") Communities on July 30, 1996. We sincerely appreciate the opportunity to discuss issues of particular concern to consumers and municipalities with respect to the open video system (OVS) rulemaking proceeding.

You asked that the communities provide additional information concerning the following items:

- (1) Statutory and legislative history supporting the position that franchising authorities can require cable operators (and, therefore, OVS operators) institutional networks (I-NETS); and
- (2) Information useful in determining same size and demographics of communities for purposes of determining public, educational, governmental (PEG) access requirements in the absence of a current cable franchise.

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**Institutional Networks:**

MIT communities believe the Commission erroneously concluded in its Second Report and Order that Section 611 of the Communications Act does not permit franchising authorities to require cable operators to build institutional networks. Second Report and Order, at ¶ 143. Because of this assumption, the Commission failed to require OVS operators to provide institutional networks comparable to those of the incumbent cable operator. The Commission must impose institutional network obligations on OVS operators that "are no greater or lesser" than the obligations imposed on cable operators. The Telecommunications Act of 1996, § 653(c)(2).

Cable operators have built institutional networks largely because franchising authorities have the ability to require such I-NETS under Section 611.

The Commission correctly noted that municipalities may require a cable operator to provide PEG channels. Section 611 allows a franchising authority to require both channel capacity for PEG channels and channel capacity for institutional networks. The language and phraseology of Section 611(b) is identical for both PEG and institutional networks. Cable operators have built institutional networks largely because they were required to do so by franchising authorities.

The legislative history to the 1984 Cable Act supports the position of MIT Communities. In the House Report to the 1984 Cable Act, the Energy and Commerce Committee noted the following limitation on subsection 611(b):

"Subsection 611(b) does not give the franchising authority the power to override the application of state law. For example if a state law prohibits (or were to prohibit) the construction of an institutional cable network without certification from a state regulatory body, then a franchising authority's power to require construction of such a network is (or would be) contingent upon such a certification. In that case, any rules and procedures established by a franchising authority for the use of channel capacity on an institutional network must be consistent with rules established by state regulatory agencies and applicable state laws." H.R. Rep. No. 98-934, 98th Cong. 2d Sess. (August 1, 1984) [emphasis added].

As this excerpt (copy enclosed) shows, Congress recognized that franchising authorities can require cable operators to build institutional networks.

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Further, relevant provisions of the 1996 Telecommunications Act dealing with institutional networks show that Congress recognizes franchising authorities' ability to require institutional networks. Section 303 of the 1996 Telecommunications Act added the following sentence (among others) to Section 621(B) [47 USC § 541(B)]:

"(B) Except as otherwise permitted by Sections 611 and 612, the franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise." [Emphasis added].

Even though franchising authorities' ability to require institutional networks is clear under Section 611, in the above sentence Congress clearly recognizes that franchising authorities -- under Section 611 -- can require a cable operator to provide an institutional network. The Conference Report to the 1996 Telecommunications Act re-enforces this conclusion when it states, "Section 621(B) establishes that franchising authorities may not require a cable operator to provide any telecommunications service or facilities, other than inter-governmental services [i.e., I-NETS], as a condition of the initial grant of a franchise or a renewal." Conf. Rep. 104-458, 104 Cong. 2d Sess. 180 (January 31, 1996) [emphasis added].

MIT Communities respectfully submit that the Commission should incorporate changes in Rule 76.1505 to reflect franchising authorities' ability to require institutional networks. Such changes are shown in Appendix 1 to the MIT Communities' Petition For Reconsideration (filed July 5, 1996).

**Same Size and Demographics:**

MIT Communities do not believe that the Second Report and Order has the best method of determining a reasonable amount of channel capacity and other terms and conditions in the absence of a previous cable franchise agreement or an agreement negotiated between the OVS operator and the local franchising authority. The Commission has chosen to rely on comparing the franchise agreements for the nearest operating cable system with a commitment to provide PEG access. Second Report and Order, at ¶ 152.

MIT Communities submit that this comparison will not yield appropriate results. Instead, we suggest that the Commission utilize a comparison based on community size and demographics. As you requested, we have attached a memo from Jean Rice, of Rice, Williams & Associates, which includes examples of how to phrase such a comparison.

VARNUM, RIDDERING, SCHMIDT & HOWLETT<sup>LLP</sup>  
ATTORNEYS AT LAW

August 5, 1996

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We hope that the above information is helpful to you. Again, thank you for taking the time to meet with us.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT<sup>LLP</sup>



Patrick A. Miles, Jr.

mdh/enclosure

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**Legislative History**

98TH CONGRESS  
2d Session

HOUSE OF REPRESENTATIVES

REPORT  
98-934

**CABLE FRANCHISE POLICY AND  
COMMUNICATIONS ACT OF 1984**

**R E P O R T**

OF THE

**COMMITTEE ON ENERGY AND COMMERCE**

together with

**ADDITIONAL AND SEPARATE VIEWS ON H.R. 4103**

[Including cost estimate of the Congressional Budget Office]



AUGUST 1, 1984.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

51-081 0

WASHINGTON : 1984

agreement, or otherwise) issued by a franchising authority to a cable operator for the construction or operation of a cable system, or the renewal of such an authorization, including a renewal granted subject to section 626 of Title VI. In includes any amendments, modifications or collateral agreements directly ancillary to such authorization.

The term does not include any authorization issued under section 214 of the Communications Act of 1934, or under any provision of any state law regarding the construction or extension of the facilities of communications common carriers.

The Committee does not intend the definition of this term or any other provision of H.R. 4103 to overturn *Chronicle Publishing Co. v. Commissioner of Internal Revenue*, 67 T.C. No. 80, Docket 855-74 (March 21, 1977), which allows the depreciation of cable franchises for tax purposes.

"Franchising authority" means any governmental entity empowered by Federal, state, or local law to grant a franchise. In several states, such as New York, the franchising process includes approval of a franchise by a state agency as well as by a local government. The Committee intends that in such cases the term "franchising authority" shall include these state agencies, in addition to any local government body with authority to grant a franchise, including a military authority if authorized to grant such a franchise.

"Grade B contour" means the field strength of a television broadcast station, as computed by the Commission. The current formula for computing the grade B contour is found at 47 CFR 73-684.

"Other programming service" means information that a cable operator makes available to all subscribers generally. This term is part of the definition of "cable service," as analyzed above.

"Person" means an individual, partnership, association, joint stock company, trust, corporation, or government entity.

"Public, educational, or governmental access facilities" means channel capacity (including any channel or portion of any channel) designated for public, educational, or governmental use, as well as facilities and equipment for the use of such channel capacity. This may include vans, studios, cameras, or other equipment relating to the use of public, educational, or governmental channel capacity.

"Service tier" means a category of video programming or other cable services which is provided by a cable operator, and for which a separate rate is charged by the cable operator.

"State" means any state, or political subdivision, or agency thereof.

"Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

#### PART II—USE OF CABLE CHANNELS AND OWNERSHIP RESTRICTIONS

##### *Section 611. Channels for public, educational, or governmental use*

Subsection 611(a) grants franchising authorities explicit authority to establish requirements for the designation and use of public, educational and governmental ("PEG") access channels. Franchising authorities may only regulate PEG channels to the extent provided in this section.

A franchising authority, under 611(b), may require as part of its request for proposals the number of channels that an operator must set aside for public, educational or governmental use.

Subsection 611(b) also permits franchising authorities to require that channel capacity on institutional networks be designated for educational or governmental use. The term "institutional network" means a communication network which is constructed or operated by the cable operator and which is generally available only to non-residential subscribers. The Committee intends that an institutional network which is designed to provide cable service which includes video programming would be a cable system.

Subsection 611(b) does not give the franchising authority the power to override the application of state law. For example, if a state law prohibits (or were to prohibit) the construction of an institutional cable network without certification from a state regulatory body, then a franchising authority's power to require construction of such a network is (or would be) contingent upon such a certification. In that case, any rules and procedures established by a franchising authority for the use of channel capacity on an institutional network must be consistent with rules established by state regulatory agencies and applicable state laws. In addition, compliance with rules established by a franchising authority would not automatically constitute compliance with any additional obligations—such as obtaining tariff approval—that might exist under state law or regulation. ★

Subsection 611(b) further authorizes franchising authorities to require that a cable operator's proposal for renewal includes a specified number of PEG channels and, as to any institutional network, a specified number of educational or governmental channels. With respect to a renewal proposal, PEG requirements imposed by a franchising authority are subject to the standards against which a renewal proposal is to be considered as set forth in section 626.

Franchising authorities may require rules and procedures governing channel capacity designated for public, educational or governmental use, as well as rules and procedures for the educational and governmental use of channel capacity designated for use on institutional networks. Franchising authorities may require a portion of a channel to be set aside for a certain access use, rather than an entire channel. Subsection 611(c) authorizes franchising authorities to enforce any franchise provision related to the use of PEG channel capacity, or related to services, facilities or equipment to be provided for PEG use, whether or not the franchise provisions were required by a franchise authority as part of its request for proposals (RFP).

Thus, offers for the provision of PEG services, facilities and equipment by a cable operator in excess of minimum requirements that might be established in an RFP, which are then reduced to the franchise, are fully enforceable by the franchising authority. (See section 622 for explanation of relationship of franchise fee to PEG related expenditures). It should be noted that pursuant to section 638 the provisions of existing franchises covering PEG channel capacity and its use as well as services, facilities and equipment (such as studios, cameras, and vans) related thereto, are fully grandfathered.

The Committee notes that in many localities today there is more channel capacity set aside for PEG use than there is actual use of those channels. The Committee believes that in such instances the needs and interests of cable subscribers would be better served by allowing unused PEG channel capacity to be used by the operator for the provision of other cable services, rather than those channels remaining "dark" until use of this channel capacity for PEG purposes increases. Section 611(d), which applies to all existing and future franchises, provides for the use, under these circumstances, of channel capacity designated for PEG purposes, and directs the franchising authority to prescribe rules and procedures for the use of unused PEG channel capacity by the cable operator.

In the case of existing franchises, the Committee expects that franchising authorities will develop such rules expeditiously, and that the development of such rules will not require any amendment of the franchise. Such rules might, but need not, involve combining different access functions on the same channel on a temporary basis until need of the channel capacity designated for each of the functions more fully develops. In any case, the Committee does not intend that this provision constitute a basis for a franchising authority to establish PEG requirements where they do not now exist in the franchise.

The Committee notes that where demand for use of such channel capacity for public, educational or governmental purposes develops, subsection 611(d) is not intended to frustrate use of these channels for those purposes. Accordingly, the franchising authority is further directed to develop rules to assure that when there is appropriate demand for use of those channels designated for PEG purposes, cable operator use of those channels ceases.

The Committee believes that it is integral to the concept of the use of PEG channels that such use be free from any editorial control or supervision by the cable operator. Subsection 611(e) so provides. There is no limitation imposed on a franchising authority's or other governmental entity's editorial control over or use of channel capacity set aside for governmental purposes. However, the Committee does not intend that franchising authorities lease governmental channels to third parties for uses unrelated to the provision of governmental access except where the provisions of the existing franchise, which are grandfathered under subsection 638(a), explicitly so provide.

#### *Section 612. Cable channels for commercial use*

An important concept in assuring that cable systems provide the public with a true diversity of programming sources is leased access. Leased access is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings he makes available to subscribers. Thus, section 612 establishes a scheme to assure access to cable systems by third parties unaffiliated with the cable operator, and thereby promotes and encourages an increase in the sources of programming available to the public.

The term "leased access" is one that is generally used in the industry to describe access channels set aside for commercial pur-



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RICE, WILLIAMS ASSOCIATES

MEMORANDUM

**DATE:** July 31, 1996

**TO:** Rick Chesson, Assistant Chief  
Policy and Rules Division  
FCC Cable Service Bureau

**FROM:** Ms. Jean A. Rice  
Partner

**RE:** Access Default Trigger and Institutional Legislative History

---

Following is a list of comparative trigger mechanisms we have used in cable franchises regarding triggering state of the art clauses. As you can see, these have been designed for specific cities. I hope they will be of some use to you.

- ...any system of similar size owned by Grantee, its parent company, management firm or affiliates
- ...any other similar sized market... and are owned by the Grantee or parent company and/or owned by other operators in the States of North Carolina and Virginia
- ...in any other similar sized market and..., and are owned by the Grantee or parent company and/or owned by other operators in the State of Iowa
- ...in the majority of cable systems not owned by the Franchisee or its parent company within the metro five-county area of Atlanta (Clayton, Cobb, DeKalb, Fulton and Gwinnett)... and in the three (3) largest cable systems within the majority of the largest twenty-five (25) MSAs (Metropolitan Statistical Areas)
- ...Grantee's and parent Company's systems in the following states: Alabama, Georgia, North Carolina, South Carolina, Tennessee, Virginia and West Virginia. Acquired systems shall only be included after they have been held by the Grantee for a period of five years

**MEMORANDUM**

Mr Rick Chessen

July 31, 1996

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- ...in a system with over 50,000 subscribers which is owned by Continental or located within the New York MSA

Other criteria could include similar age of the cable system and similar demographics.

As was requested in the meeting I attended with your Bureau, we checked the legislative history on the Cable Communications Policy Act of 1984, Section 611, regarding institutional networks and found an example which indicates that State law may prohibit cities from requiring institutional networks. A copy of the legislative history of Section 611 is attached.