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

In the Matter of	)	
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	)	CS Docket No. 96-133
Annual Assessment of the Status of	)	
Competition in the Market for the	)	
Delivery of Video Programming	)	DOCKET FILE COPY ORIGINAL
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REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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The National Cable Television Association, Inc. ("NCTA"), by its counsel, hereby submits its reply comments regarding the Commission's Third Annual Report to Congress on the status of competition in the multichannel video programming market. NCTA is the principal trade association of the cable television industry. Its members include the owners and operators of cable systems serving 80 percent of the nation's cable television subscribers and over 100 program networks that now command 50 percent viewership in cable households. NCTA's membership also includes equipment manufacturers and others affiliated with the cable television industry.

I. INTRODUCTION AND SUMMARY

The Commission recently wrote what could be the first sentence of its Third Annual Report to Congress: "[T]he market for video services has experienced an increase in competition from alternative providers of video programming. The 1996 Act should stimulate competition further by lifting restrictions on local telephone companies providing video

programming in their telephone service areas."[1] NCTA's comments[2] in this proceeding buttress this conclusion and not only demonstrate that competition in the video marketplace is strong, but also that it is accelerating rapidly. Direct broadcast satellite ("DBS") is now providing vigorous competition to cable. Competition from wired systems owned by telephone companies is beginning in earnest. Competition from alternative technologies such as digital MMDS is projected to increase rapidly, especially with some of the recent large financial investments from regional telephone companies. Broadcast television continues to be a powerful competitor to cable and to dominate the nation's viewing patterns. As discussed herein, the comments filed by other parties in this proceeding provide additional data on these developments and confirms the trends discussed in our initial comments.

In our initial comments, we also made two recommendations that, if acted upon, would enhance competition in the video marketplace. We requested uniform national rules for telecommunications interconnection, which the Commission has now adopted. We also requested that the Commission act upon the growing number of effective competition petitions from cable companies and adopt final rules on effective competition. Until the Commission acts on these petitions, cable companies are restricted in their ability to respond promptly -- if at all -- to their competitors, which ultimately deprives consumers of the benefits of competition.

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1 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266; In the Matter of Cable Pricing Flexibility, CS Docket 96-157, FCC 96-316, Memorandum Opinion and Order and Notice of Proposed Rulemaking, released August 15, 1996 at ¶12. ("Cable Pricing Flexibility NPRM")

2 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of the National Cable Television Association, July 19, 1996 ("NCTA Comments").

In contrast, some other commenters sought to capitalize on this annual inquiry by requesting substantial regulatory concessions from the Commission or sweeping legislative changes from Congress. As appears to have become a tradition, cable's competitors have once again tried to redirect this proceeding to advance a wish list of schemes and strategies designed to give them an unwarranted competitive advantage. Most of these issues are being dealt with in other Commission proceedings (e.g. proposals regarding cable inside wiring, effective competition standards, bulk discount rules, OVS cost allocation rules). Some of the proposals have already been rejected (e.g., program access, cable/DBS cross-ownership proposals). We urge the Commission not to become side-tracked with these proposals in this proceeding.

For the reasons stated below, the Commission's Third Annual Report to Congress should recognize the changed competitive environment facing the cable industry -- just as Congress itself acknowledged those changes in relevant provisions of the Telecommunications Act of 1996.[3] At the same time, the Commission must reject the self-interested pleas of cable's competitors for rules which would put a brake on competitive developments in the video marketplace.

II. THE COMMENTS IN THIS PROCEEDING CONFIRM THE INCREASE IN COMPETITION TO CABLE SINCE THE 1995 REPORT

In our initial comments, we demonstrated that competition to cable has increased from DBS, telephone company-owned traditional wired cable systems, SMATV systems and MMDS. We also showed that regional telephone companies have made substantial financial investments in digital MMDS systems with the capacity to deliver over 100 channels of video. The

[3] Pub. L. No, 104-104, 110 Stat. 56 (1996) ("1996 Act").

submissions of other commenters confirm these competitive trends, especially the rapid growth of DBS and the increase in competition from wired cable systems owned by telephone companies.

A. DBS Has Experienced Explosive Growth

In its comments, the Satellite Broadcasting and Communications Association of America ("SBCA") asserts that:

> [I]t is clear that the Commission's policies to encourage diversity, choice and competition in the video market place are beginning to take effect. The growth in DTH subscribers, driven principally by the advent of small dish antennas and a greater variety of programming and channel capacity due to digital compression, portends a healthy future for the DTH industry.[4]

Indeed, as is universally acknowledged, DBS equipment is the fastest-growing consumer electronics product in history. According to SBCA, in just the past year, total DBS subscribership (excluding C-band) has grown from 3.22 million, or 3.5 percent of U.S. television households as of (June 1, 1995) to 5.465 million, or 5.6 percent of U.S. television households (as of July 1, 1996).[5] SBCA has estimated that direct-to-home ("DTH") systems of all kinds (including C-band) will be in 8 million U.S. households by the end of 1996.[6]

In our initial comments, we also cited a projection by an independent consulting firm that estimated that total DTH (including C-band) subscribers would almost triple to 16 million

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[4] In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of the Satellite Broadcasting and Communications Association, July 19, 1996, at 19 ("SBCA Comments").

[5] SBCA Comments at 7. In our initial comments, we may have underestimated the growth of DBS. Based on publicly available information, we estimated that total DBS subscribers (excluding C-band) would grow to 5.7 million subscribers by December 1996. NCTA Comments at 10.

[6] Jim McConville, *What's Up There: a DTH Directory*, BROADCASTING AND CABLE, August 12, 1996, at 82.

subscribers by the year 2000.[7] A recent Wall Street Journal article estimated that DBS providers could gain as many as 12 million new subscribers in the next four years, which would bring the total DTH (including C-band) subscriber count to 20 million by the year 2000.[8]

The comments of DBS provider DirecTV reinforce how dramatic its recent growth has been and how optimistic its management is regarding future growth. On June 30, 1995, DirecTV had approximately 600,000 subscribers.[9] As of June 30, 1996, DirecTV's subscriber base had grown to 1.6 million.[10] This is an annual growth rate of 160 percent. Recently, DirecTV president Eddy Hartenstein predicted that DirecTV would reach 3 million subscribers by the end of 1996.[11] This is in large part because of the joint marketing agreement between AT&T and DirecTV which is linked to AT&T's 2.5 percent ownership of DirecTV. AT&T has options to increase its investment in DirecTV to up to 30 percent over five years, depending primarily on the number of new DirecTV subscribers AT&T enrolls over specific time periods.[12]

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7 NCTA Comments at 10.

8 Mark Robichaux, *DirecTV Plans to Offer Cut in Dish Price*, THE WALL STREET JOURNAL, August 13, 1996, at A6 ("Robichaux").

9 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61, FCC 95-491, 11 FCC Rcd 2060, 2081 (1995) ("*1995 Competition Report*").

10 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of DirecTV, July 19, 1996, at 4 ("DirecTV Comments").

11 Evan Ramstad, *AT&T Venturing into the Direct-Satellite TV Business*, CHARLOTTE OBSERVER, March 26, 1996.

12 DirecTV Comments at 4.

DirecTV plans to reduce its prices for dish equipment in the next several weeks in response to competition from EchoStar.[13] The promotion will involve a steep discount, probably in the form of a rebate, for customers who sign long-term programming agreements.[14]

In sum, the SBCA and DirecTV comments buttress the evidence that cable today faces formidable competition from direct-to-home satellite-delivered video programming.

B. Competition in Wired Systems Owned by Telephone Companies Has Arrived

The comments demonstrate that telephone company owned and operated cable systems are becoming a competitive force in the video marketplace. For example, US West has invested heavily in traditional wired cable systems, acquiring Continental Cablevision, Wometco Cable Company, Georgia Cable TV and 25 percent of Time Warner Entertainment, which includes Time Warner Cable.[15] Ameritech has launched an 81-channel wired service in direct competition with the Time Warner system in Columbus, Ohio[16] and Sprint's video dialtone trial is underway in Wake Forest, North Carolina.[17]

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[13] Robichaux at A3.

[14] Id.

[15] NCTA Comments at Appendix B.

[16] Id. at 14.

[17] Id.

In its comments, Ameritech describes its acquisition of 20 cable franchises in four midwestern states.[18] The total population of these franchised areas is over 1.2 million.[19] The largest of these franchise areas, Columbus, Ohio, has a population of 600,000.[20] According to Ameritech, in some areas where Ameritech has secured a franchise, the incumbent cable operator has already begun offering substantial discounts for long term commitments.[21]

Other RBOCs report similar growth. According to SBC Communications, it is offering wired cable service in Richardson, Texas, which has prompted a competitive response from the incumbent cable operator.[22] Similarly, in Chamblee, Georgia, BellSouth is overbuilding incumbent cable operator Comcast. According to BellSouth, Comcast has responded with plans to upgrade its system to add an additional 30 channels at no extra cost to subscribers.[23] BellSouth is now seeking cable franchises in ten of its top fifteen telephone markets.[24] It has

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18 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of Ameritech, July 19, 1996, at 3 ("Ameritech Comments").

19 Id.

20 Id.

21 Id. at 6.

22 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of SBC Communications, July 19, 1996, at 3-4 ("SBC Comments").

23 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of BellSouth, July 19, 1996, at 2 ("BellSouth Comments").

24 Alan Breznick, *BellSouth Widens Video Strategy*, CABLE WORLD, July 29, 1996, at 4.

filed applications for 22 cable franchises in the greater Atlanta, Miami, Orlando, Memphis, Raleigh and Charlotte areas.[25]

In its comments, Bell Atlantic reports on the video dialtone system it launched in January 1996.[26] Future Vision is the only currently active video programming provider on the network.[27] As of April 30, Future Vision had signed up 2,185 subscribers of a potential 3,125 homes.[28] This is a penetration of 69.9 percent, which would be enviable in a new build cable system, but is especially remarkable given the presence of an incumbent cable operator. Bell Atlantic is building an all-digital, fiber-to-the-curb network which will provide voice, data, and video services in Dover Township, New Jersey.[29] Bell Atlantic has completed construction to 13,000 homes (34 percent) to date, and expects to complete construction to all 38,000 homes by the fourth quarter of 1998.[30]

According to Bell Atlantic, the incumbent cable operator, Adelphia, lowered its monthly rate for basic service from $25.28 to $18.95 to compete with Future Vision's initial price of $19.95.[31] Future Vision then lowered its price to $14.95.[32] Adelphia responded that it would

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25 Id.

26 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of Bell Atlantic, July 19, 1996, at 5 ("Bell Atlantic Comments").

27 Id.

28 Id.

29 Id. at 6.

30 Id.

31 Id.

32 Id.

offer high-speed Internet access for schools, high speed Internet access for cable subscribers, future local telephony service, a new analog set-top box with interactive features, and the future capability to offer up to 200 digital channels.[33]

Pacific Telesis plans to offer wired video services in San Diego and the San Francisco Bay area by the end of 1996.[34] This is pursuant to the Commission's approval of Pac Tel's applications for video dialtone in specific locations in California in July 1995.[35]

Finally, on August 7, 1996, the Commission completed reconsideration of its Open Video Systems ("OVS") rulemaking thereby providing the final rules for another outlet for video competition as mandated by the 1996 Act.[36] As NCTA has argued elsewhere, the Commission must act promptly to adopt rules to govern the allocation of costs for local exchange carrier provision of OVS over facilities also used for telephone service to ensure that OVS is not financed by captive ratepayers. Nevertheless, if OVS has the effect intended by Congress and the Commission, the landscape of the video marketplace will change dramatically.

As the comments in this proceeding demonstrate, telephone company investment in wired cable systems is growing apace and has already touched off fierce competition in some markets. This development should be acknowledged in the Third Annual Report to Congress.

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33 Id.

34 Pacific Telesis, Notice of Proxy: 1995 Consolidated Annual Meeting Statement, December 31, 1995, *available in* Disclosure Incorporated, EdgarPlus.

35 Id.

36 Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, Third Report and Order and Second Order on Reconsideration, CS Docket No. 96-46, FCC 96-334, released August 8, 1996.

C. Competition from Alternative Technologies such as Digital MMDS is Imminent

In addition to wired cable construction, local exchange companies have invested substantial amounts of money in MMDS. The Commission has fostered such investment by employing a light regulatory hand and taking steps to increase the industry's channel capacity and access to programming. Indeed, the Commission recently granted a petition for declaratory ruling permitting the use of digital modulation by MMDS.[37] This action should hasten the introduction of advanced telecommunications services and digital compression to expand MMDS channel capacity. In its comments, Bell Atlantic recognizes that "conversion of MDS and ITFS from analog to digital will allow wireless cable operators to increase their channel capacity and service offerings, making them more competitive with other video delivery methods, such as DBS and wired cable systems."[38]

Bell Atlantic is one of the regional telephone companies that has made a large financial investment in MMDS.[39] Their agreement with MMDS operator CAI covers 13 markets and 12 million line of sight homes.[40] Bell Atlantic will launch the first system under this agreement in

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[37] Request For Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, DA 95-1854, Declaratory Ruling and Order, FCC 96-304, July 10, 1996.

[38] Bell Atlantic Comments at 10.

[39] NCTA Comments at 16.

[40] Dana Cervenka, *MMDS Standing Tall on Digital Technology, RBOC $$,* COMMUNICATIONS ENGINEERING AND DESIGN, July 1996, at 58 ("Cervenka").

the first quarter of 1997 in the Norfolk-Portsmouth-Virginia Beach area of Virginia.[41] The system will offer 120 digital channels and at launch will be available to 400,000 homes.[42]

Other regional telephone companies which have made substantial investments in digital MMDS include BellSouth and Pacific Telesis. BellSouth will begin providing 100 channels of digital MMDS in greater New Orleans in mid-1997.[43] When Pac Tel's acquisitions of MMDS companies, valued at $300 million, are complete, it will have access to 9 million line-of-sight homes.[44]

Cable companies will be facing increasing competition from well-financed telephone-company backed MMDS systems in major urban areas by early 1997. This significant development should be reported to Congress in the Third Annual Report.

* * *

As the record in this proceeding demonstrates, the marketplace for video programming distribution is significantly more competitive now than when the *1995 Competition Report* was issued. Because of the pace of technological change and the entry of new, well-financed competitors into this marketplace, competition can be expected to continue to intensify. This trend was recognized by Congress in the 1996 Telecommunications Act; the Commission should do no less in its Third Annual Report.

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[41] Alan Breznick, *Bell Atlantic Ready to Launch Tele-TV Package in Virginia*, CABLE WORLD, June 17, 1996, at 58.

[42] Id.

[43] Cervenka at 58.

[44] Id.

III. THE COMMISSION SHOULD REJECT PROPOSALS BY CABLE'S COMPETITORS TO PLACE REGULATORY STRAIT JACKETS ON CABLE

As might be expected, many of cable's competitors -- whose remarkable growth is detailed in their own comments -- urge the Commission to impose even more burdensome regulatory requirements on cable so that they can have a "fair advantage" in the fight for the video programming customer. It is ironic, to say the least, that at a time when Congress and the Commission have begun to recognize and alleviate some of the regulatory constraints on cable's ability to respond to competition,[45] cable's competitors continue to seek the imposition of even greater restrictions on the cable industry. Most of their proposals are the subject of pending rulemaking proceedings and have been fully briefed by NCTA and others in those proceedings. Others have already been rejected by the Commission. The Commission can hardly be expected to make recommendations to Congress embodying proposals which have either been rejected or are currently the subject of contested proceedings. In any event, none of the suggestions deserve attention in this proceeding.

A. The Commission Has Denied Proposals to Modify the Program Access Rules and to Adopt a Cable/DBS Cross-Ownership Ban

The Residential Communications Network ("RCN") asks the Commission to extend the program access rules -- an issue that was fully vented and rejected by the Commission last year. In defiance of the clear statutory mandate, RCN once again urges the Commission to interpret

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[45] See, generally, 1996 Act at Section 301; Cable Pricing Flexibility NPRM at ¶16. ("Because [cable's] competitors are not subject to the type of rate regulation imposed upon cable operators by the Communications Act, they have greater flexibility to restructure their pricing as well as the services they offer consumers.")

the program access provisions of the Communications Act[46] to apply not only to vertically-integrated satellite-delivered programming but also to terrestrial-delivered programming from non-vertically integrated companies.[47]

At the outset, the interpretation sought by RCN is foreclosed by the legislative history of the relevant provisions. As we described in detail in our comments in connection with the Commission's 1995 Competition Report, Congress plainly limited program access requirements to vertically-integrated satellite-delivered programming.[48] In the *1995 Competition Report*, the Commission had sought comment on whether it should recommend to Congress that it amend the program access rules to make them applicable to all cable program providers, not just those that are vertically-integrated or satellite-delivered.[49] The Commission correctly rejected such suggestions to extend the existing program access rules observing that:

> In general, we continue to believe that the program access rules, as enforced by the Commission, successfully promote competition from existing and potential competitors in the video programming distribution market, and do not unreasonably inhibit efficient integration or restrict the development and distribution of new programming.[50]

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46 47 U.S.C. § 548 (b) (1995).

47 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of Residential Communications Network, July 19, 1996, at 5 ("RCN Comments").

48 See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, Comments of the National Cable Television Association, Inc., filed June 30, 1995 at 35-39.

49 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, Notice of Inquiry, 10 FCC Rcd 7805, 7821 (1995).

50 Id.

As NCTA and others have said repeatedly, the record is devoid of compelling evidence that non-vertically integrated programmers have failed to provide access to alternative multichannel video programming providers nor would those programmers have an incentive to do so. The Commission rejected this proposal for good cause last year. Nothing has changed since then which would cause the Commission to revisit the issue.

The National Rural Telecommunications Cooperative ("NRTC") also attempts to resurrect a dead issue: a DBS/cable cross-ownership ban. It contends that cable ventures into DBS, such as Primestar, should not be allowed because "cable affiliated entities would have an incentive to minimize competition from any DBS resources they control, and would coordinate their joint activities to maximize their combined profits."[51] But Congress and the Commission have already rejected such a prohibition.

In the course of enacting the 1992 Cable Act, Congress stripped from the Senate bill a provision that would have required the Commission to adopt a DBS/cable cross-ownership restriction when DBS services obtained ten percent of the television households. The Conference Report found that such limitations would, at a minimum, be premature.[52] Recently, the Commission considered but declined to adopt cable/DBS cross-ownership restrictions. It found that its structural rule restricting ownership of orbital locations was satisfactory to spur adequate competition within the DBS marketplace and among MPVDs overall.[53] The

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[51] In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of National Rural Telecommunications Association, July 19, 1996, at 5 ("NRTC Comments").

[52] Conference Report on S.12, 102d Cong., 2d Sess., 138 Cong. Rec. H8329 (daily ed. Sept. 14, 1992).

[53] In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order, IB Docket No. 95-168, PP Docket No. 93-253, 1995 FCC LEXIS 8021.

Commission reasoned "competition involving several full-CONUS DBS operators should . . . constrain a cable-affiliated DBS operator from positioning its services in a manner that avoids competition with cable systems."[54]

As described in our initial comments and in these reply comments, the DBS marketplace is even more vibrant now than when these previous determinations were made. Given this dynamic and growing market, there is simply no reason to revisit the Commission's earlier conclusions that cable ownership of DBS services is permissible.

B. The Commission Should Reject Other Proposals that are the Subject of Pending Proceedings

A number of other proposals urged by commenters have been raised and are currently being considered in pending Commission proceedings. NCTA and others have fully briefed these issues in those proceedings. The commenters here offer nothing new. In any event, it would be inappropriate to make recommendations to Congress on these issues when the Commission is now considering them in contested rulemaking proceedings.

Inside Wiring. RCN urges the Commission to "resolve promptly the cable inside wiring issue" and to move the demarcation point to "where the common line meets the dedicated line."[55] Proposals to allow cable's competitors to usurp a cable operator's inside wiring in multiple dwelling units ("MDUs") have been exhaustively briefed by NCTA and other parties in two pending Commission proceedings. In comments in those proceedings, we demonstrated that moving the demarcation point beyond its current location in MDUs is outside the bounds of

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[54] Id. at *26.

[55] RCN Comments at 7.

the 1992 Cable Act and the Telecommunications Act of 1996. And, as a policy matter, we showed that such proposals would impede rather than promote competition by creating a world in which all broadband services are delivered by a single provider -- a far cry from the multi-wire, competitive model envisioned by the Commission and codified by Congress in the Act.[56]

Moreover, proposals to move the demarcation point would deter cable investment because they would increase the risk that the new or upgraded facilities would be surrendered to a competitor, and therefore could not be used to deliver the services which stimulated the investment. This will only diminish consumer choice by undermining existing marketplace incentives that encourage network upgrades and the deployment of competitive end-to-end broadband networks.

Bulk Discounts. The Wireless Cable Association ("WCA") and OpTel urge the Commission to apply the bulk discount exception to the uniform rate structure rules only where the cable operator negotiates a single bulk sale with the MDU property owner or manager and the discount is deducted from a bulk payment paid by the property owner on behalf of the MDU residents, not where the cable operator offers discounted rates on an individual basis to subscribers on the basis of their residence in an MDU.[57]

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[56] In the Matter of Telecommunications Services-Inside Wiring, CS Docket No. 95-184, and In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Docket No. 92-260, NCTA Comments, March 18, 1996, at 29; NCTA Reply Comments, April 17, 1996 at 6.

[57] In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of the Wireless Communications Association, July 19, 1996, at 16 ("WCA Comments"); In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Comments of OpTel, July 19, 1996, at 4 ("OpTel Comments").

The proper interpretation of the bulk discount exception to the uniform rate requirement is the subject of an ongoing proceeding (CS Docket No. 96-85) implementing the cable reform provisions of the 1996 Act.[58] For the reasons stated in NCTA's comments in that proceeding, the Commission should not adopt this strained reading of the Act.[59]

Effective Competition. The 1996 Act adds a new "effective competition" test which, if met, frees a cable system from rate regulation. The new test is triggered by the presence of competition from a multichannel video programming provider (other than DBS) in which a local exchange carrier has the requisite interests. Ignoring the plain meaning of the statute, OpTel suggests that, in order to be subject to "effective competition" under the new definition, a cable operator should be required to prove that competition is having a restraining effect on rates.[60] This is an issue which is the subject of considerable comment, both in the cable reform proceeding (CS Docket 96-85) as well as in the various proceedings triggered by the filing of "effective competition" petitions by a number of cable operators. It will -- and should -- be resolved in those proceedings and should not be the subject of a recommendation to Congress in the interim.

WCA warns of the danger of finding "effective competition" where none exists and thereby lifting the uniform pricing requirement prematurely.[61] WCA cites the competitive

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[58] Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, CS Docket No. 96-85, Notice of Proposed Rulemaking FCC 96-154, released April 9, 1996, at ¶34.

[59] In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, CS Docket No. 96-85, Comments of NCTA, June 28, 1996, at 44-45 ("Cable Reform: NCTA Comments").

[60] OpTel Comments at 3.

[61] WCA Comments at 14.

situation between Adelphia Cable and wireless cable operator CFW Cable in Charlottesville, Virginia a purported illustration of its concern.[62]

WCA claims that Adelphia is not facing effective competition in Charlottesville because CFW Cable serves a small number of subscribers in Charlottesville and Albemarle County and because CFW Telephone, the parent company of CFW Cable, does not provide local exchange services in Charlottesville or Albemarle County. This issue too is included in the ongoing proceeding in CS Docket No. 96-85 as well as in the proceeding to which WCA alludes in which Adelphia has filed a petition seeking a declaration that it faces effective competition in Charlottesville.[63] It has been exhaustively briefed by parties on both sides. WCA offers nothing new here and the Commission should reject the proposal to construe local exchange carrier affiliation more narrowly than the plain language of the statute warrants.

OVS Cost Allocation. The rules associated with cost allocation for OVS services are the subject of a pending rulemaking proceeding, CC Docket No. 96-112. In its Notice of Proposed Rulemaking in that proceeding, the Commission tentatively concluded that common loop costs utilized in the provision of telephony and video services should be allocated to these two types of services equally. In this proceeding, SBC Communications complains that "[a]rbitrary allocations of that nature are significantly punitive, disincenting LEC new market entrants such as SBC from entering the video market using integrated broadband networks."[64]

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[62] Id. at 14-15.

[63] See In re Petition of Multi-Channel TV Cable Company d/b/a Adelphia Cable Communications, CSR-4750:E, Response in Opposition to Petition for Decertification and Finding of Effective Competition, filed by City of Charlottesville, June 19, 1996 (raising local exchange carrier issue).

[64] SBC Comments at 5.

As with the other proposals previously discussed in this section, the issue of OVS cost allocation is the subject of an extensively-briefed pending rulemaking. In that proceeding, NCTA supported a fixed factor allocation such as the 50-50 allocation proposed by the Commission. As its fellow BOCs have done in that rulemaking proceeding, here SBC would have the Commission distort the video market through the creation of artificial economic incentives by the misallocation of common costs of integrated networks. Complaints about the overallocation of costs to competitive services are actually complaints about the removal of uneconomic cross-subsidies. The viability of providing video services over integrated networks should not be permitted to depend upon cross-subsidies from local telephone ratepayers. Rather, the viability of integrated network construction must stand or fall without coerced financial assistance from local ratepayers. Otherwise, market-based incentives for entering competitive fields will be severely distorted and the Commission's mandate to protect the public interest will be ignored.[65] The Commission should ignore SBC's inappropriate request in this proceeding and promptly resolve the cost allocation issues in its pending rulemaking.

"Fresh Look" Doctrine. OpTel suggests that exclusive contracts between a cable operator (but not any other MVPD) and an MDU be subjected to the "fresh look" doctrine, which has occasionally been applied in common carrier regulation.[66] OpTel has recently made this same proposal in MM Docket No. 92-260 and CS Docket No. 95-184, dealing with cable home wiring and inside wiring. Because the OpTel ex parte filing was made after the scheduled

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[65] For a detailed discussion, see In the Matter of Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services, CC Docket No. 96-112, Reply Comments of National Cable Television Association, June 12, 1996.

[66] OpTel Comments at 8-9.

pleading cycle had concluded in that docket, cable parties in that proceeding have not yet had an opportunity to brief the "fresh look" issue fully.

While OpTel's suggestion should be dealt with in the pending inside wiring docket, suffice it to say now that its argument is premised on a false assumption that cable agreements with MDUs are the result of monopoly, take-it-or leave it negotiations while SMATV agreements with MDUs are not. There is no proof that exclusive cable agreements are the result of any different process than the SMATV agreements in existence today. OpTel's attempt to label cable's contracts as "perpetual" do nothing to change the fact that those agreements were, and are, proper, privately-negotiated, exclusivity agreements of the same type that OpTel endorses. In fact, the SMATV industry has existed at least since the 1980s, when OpTel claims that many of these "perpetual" agreements were signed.[67]

In contrast, the contracts OpTel complains about are no different from those it enters into with MDUs in the open market. Indeed, OpTel states that the "economics of the MDU marketplace require the use of exclusive service agreements...."[68] This demonstrates that MDUs have had a choice in video providers and no changed circumstances justify application of the "fresh look" doctrine here.

In any event, the "fresh look" doctrine has been applied in common carrier regulatory environments where an area previously subject to monopoly is opened to competition or is the subject of significant changed circumstances. This was the case where the 800 number market -- which previously had been the sole province of AT&T because of the lack of 800 number

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[67] Id.

[68] Id. at 2.

portability -- was made subject to number portability requirements. As a result, the Commission thought it fair to give customers with long-term AT&T 800 number contracts a "fresh look" to determine if they wanted to keep those contracts or switch to another 800-number provider.[69] No similar circumstances warrant application of the policy to non-common carrier contracts such as OpTel proposes.

IV. CONCLUSION

For the foregoing reasons, NCTA respectfully urges the Commission to report to Congress that a vibrant competitive marketplace now exists for the distribution of video programming.

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[69] Competition in the Interexchange Marketplace, 7 FCC Rcd 2677, 2678 (1992).