

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

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In the Matter of)
)
)
Section 257 Proceeding to Identify)
and Eliminate Market Entry Barriers)
for Small Businesses)

GN Docket No. 96-113

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COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Inquiry ("Notice") in the above-captioned proceeding. 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 cable program networks that now command 50 percent of the viewership in cable households. NCTA's membership also includes cable equipment suppliers and others interested in or affiliated with the cable television industry. These comments will address the entry barriers facing small cable operators seeking to compete in the telecommunications marketplace.

INTRODUCTION AND SUMMARY

The Notice in this proceeding seeks information necessary to fulfill the Commission's obligations under Section 257 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.¹ That provision charges the FCC with the task of identifying

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

and eliminating market entry barriers that deter the formation and expansion of small telecommunications businesses.

Small cable operators fall squarely within the group of telecommunications businesses addressed by Section 257.² These operators play a vital role in delivering video programming services to customers, particularly in rural, low-density areas which may otherwise have gone unserved. Many of these same operators are also entering or may seek to enter new lines of telecommunications businesses, assuming significant barriers to competitive entry are removed.

The Commission has consistently recognized the important role played by small cable companies in the competitive telecommunications marketplace and the need to remove unwarranted regulatory obstacles in order to ensure that these companies may continue to provide high quality service to subscribers. Toward this end, the Commission has relaxed the rate regulatory burdens imposed on small cable companies, allowing these companies “to serve subscribers better and to grow [their] business,”³ “to prepare for potential competition,”⁴ to promote the availability to the public of a diversity of views and information through cable, and to expand the capacity and programs offered by cable operators over their cable systems.⁵

² Other cable operators are also seeking to enter new or previously-closed markets. The market entry barriers addressed in these comments similarly impede the ability of such new entrants to provide advanced cable, information and telecommunications services in these markets.

³ In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 14, 7393, 7395 (1995) (“Small System Order”).

⁴ Id. at 7406.

⁵ Id. at 7406-7.

Section 257 similarly seeks to improve the ability of small businesses, such as small cable companies, to compete and survive in their core businesses and to expand into new lines of business. Section 257 does so by directing the FCC to eliminate market barriers as a means of promoting “the policies and purposes of [the 1996 Act] favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”⁶

Against this backdrop, it is critical that the FCC remove those barriers that most hinder the ability of small cable and other potential new entrants to expand into the market for telecommunications and information services. These barriers include both difficulties encountered in raising capital and legal and regulatory constraints. As we discuss below, the Commission should take a number of steps to alleviate these barriers including (1) in its rulemaking to implement Cable Act Reform, adopting an affiliation standard that excludes passive investments; (2) in administering the Telecommunications Development Fund pursuant to Section 707 of the 1996 Act, recommending that the TDF Board consider the extent of federal government support programs already available to the applicant in deciding how to allocate loans and loan guarantees; (3) avoiding an overbroad interpretation of the 1996 Act’s provision permitting local franchising authorities to manage their rights-of-way; (4) making clear that the exemption from the 1996 Act’s interconnection requirements for rural telephone companies will be strictly construed; and (5) recommending to Congress that the exemption for cooperative and municipally-owned poles in Section 224 of the Communications Act be repealed.

⁶ 47 U.S.C. § 257(b).

I. SMALL CABLE OPERATOR ATTRIBUTES

In the Notice, the Commission asks commenters to provide profile data about small telecommunications businesses to assist it in identifying market entry barriers and designing appropriate measures to eliminate those barriers.⁷ There is no comprehensive database that provides the type of precise quantitative data about small cable companies solicited by the Commission. Nevertheless, the record developed in the Commission's rate regulation proceeding, the record in this proceeding to date, and information solicited from NCTA's small operator members indicates that small cable companies generally are privately-held businesses which may be structured as sole proprietorships, corporations or partnerships. These companies typically provide service to rural, low-density areas, as well as to suburban or niche urban markets.⁸

The FCC found in its Small System Order that of the 11,200 cable systems operating as of June, 1995, approximately 66% were owned by FCC-defined "small cable companies." These systems comprised 87% of the nation's systems, but served only 12.1% of subscribers nationwide.⁹ The FCC also found that because small cable companies serve fewer subscribers,

⁷ Notice at ¶24.

⁸ The FCC has found that the average number of subscribers per mile for small cable companies is roughly half that of other cable television businesses. Small System Order at 7408.

⁹ Id. at 7411. The FCC's statistics reflect all systems serving 15,000 or fewer subscribers from the system's principal headend, so long as that system was owned or operated by a "small cable company," defined as a cable television operator that serves a total of 400,000 or fewer subscribers over one or more cable systems. 47 C.F.R. § 76.901(c), (e). The definition of a "small cable operator" under the 1996 Act includes companies that serve fewer than 1% of subscribers nationwide so long as such companies are not affiliated with any entity with gross annual revenues that exceed \$250 million. 47 U.S.C. § 623(m). It should be noted in this regard that the FCC to date has not finally resolved the meaning of "affiliation" for these purposes. However, NCTA estimates based on the best available data from A.C. Nielsen's Cable On-Line Data Exchange (as of July 20, 1996) that the 1996 Act's definition of a "small cable operator" includes approximately 1575 companies which

they are typically ineligible for the purchasing discounts that are generally available to larger companies.¹⁰ In addition, because cable television operations have a high fixed-cost component and because small cable operators usually operate in low-density population areas, they tend to have a higher cost of doing business, and face a higher cost of capital than their larger counterparts.¹¹ These operators also generally have lower premium revenue.¹²

While the core business of small cable operators continues to be the provision of multichannel video programming services to residential customers, many small cable companies and entrepreneurs are at the forefront of those already entering¹³ or seeking to gain entry into

own or operate approximately 58% of all systems and serve approximately 13% of all subscribers nationwide.

¹⁰ Small System Order at 7408.

¹¹ Small cable operators have reported that because of difficulties in obtaining financing, they have completed upgrades using internal funds, which slowed the upgrades. Others have reported that their cost of capital is high because of the risks perceived by banks, including risks resulting from company size and lack of geographic diversity. One NCTA member reported, for example, that its cost of bank debt was 10.5 to 11 percent and its cost of equity was 22 to 25 percent. These costs were too high for this operator to effectively refinance or to remain in the cable business. Reports from operators also indicate that their ability to access capital decreases as the size of the business and the loan needed decreases. One small operator in Arizona, for example, reported that many banks simply are unwilling to offer loans of less than \$10 to \$20 million.

¹² Id. at 7408. The FCC found that the average annual premium revenue per subscriber for small cable companies, based on cost-of-service filings made with the FCC, was 56 percent of the revenue for other cable television companies.

¹³ For example, Chambers Communications, a small cable operator serving approximately 81,800 total subscribers, recently announced the launch of a new subsidiary, Chambers Multimedia Connection (CMC), that offers low cost Internet access service using high-speed, 28.8 Kbps dial-up. Chambers' customers will be able to receive unlimited hours of full Internet access and e-mail services. In addition, Chambers will offer each of its local schools a CMC Internet Access account at no charge. Sjoberg's Cable TV, a Minnesota small cable operator which serves a total of 4800 subscribers, currently offers Ingenious service (a one-way data service that customers subscribe to in order to access newswire services, weather and sports information and a chat line) to residential, business and governmental users and is interconnecting with fiber all the schools in one school district served by Sjoberg's system. This interconnection will allow data, voice and video to be sent to the interconnected buildings and classrooms. And in eastern Pennsylvania, a partnership comprised of

new lines of business, including the delivery of Internet access, other data services, distance learning, and telephony. The capital requirements to enter these businesses are high, however, and the capital needed for entry will be made more accessible only if Congress and the FCC continue to remove regulatory uncertainty and market entry barriers and to create regulatory parity among competitors. Such certainty, the removal of entry barriers, and the establishment of a level playing field is particularly critical for small cable companies, since those companies typically rely on private investment from local and national banks and on institutional and venture capital investments, rather than on government-supported loans, loan guarantees or publicly-traded capital, to obtain the funding needed to expand their plant and deliver new services.

The following section addresses the obstacles to entry that must be removed if small cable operators are to grow their core cable business in order to compete with other multichannel video providers and to continue to bring new telecommunications and information services and the benefits of competition not only to rural America but also to the suburban and niche urban markets they serve.

II. BARRIERS TO ENTRY

A. Difficulties Encountered in Raising Capital

Both the Commission and Congress have recognized and sought to relieve the difficulties small cable has faced in accessing capital. The Commission in particular has acknowledged that small cable companies need to access capital in order to upgrade their systems, add new services to meet subscriber demands, and compete more effectively with other service providers.

cable television companies, including small cable operators, and small independent telephone companies interconnected via fiber, is offering Internet service to the public.

1. Cable Act Reform. The 1996 Act exempts “small cable operators” from certain rate regulation provisions of the Communications Act in franchise areas where the operator serves 50,000 or fewer subscribers. The Act defines a small cable operator as “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”¹⁴

As NCTA urged in its Comments and Reply Comments in the Cable Act Reform rulemaking, which NCTA incorporates herein,¹⁵ the Commission, consistent with its small system policies generally and with congressional intent to encourage the investment of capital in small cable, should modify its proposed definition of “affiliation” for purposes of small cable operator rate deregulation. Under that proposed definition, all entities with a 20% or greater equity ownership in the small cable operator would be considered affiliated with the operator, even if the investor’s interest is purely passive.

As suggested by NCTA and the majority of those commenting, the FCC should promptly adopt an affiliation rule for purposes of small operator deregulation which excludes entities that make passive investments in the small cable operator. Including passive investments for affiliation purposes flies in the face of congressional intent with respect to small cable operators since such inclusion would limit, rather than expand, the opportunities for small systems to survive and compete in the years to come. Deregulation of rates will not have Congress’ desired

¹⁴ 47 U.S.C. § 623(m).

¹⁵ Comments of The National Cable Television Association, Inc. in Cable Act Reform Rulemaking, CS Docket No. 96-85, (filed June 4, 1996); Reply Comments of the National Cable Television Association, Inc. in Cable Act Reform Rulemaking, CS Docket No. 96-85 (filed June 28, 1996).

effect of attracting investment capital if the investment of such capital by passive investors will itself result in the reregulation of a small cable operator's rates.¹⁶ Absent such investment, small cable operators will be frustrated in their efforts to grow their core business or to deliver new telecommunications services, contrary to the pro-competitive goals of the 1996 Act, as expressed throughout the Act and in Section 257 specifically. Accordingly, the Commission should resolve expeditiously its cable reform proceeding and adopt the small cable affiliation standard advanced by NCTA.

2. Telecommunications Development Fund. As the Commission stated in the Notice, Congress in Section 707 of the 1996 Act¹⁷ established the TDF to promote access to capital for small businesses in the telecommunications industry, to stimulate the development of new technology, and to support delivery of universal service.¹⁸ In order to promote the goals of Section 257, the Commission should suggest that the TDF be used to fill the gaps for companies which do not already have access to other similar sources of funding. For example, the Commission should recommend that, in administering the TDF and allocating its funds, the TDF Board should consider whether the applicant already benefits extensively from federal government support mechanisms, such as those established for rural telephone companies by the Rural Electrification Act of 1936.¹⁹ Pursuant to the RE Act, the Rural Utilities Service administers three loan assistance programs, with cumulative loans totaling approximately \$6.6

¹⁶ See NCTA Reply Comments at 21-2.

¹⁷ 47 U.S.C. § 614.

¹⁸ Id.

¹⁹ Rural Electrification Act of 1936, 7 U.S.C. §§ 901-950b (1994) ("RE Act").

billion (insured telephone loans), \$3.0 billion (rural telephone bank loans), and \$0.8 billion (loan guarantees).²⁰

At the same time, however, entry barriers for competitors to these rural telephone companies remain significant. Indeed, as the Common Carrier Bureau recently observed, the presence of these support mechanisms and the unavailability of support for new entrants has itself served as a barrier to competitive entry in rural markets.²¹ The TDF could serve as a meaningful source of capital for new entrants, providing access to the types of funding the incumbent carriers already possess.

B. Legal/Regulatory Barriers to Entry

Funding problems are not the only barriers to entry faced by small cable companies. Equally, if not more, significant are a number of legal and regulatory provisions which create barriers which limit the ability of small companies -- particularly new entrants -- to challenge incumbents in the provision of telecommunications and information services. We discuss a number of these barriers below.

1. Avoid Overbroad Interpretation of Rights-of-Way Management Authority. A

significant market entry barrier affecting cable entrepreneurs exists at the local level. The 1996

²⁰ "Preparation for Addressing Universal Service Issues: A Review of Current Interstate Support Mechanisms," Common Carrier Bureau, FCC (Feb. 23, 1996) at 78 citing Rural Electrification Administration, U.S. Department of Agriculture, Informational Publication 100-7, Report of the Administrator, Fiscal Year 1993 at 16 (1994) ("CCB Report"). As the Bureau observed in its Report, the rural telephone borrowers who are the recipients of these loans "have become increasingly financially stable." Id. at 7.

²¹ Id. at 85-86 (discussing the already high barrier to market entry in the rural telephone market, which is exacerbated because the new entrant must not only deal with the high cost of providing service, but also the ability of the existing carrier to charge prices below the true cost of service as a result of the federal subsidies it receives).

Cable Act adopts clear limits on the right of local franchising authorities to use the cable franchising process to restrain rather than foster the deployment of telecommunications services, to dictate transmission technology, or to set technical standards.²² At the same time, the 1996 Act provides that municipalities retain the authority to manage the use of rights-of-way “on a competitively neutral and nondiscriminatory basis.”²³

Small cable companies are eager to help accomplish the 1996 Act’s goal of “accelerat[ing] rapidly private sector deployment of advanced communications and information technologies and services to all Americans.”²⁴ If they are to do so, however, the Commission must make clear that a municipality’s authority to manage public rights-of-way granted by Section 253(c) of the 1996 Act does not include the right to take actions which are tantamount to denying entry to a competitor²⁵ nor should they be able to use the cable franchising process to regulate telecommunications services delivered over cable systems.

²² 1996 Act at §301(e).

²³ 47 U.S.C. § 253(c); see also H.R. Rep. No. 458, 104th Cong., 2d Sess. 127 (1996) (“Conference Report”).

²⁴ Conference Report at 1.

²⁵ This is not merely a theoretical concern. In a case now pending before the Commission, the municipalities of Bogue and Hill City, Kansas have sought to justify their decision to deny entry by Classic Telephone, Inc. in favor of another telephone company under Sections 253(b) and (c), despite the fact that Classic has already been certificated by the State public service commission as a telecommunications carrier. The cities have argued that their authority to manage the public rights-of-way under Section 253(c) authorizes them to deny competitive entry -- contrary to the letter and spirit of the 1996 Act, which expressly preempts attempts by local governments to deny entry to telecommunications service providers. See Petition for Preemption of Local Entry Barriers Pursuant to 47 U.S.C. § 253(d), filed by Classic Telephone Inc., In the Matter of Classic Telephone, Inc., CCB Pol 96-10; Reply Comments of the National Cable Television Association, Inc., File No. CCB Pol 96-10 (filed May 10, 1996).

In this regard, the Commission should make clear that it will preempt any municipal regulation of telecommunications services that extends beyond legitimate rights-of-way or management functions, such as the ones described by the Commission in its proceeding to implement Section 302 of the 1996 Act.²⁶ In that proceeding, the Commission made clear that the authority to manage rights-of-way includes only the functions which local governments have historically had to minimize the physical disruptions to public rights-of-way associated with the construction of telecommunications networks. The Commission listed as valid right-of-way management activities: (1) the coordination of construction schedules, (2) the establishment of standards and procedures of reconstructing lines across public property; (3) the determination of insurance and indemnity requirements; (3) the establishment of rules for local building codes; (4) the scheduling of common trenching and street cuts; (5) repairing and resurfacing construction-damaged streets, and (6) keeping track of the various systems using the rights-of-way to prevent interference among facilities.²⁷

In sum, in order to prevent this rights-of-way authority from becoming a vehicle for cities to regulate entry, the Commission should make clear as it implements Sections 253 as well as the 1996 Act amendments to Section 621 of the Communications Act (which govern cable franchising) that the authority to manage rights-of-way contained in those provisions is strictly limited to the authority to minimize physical disruptions of rights-of-way. The Commission should also make clear, consistent with the 1996 Act and as urged by NCTA in its comments in

²⁶ Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, Second Report and Order, FCC 96-249, released June 3, 1996, at ¶ 210; recon., Third Report and Order and Second Order on Reconsideration, FCC 96-334, released Aug. 8, 1996.

²⁷ Id.

the Cable Act Reform proceeding,²⁸ that local franchising authorities may no longer engage in the day-to-day enforcement of cable technical standards in any way or adopt their own technical standards as part of their local regulatory jurisdiction.

2. Denial of the Right to Interconnect. The ability of an incumbent rural telephone company to deny interconnection to new entrants also serves as a significant entry barrier in rural markets. In the 1996 Act, Congress sought to extend the benefits of consumer choice to customers in both urban and rural areas. Accordingly, the rural exception now embodied in Section 251(f)(1) of the Communications Act was carefully crafted to avoid granting rural telephone companies a blanket exemption from the 1996 Act's interconnection requirements. Instead, upon a rural telephone company's receipt of "a bona fide request for interconnection, services, or network elements" encompassed by Section 251(c), the Act provides that the appropriate State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with the 1996 Act's universal service provisions.²⁹

As the FCC observed in its recent decision implementing this section, Congress intended this exemption to apply only to the extent, and for the period of time, that policy considerations justify such exemption and "did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive

²⁸ NCTA Comments at 49-53.

²⁹ 47 U.S.C. § 251(f)(1)(B).

local exchange service.”³⁰ In keeping with this intent, the FCC found that rural LECs seeking to maintain an exemption once a bona fide request has been made, or to justify suspension or modification of the interconnection requirements, bear the burden of proving that application of the interconnection requirements would cause undue economic burdens “beyond the economic burdens typically associated with efficient competitive entry.”³¹

However, the FCC must go further than placing the burden of proof on the incumbent telephone company to ensure that competitive entry (and all of the consumer benefits such entry brings) occurs in rural America. First, the Commission should make clear, consistent with the plain language of Section 251(f)(1), that the limitation embodied in the rural exemption set forth in Section 251(f)(1)(C) must be strictly construed.³² For example, by its terms, the rural exemption does not apply to a request for interconnection or access from a cable operator in any area in which a rural telephone company commences providing video programming to subscribers after the date of enactment of the 1996 Act.³³ If incumbent rural telephone companies are able to offer cable and telephony service jointly while frustrating the ability of rural cable operators to provide competing telephony services, rural consumers will be deprived of competitive opportunities in telephony services, and, possibly, in video services as well.

³⁰ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325, released Aug. 8, 1996, at ¶ 262 (“Interconnection Order”).

³¹ Id.

³² The Commission’s Interconnection Order was silent on this point.

³³ Conference Report at 122. (“The exemption is not available where an incumbent cable operator makes a request to an incumbent telephone company providing video programming in the same service area, except where rural telephone companies offer video programming directly to subscribers on the date of enactment.”)

Second, the Commission should provide guidance regarding the meaning of the term “bona fide” request in order to prevent disputes over the “bona fide” nature of a request from themselves becoming barriers to market entry.³⁴ This will avoid protracted argument over whether an entity’s request for interconnection, services, or network elements under subsection (c) has properly triggered State commission inquiry into the permissibility of preserving the exemption. For instance, the Commission should make clear that the term “bona fide” does not allow incumbent rural telephone companies or States to impose burdensome “pre-filing” requirements on small cable companies before the State will agree to review the request.

The Commission clearly has the authority to take these steps in order to avoid undermining the pro-competitive, national policy framework established by the 1996 Act. In that Act, Congress directed the Commission to “implement the requirements” of Section 251 and authorized it to preempt enforcement of any State “order [] or policy” that conflicts with or impedes implementation of that section.³⁵ Hence, the Commission clearly has authority to provide guidance additional to that already provided in its Interconnection Order with respect to the States’ exercise of the Section 251(f) exemption authority in order to meet the objectives of

³⁴ The Commission in its Interconnection Order declined to adopt national rules or guidelines regarding this and other aspects of Section 251(f), but indicated that it would offer guidance on these matters at a later date, if it believed doing so was necessary and appropriate. Interconnection Order at ¶ 1263. Such guidance is appropriate in the context of this proceeding, which is specifically designed to eliminate barriers to competitive entry.

³⁵ See 47 U.S.C. § 251 (d). The Commission should similarly ensure that the statutory provisions allowing for suspension and modification of a carrier’s interconnection provisions are narrowly construed, as urged in NCTA’s Comments and Reply Comments in the interconnection proceeding, which are incorporated herein. See Comments of the NCTA at 63-67, Reply Comments of NCTA at 24-27.

eliminating market entry barriers for cable entrepreneurs and other small businesses seeking to provide telecommunications and information services.

3. Excessive and Burdensome Pole Attachment Rates and Terms. As noted above, many small cable companies operate in smaller, rural markets in which access to utility poles is a critical part of providing cable service and other new services the cable operator may wish to offer. The inability to access these poles at a reasonable price and on reasonable terms constitutes a significant market entry barrier.

In rural areas, the poles which small cable companies must access are often owned by rural cooperatives and municipally-owned utilities. These entities were exempted from the 1978 Pole Attachment Act³⁶ on the premise that they would not likely overcharge their customer-owners or impede the development of cable to those customers. These entities, however, are in many cases now competing or plan to compete in the video business in competition with small cable companies -- principally through the marketing of Direct Broadcast Satellite ("DBS") services to their members. The National Rural Telecommunications Cooperative (NRTC) -- a non-profit cooperative association comprised of 521 rural electric cooperatives and rural telephone systems -- and its members, for example, distribute not only C-Band, but also DBS services throughout the country.³⁷ At the same time, small cable companies have reported that they have encountered substantial rate increases for pole attachments as well as difficulty in negotiating for all types of pole attachment terms and conditions over recent years, significantly

³⁶ P.L. No. 95-234, February 21, 1978; 47 U.S.C. §224.

³⁷ Letter to Donald H. Gips, Chief, International Bureau from Jack Richards, Counsel to the NRTC, In re Applications of TelQuest Ventures, L.L.C. and Western Tele-Communications, Inc., File Nos. 758-DSE-P/L-96, 759-DSE-L-06 and 844-DSE-L-96, filed May 29, 1996 at 2.

increasing the costs of doing business and hobbling the ability of these entities to expand further into rural areas they serve.³⁸

The best means for ensuring fair entry in all markets and a level playing field among competitors is to regulate these cooperative and municipally-owned poles in the same manner as other owners of poles are regulated. The Commission should therefore recommend to Congress that it remove the exemption for cooperative-owned and municipally-owned poles now included in the Pole Attachment Act.³⁹

* * *

In sum, there are a number of significant steps the Commission can take with the authority it has been given in Section 257 to strike down or at least ameliorate economic and legal barriers to the entry of small cable companies into new telecommunications businesses. We urge the Commission to take prompt action in the areas we have discussed above.

III. DEFINITION OF SMALL BUSINESSES UNDER SECTION 257

The Notice also seeks comment on the appropriate definition of small business for purposes of Section 257 and requests input regarding the factors the FCC should consider in

³⁸ See, e.g., Comments of the Small Cable Business Association at 21-22 (filed May 16, 1996), and Comments of Cole Raywid & Braverman on Pole Attachment Issues at 7 (filed May 20, 1996), In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98. In some cases, operators have reported that rural co-operatives entering the DBS business have doubled and in some cases, tripled their pole rates. For example, a small Minnesota operator reported that one rural co-op in its service area that was going into the DBS business more than tripled its rate from \$3.00 to \$9.91 per pole in 1991. In Pennsylvania, another small operator reported that a rural co-op in its service area raised its rates 110% at the same time as the Pennsylvania Rural Electric Association was promoting and advertising DBS service. Similarly, in Alabama, a rural co-op in 1994 raised its pole rental rate over 72% during a period in which it was also mailing promotional material on DBS to its customers.

³⁹ 47 U.S.C. §224(a)(1).

defining what constitutes a small business.⁴⁰ In the case of small cable entities, Congress and the Commission have already addressed this issue. In this regard, small cable businesses have been defined in two ways: for purposes of FCC small system rate relief, they are defined as companies with 400,000 subscribers,⁴¹ and for purposes of *statutory* rate deregulation, as companies that serve fewer than 1% of subscribers nationwide so long as such companies are not affiliated with any entity with gross annual revenues that exceed \$250 million.⁴²

In adopting these definitions, the FCC and Congress both acknowledged that operators within this size category share characteristics that justified special treatment, at least for purposes of FCC rate regulation. Those same characteristics are relevant to the purposes served by Section 257 and should be adopted by the Commission for use in that context as well.⁴³ As recognized in the Small Business Act, the size standard for determining what constitutes a small business should be customized “to the extent necessary to reflect the differing characteristics of the various industries and to consider other factors deemed to be relevant by the Administrator.”⁴⁴ Consequently, for purposes of Section 257 relief, NCTA proposes that, at a minimum, any cable company that meets either of the two current FCC definitions should qualify as a small business for purposes of Section 257.

⁴⁰ Notice at ¶40.

⁴¹ Sixth Report and Order at 7406. This subscriber number was adopted as the equivalent of \$100 million in annual regulated revenue. Id. at 7408.

⁴² 1996 Act at §301(c), adding §623(m).

⁴³ As noted supra, it is critical that in implementing the definition of a “small cable operator” under the 1996 Act, the FCC should not consider passive investment interest in determining if an entity is “affiliated” with a cable operator.

⁴⁴ 15 U.S.C. §632(a).

CONCLUSION

For the foregoing reasons, the Commission should adopt rules and policies pertaining to small telecommunications businesses consistent with these comments.

Respectfully submitted,



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