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

In the Matter of)
Implementation of Section 10 of the)
Cable Television Consumer Protection)
and Competition Act of 1992)

MM Docket No. 92-258

Indecent Programming and)
Other Types of Materials on)
Cable Access Channels)
)

MEMORANDUM OPINION AND ORDER

Adopted: May 6, 1997

Released: May 7, 1997

By the Commission:

1. As part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),¹ Congress enacted Section 10 in order to protect children from indecent programming on leased access and public, educational and governmental ("PEG") access channels. The Commission thereafter established rules to implement Section 10. As required by the statute, these rules provided that cable operators could prohibit such programming on PEG access channels. Also as required by Section 10, the rules provided that, for leased access channels, cable operators had to either enforce a policy prohibiting such programming or segregate and block any programming that was not prohibited. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* ("*Denver Consortium*"), the Court addressed the constitutionality of Section 10. The Supreme Court found that the PEG access channel provision permitting the refusal to transmit indecency and the leased access channel provision requiring segregation and blocking were unconstitutional.² In this Memorandum Opinion and Order, we adopt rule changes responsive to the Supreme Court's decision.

2. The statutory provisions on leased access are found in Section 612 of the Communications Act. Section 10(a) of the 1992 Cable Act amended Section 612(h) of the Communications Act, adding language to "permit a cable operator to enforce prospectively a

¹ Public Law No. 102-385, 106 Stat. 1460 (1992). The 1992 Cable Act amended the Communications Act of 1934, which recently has been further amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

² 116 S. Ct. 2374 (1996).

written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards" on commercial leased access channels on their systems.³ Section 10(b) added a new subsection (j) to Section 612. Section 10(b) required the Commission to adopt regulations that are designed to restrict access of children to indecent programming on leased access channels (that is not voluntarily prohibited under Section 10(a)) by requiring cable operators to place indecent programming on a "blocked" leased access channel.⁴ Section 10(c) required the Commission to adopt regulations to enable cable operators to prohibit use of channel capacity on the PEG access channels for programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.⁵ Section 10(d) of the 1992 Cable Act amended Section 638 of the Communications

³ Section 10(a) of the 1992 Cable Act amended section 612(h) of the Communications Act, 47 U.S.C. § 532(h), adding the bold language:

Section 612 Cable Channels for Commercial Use

(h) Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority **or the cable operator** is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States. This subsection shall permit a cable operator to enforce prospectively a **written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.**

⁴ Section 10(b) of the 1992 Cable Act amended section 612 of the Communications Act, 47 U.S.C. § 532, adding (j):

(j)(1) Within 120 days following the date of the enactment of this subsection, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by

(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).

⁵ Section 10(c) of the 1992 Cable Act states the following:

(c) Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such a system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

Act.⁶ Section 76.701 and Section 76.702 of the Commission's rules implement Section 10.⁷ These rules were stayed after the initial decision in *Alliance for Community Media v. FCC* ("Alliance") finding them unconstitutional and that stay has been continued in force pending Supreme Court review.⁸

3. In the Telecommunications Act of 1996 ("1996 Act"), Congress further amended Sections 611 and 612 of the Communications Act. Section 611(e) and Section 612(c)(2) generally provide that a cable operator may not exercise any editorial control over the content on PEG access and leased access channels. The 1996 Act added language to except from this ban on editorial discretion programming which contains obscenity, indecency, or nudity.⁹ In

⁶ Section 10(d) of the 1992 Cable Act amended section 638 of the Communications Act adding the bold language:

Section 638 Criminal and Civil Liability

Nothing in this title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 612 or under similar arrangements unless the program involves obscene material.

⁷ See 47 C.F.R. §§ 76.701, 76.702. See also Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, First Report and Order, 8 FCC Rcd 998 (1993); Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, Second Report and Order, 8 FCC Rcd 2638 (1993). The existing rules are attached as Appendix A.

⁸ *Alliance for Community Media v. FCC*, 10 F.3d 812 (D.C. Cir. 1993), vacated 15 F.3d 186 (D.C. Cir. 1994), reh'g en banc, 56 F.3d 105 (D.C. Cir. 1995), aff'd in part and rev'd in part, *Denver Consortium*, 116 S. Ct. 2374 (1996).

⁹ Section 506(a) of the 1996 Act amended Section 611(e) of the Communications Act by adding the italicized language:

Section 611 Cable Channels for Public, Educational, or Governmental Use

(e) Subject to Section 624(d), a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section, *except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.*

Section 506(b) of the 1996 Act amended Section 612(c)(2) of the Communications Act by adding the italicized language:

Section 612 Cable Channels for Commercial Use

(c)(2) A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator *a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity* and may

Order and Notice of Proposed Rulemaking in CS Docket No. 96-85 -- Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 ("*Cable Act Reform Order*"), the Commission amended Section 76.701 and Section 76.702 of its rules to implement the 1996 Act.¹⁰

4. As a result of the Court's decision that Section 10(b) is unconstitutional, we will delete those parts of Section 76.701 which implemented the requirement that cable operators not adopting a policy of prohibiting indecent programming on leased access channels must segregate and block such programming.¹¹ We note, however, that a cable operator voluntarily may segregate, block, and time channel indecent leased access programming under Section 10(a). As we stated when initially implementing Section 10(a), "we believe that cable operators with policies prohibiting indecent programming have, under section 10(a), the discretion to block any such programming, rather than banning it completely, and moreover, they may provide such programming on blocked channels during time periods of their own choosing."¹² Further, the Court in *Denver Consortium* stated that Section 10(a)'s "permissive nature brings with it a flexibility that allows cable operators, for example, not to ban broadcasts, but, say, to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children."¹³ It is also the case that, under Section 10(a), cable operators may prohibit some indecent programming, but not all.¹⁴

5. Finally, as a result of the Court's decision that Section 10(c) is unconstitutional, we will amend Section 76.702. Insofar as the 1996 Act grants to the cable operator the right to refuse to transmit indecent public access programming, it apparently conflicts with the Court's

consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

¹⁰ 11 FCC Red 5937, 5959 5961 ¶¶ 61 67 (1996). The rules were amended without notice and comment because they were mandated by the 1996 Act and did not involve any discretion on the part of the Commission. *Id.* at 5938 ¶3. The Order noted that the rules, as amended, were stayed for as long as the *Alliance* stay remained in effect. In the Notice of Proposed Rulemaking, the Commission sought comment on the proper interpretation of the word nudity, tentatively concluding that the term nudity should be interpreted to mean nudity that is obscene or indecent. *Id.* at 5975 ¶¶ 110 -111. This issue will be addressed in the pending proceeding in that docket.

¹¹ Paragraphs (b) through (i) of 47 C.F.R. § 76.701 will be deleted and paragraph (i) will be redesignated as (b) and amended.

¹² 8 FCC Red at 1005.

¹³ *Denver Consortium*, 116 S. Ct. at 2387, citing First Report and Order, 8 FCC Red. at 1003 (interpreting the 1992 Cable Act's provisions to allow cable operators broad discretion over what to do with offensive materials).

¹⁴ In the First Report and Order, the Commission, noting that some cable operators suggested that they have the discretion to prohibit some, but not necessarily all indecent programming under section 10(a) as long as they block the rest under section 10(b), stated that "[g]iven the wide discretion Congress afforded cable operators under this section, we see no reason to dispute this interpretation." 8 FCC Red at 1003.

decision in *Denver Consortium* that cable operators may not prohibit "the transmission of 'patently offensive' sex-related materials" over public access channels.¹⁵

Paperwork Reduction Act of 1995 Analysis

6. The requirements adopted in this *Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose modified information collection requirements on the public. Implementation of any modified requirement will be subject to approval by the Office of Management and Budget ("OMB") as prescribed by the 1995 Act. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to comment on the information collections contained in this *Order* as required by the 1995 Act.¹⁶ Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

7. Written comments by the public on the modified information collections are due on or before 60 days after publication of the *Order* in the Federal Register. A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov. For additional information concerning the information collections contained herein contact Dorothy Conway at 202-418-0217, or via the Internet at dconway@fcc.gov.

Regulatory Flexibility Act Analysis

8. Pursuant to Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the Notice of Proposed Rulemaking in MM Docket 92-258.¹⁷ Comments concerning the IRFA were addressed in previous orders.¹⁸ As discussed above, in this *Memorandum Opinion and Order* we are amending our rules to conform to the Supreme Court's *Denver Consortium* decision. Under the rule changes adopted here, a cable operator will no longer be required to segregate and block indecent programming on leased access channels. Further, a cable operator will not be permitted to refuse

¹⁵ *Denver Consortium*, 116 S. Ct. at 2382.

¹⁶ Pub. L. No. 104-13.

¹⁷ 7 FCC Red 7709, 7712 (1992).

¹⁸ See 8 FCC Red 998, 1010-11 (1993); 8 FCC Red 2638, 2643 (1993).

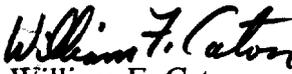
to transmit indecent PEG access programming. There will be no cost to cable operators as a result of these rule changes, and therefore the amendments will not have a significant economic impact on cable operators. Therefore, we do not believe that the amendments adopted herein will have a significant economic impact on a substantial number of small entities, and no further regulatory flexibility analysis is required.¹⁹ A copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

Ordering Clauses

9. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i) and 4(j) and 303 of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i), 154(j), 303, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Part 76 of the Commission Rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix B.

10. IT IS FURTHER ORDERED that the rule provisions set forth in Appendix B shall become effective upon approval by the Office of Management and Budget of the modified information collection requirements.

Federal Communications Commission


William F. Caton
Acting Secretary

¹⁹ 5 U.S.C. § 605(b).

APPENDIX A**Current Rules**

Sec. 76.701 Leased access channels.

(a) Notwithstanding 47 U.S.C. 532(b)(2) (Communications Act of 1934, as amended, section 612), a cable operator, in accordance with 47 U.S.C. 532(h) (Cable Consumer Protection and Competition Act of 1992, section 10(a)), may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

(b) A cable operator that does not prohibit the distribution of programming in accordance with paragraph (a) of this section shall place any leased access programming identified by program providers as indecent on one or more channels that are available to subscribers only with their prior written consent as provided in paragraph (c) of this section.

(c) A cable operator shall make such programming available to a subscriber within 30 days of receipt of a written request for access to the programming that includes a statement that the requesting subscriber is at least eighteen years old; a cable operator shall terminate a subscriber's access to such programming within 30 days from receipt of a subscriber's request.

(d) A program provider requesting access on a leased access channel shall identify for a cable operator any programming that is indecent as defined in paragraph (g) of this section. Such identification shall be in writing and include the full name, address, and telephone number of the program provider and a statement that the program provider is responsible for the content of the programming. A cable operator may require that such identification be

provided up to 30 days to the requested date for carriage. A program provider requesting carriage of "live programming" on a leased access channel that is not identified as indecent must exercise reasonable efforts to insure that indecent programming will not be presented. A cable operator will not be in violation of paragraph (b) of this section if it fails to block indecent programming that is not identified by a program provider as required in paragraph (d) of this section.

(e) A cable operator may request a program provider to certify that the programming intended for leased access is not obscene programming or indecent programming subject to the requirement of paragraph (b) of this section. A cable operator may request a program provider of "live programming" to certify that reasonable efforts will be made to ensure that such programming is not obscene programming or indecent programming subject to the requirement of paragraph (b) of this section.

(f) A cable operator shall not be required to provide leased access to a program provider if--

(1) The program provider refuses to identify whether programming is indecent as required under paragraph (d) of this section; or

(2) The program provider refuses or fails to certify, if requested by the cable operator under paragraph (e) of this section, that the programming is not obscene programming or indecent programming subject to the requirement of paragraph (b) of this section; or

(3) The program provider refuses or fails to certify, if requested by the cable operator under

paragraph (e) of this section, that reasonable efforts will be made to ensure that any "live programming" is not obscene programming or indecent programming subject to the requirement of paragraph (b) of this section; or

(4) The program provider has failed to provide up to thirty days' prior notice, if requested by the cable operator, that the programming is indecent.

(g) For purposes of paragraphs (b)-(f) of this section, "indecent programming" is any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.

(h) Cable operators shall retain records sufficient to verify their compliance with paragraph (b) of this section and make such records available to the public. Such records must be retained for a period sufficient to cover the limitations period specified in 47 U.S.C. 503(b)(6)(B).

(i) Paragraphs (a) through (h) of this section apply to any leased access program or portion of a leased access program which the cable operator reasonably believes contains obscenity, indecency, or nudity.

Sec. 76.702 Public, educational and governmental access.

Any cable operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental access facility for any programming which contains nudity, obscene material or indecent material as defined in § 76.701(g), or material soliciting or promoting unlawful conduct. For purposes of this section, "material soliciting or promoting unlawful conduct" shall mean material that is otherwise proscribed by law. A cable operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.

APPENDIX B**Amended Rules**

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.701 is amended to read as follows:

Sec. 76.701 Leased access channels.

(a) Notwithstanding 47 U.S.C. 532(b)(2) (Communications Act of 1934, as amended, section 612), a cable operator, in accordance with 47 U.S.C. 532(h) (Cable Consumer Protection and Competition Act of 1992, section 10(a)), may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

(b) A cable operator may refuse to transmit any leased access program or portion of a leased access program that the operator reasonably believes contains obscenity, indecency or nudity.

3. Section 76.702 is amended to read as follows:

Sec. 76.702 Public access.

A cable operator may refuse to transmit any public access program or portion of a public access program that the operator reasonably believes contains obscenity.