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

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WASHINGTON, D.C. 20554

In the Matter of)
)
Annual Assessment of the Status of)
Competition in Markets for the Delivery)
of Video Programming)

CS Docket No. 97-141

COMMENTS

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

Paul J. Sinderbrand
Robert D. Primosch

Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Suite 600
Washington, DC 20006
(202) 783-4141

Its Attorneys

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EXECUTIVE SUMMARY

The Wireless Cable Association International, Inc. ("WCA") submits that in light of recent events within the cable industry, the Commission's inquiry must be guided by one overriding proposition: program access remains the most critical issue facing wireless cable operators and other alternative multichannel video programming distributors ("MVPDs") seeking to compete with incumbent cable operators. Over the past year, consolidations and joint ventures within the cable industry have accelerated to unprecedented levels, particularly among the larger, vertically integrated MSOs. As a result, cable programming services will be even more beholden to the large MSOs (and, correspondingly, under greater pressure not to sell to cable's competitors) as those large MSOs tighten their control over distribution on a national and regional scale. Furthermore, the expansion of joint ventures between programmers, broadcasters that are not considered to be vertically integrated under traditional modes of analysis and the largest MSOs will have a similar chilling effect on the availability of cable programming to wireless cable operators and other competing MVPDs. Moreover, the migration of cable programming services from satellite to fiber delivery is becoming a reality, thereby providing the cable industry with yet another strategy for evading its program access obligations to its competitors.

At the same time, the wireless cable industry's ongoing conversion to digital transmission will increase competitive pressure on incumbent cable operators, providing unprecedented incentive for the large MSOs to pressure programmers to delay selling to wireless cable operators or, in the alternative, utilize fiber delivery to avoid selling to wireless cable altogether. Significantly, Congress has already taken note of these developments and is considering program access legislation that would address the problems identified above. WCA thus urges the Commission to undertake a thorough reexamination of its program access rules, with the objective of adopting rule modifications and/or making recommendations to Congress that at a minimum (1) expand the scope of the program access rules to encompass all cable programming regardless of whether it is vertically integrated or satellite-delivered and (2) prohibit television broadcast stations from requiring non-cable MVPDs, but not cable, to carry additional non-broadcast channels as a condition of granting retransmission consent.

In addition, on March 10, 1997 the wireless cable industry filed a Petition for Rulemaking (the "Two-Way Petition") requesting that the Commission adopt comprehensive rules that will allow wireless cable operators to use their channels to provide two-way services such as Internet access and high-speed data transmission. Given the cable industry's substantial head start in testing and developing two-way services over cable plant, and given that earlier this year the Commission adopted rules authorizing Wireless Communications Service and Local Multipoint Distribution Service licensees to provide two-way services without further Commission approval, WCA submits that the public interest and considerations of equity militate strongly in favor of immediate action on the Two-Way Petition.

Finally, for the reasons set forth herein, WCA requests that the Commission should do whatever is necessary to expedite pending rulemakings (such as those relating to inside wiring, antenna preemption, and Cable Act reform) that have a direct impact on the wireless cable industry's

ability to compete on a fair and equitable basis with the cable industry for as long as possible. By focusing its efforts on these matters in the near term, the Commission will alleviate the delays wireless cable operators have experienced in delivering service to the public and provide some badly needed clarity to its regulatory environment for the MVPD marketplace.

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COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Inquiry* in the above-captioned proceeding.

I. INTRODUCTION.

He who owns the programming rights [rules] the marketplace.

Rep. Billy Tauzin
Chairman, House Telecommunications
Subcommittee^{1/}

In less than ten words Mr. Tauzin has summarized what Congress observed nearly five years ago in adopting the program access provision of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"): wireless cable operators and other alternative multichannel video programming distributors ("MVPDs") cannot survive without fair and equitable access to the cable programming services which have now become staples of television viewing among American

^{1/} Glick, "Tauzin Concerned About Cable Consolidation, Program Exclusivity," *Cable World*, at 1, 43 (Jul. 7, 1997).

consumers. The recent wave of consolidations and joint ventures within the cable industry, completed with a shift of regional services from satellite to fiber distribution, suggest that the program access problem is likely to become irreparably worse if the Commission and Congress do not seize the opportunity to reevaluate whether the program access rules are adequate to deter anticompetitive behavior by the cable industry. Accordingly, WCA strongly urges the Commission to use the information filed in this proceeding as the catalyst for a comprehensive reevaluation and modification of its program access rules in response to the new competitive environment.

Furthermore, it has become abundantly clear that the cable industry and, more recently, LMDS, are moving with great speed toward providing two-way services such as Internet access and high-speed data transmission. Though the Commission has been very supportive of the wireless cable industry's efforts to test and develop two-way services, the fact remains that the Commission does not have a comprehensive set of rules that would allow wireless cable operators to deploy two-way and other innovative services on a routine basis. WCA therefore respectfully requests that the Commission close this regulatory and marketplace disparity as soon as possible by issuing a notice of proposed rulemaking in response to the wireless cable industry's pending petition for rulemaking proposing rules for flexible use of MDS and ITFS channels.

Finally, there are a number of pending proceedings at the Commission which require near-term resolution if competition is to emerge. WCA thus requests that where possible the Commission should continue to do whatever is necessary to expedite these matters and thereby offer all MVPDs some guidance as to their rights and responsibilities to each other and to their subscribers.

II. DISCUSSION.

A. *The Commission Must Reevaluate Its Program Access Rules To Ensure That They Will Be Effective In Counteracting Anticompetitive Practices Arising From Increased Consolidation Within the Cable Industry.*

In its *Third Annual Report* to Congress on the status of competition in the MVPD marketplace, the Commission stated:

In all but a few local markets for the delivery of video programming the vast majority of consumers still subscribe to the service of a single incumbent cable operator. The resulting high level of concentration, together with impediments to entry and product differentiation, mean that the structural conditions of markets for the delivery of video programming are conducive to the exercise of market power by cable operators.^{2/}

Recent events within the cable industry indicate that the Commission's observation remains valid. By the end of this year, the already extensive consolidation within the cable industry will increase to unprecedented levels, in large part due to TCI's recently announced plan to enter into joint ventures with other large MSOs for the purpose of forming regional cable clusters in large markets across the United States.^{3/} For instance, TCI has agreed to sell 10 cable systems serving

^{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, FCC 96-496, at ¶ 128 (rel. Jan. 2, 1997) [the "*Third Annual Report*"]. Indeed, by the end of 1995, the four largest MSOs served 61.4% of all cable subscribers nationwide - Tele-Communications, Inc. ("TCI") (27.9%), Time Warner (18.9%), Continental/U S WEST (7.7%) and Comcast (6.8%). Moreover, the cable industry has become highly concentrated at the regional level as well: the number of cable system "clusters" serving at least 100,000 subscribers increased from 97 at the end of 1994 to 137 by year-end 1995, accounting for 50% of all cable subscribers nationwide. Among the four largest MSOs, Time Warner and TCI each controlled 32 such clusters, and Comcast controlled six. *Id.*

^{3/} Robichaux, "TCI Closing Deals with Time Warner, Others to Shed Subscribers, Slash Debt," *Wall Street Journal*, at B14 (June 24, 1987); Higgins, "TCI Cablevision Numbers Puzzle Wall Street," *Broadcasting*, at 54 (June 16, 1997).

820,000 subscribers in the New York ADI to Cablevision Systems Corp. ("Cablevision") in exchange for a one-third interest in that company.⁴ Because Cablevision already owns systems serving 1.7 million subscribers in the New York market, its acquisition of the TCI systems will create a cluster of 2.5 million subscribers, the largest of its kind in the United States. More recently, TCI announced a joint venture with Falcon Holding Group, L.P., under which TCI will consolidate approximately 300,000 TCI subscribers in six states with 700,000 Falcon subscribers in 26 states.⁵ Upon completion of that transaction, it is expected that TCI will own approximately 40% of the combined company. In addition, TCI has entered into an agreement with Adelphia Communications Corp. to form a 466,000 subscriber cluster in Pennsylvania, New York and Ohio.⁶

Further, shortly after the announcement of the TCI/Cablevision transaction, Fox Sports Net, which is a 50/50 venture between TCI's Liberty Media Corp. and News Corp.'s Fox Sports, announced an agreement to purchase 40 percent of Cablevision's SportsChannel regional networks.⁷ Even prior to this transaction, Cablevision already represented perhaps the most extreme case of vertical integration imaginable. Not only does Cablevision control a massive cluster of cable systems in the New York City metropolitan area, but:

⁴ Umstead, "More Moves for TCI/Cablevision?," *Multichannel News*, at 1 (June 16, 1997).

⁵ Gibbons & Hearn, "TCI Subs Fly to Falcon," *Multichannel News*, at 1 (June 30, 1997).

⁶ Neel, "TCI Shuffles the Deck," *Cable World*, at 8 (June 16, 1997). TCI is also expected to announce similar transactions with Adelphia in Miami; with Comcast in Pennsylvania and New Jersey; with TCA Cable in Texas; and with InterMedia Partners in Kentucky. *Id.*

⁷ Umstead, "Fox Builds Sports Empire," *Multichannel News*, at 1 (June 23, 1997).

Cablevision [has] full ownership of the Knicks and Rangers sports teams and of the MSG cable network, as well as of the [Madison Square Garden] arena itself. Coupled with the cable rights it already has to five major New York area professional teams -- the Yankees, Mets, Devils, Nets and Islanders -- Cablevision has become the uncontested powerhouse of television sports.^{8/}

In other words, Cablevision literally is vertically integrated from top to bottom: in the case of the Knicks and the Rangers, it owns the facilities where programming is created (Madison Square Garden), the program content itself (the Knicks and the Rangers), the cable programming services that transmit that program content (the MSG and SportsChannel networks) and the cable systems which will retransmit that program content to 2.5 million subscribers in the New York market after Cablevision's acquisition of TCI's cable systems.

Now, however, the nine owned-and-operated Fox/Liberty regional sports networks and the eight Cablevision sports channels will be merged to create a new national sports network that will reach approximately 55 million homes in 17 major markets. The new venture will own the local cable rights to 20 Major League Baseball teams, 17 NBA teams and 12 NHL franchises, representing an unprecedented control of professional sports programming by a cable programmer affiliated with the large MSOs.^{9/} The Fox Sports Net/Cablevision transaction is equally daunting when viewed in terms of horizontal integration: in effect, Fox has entered into a joint sports programming venture with the largest cable operator in the United States (TCI), which in turn will hold a one-third interest in the sixth largest MSO (Cablevision).

^{8/} Fabrikant, "As Wall Street Groans, A Cable Dynasty Grows," *N.Y. Times*, Financial P. 1 (April 27, 1997).

^{9/} "New Teammates: Fox/Liberty Nets, SportsChannel," *Media World* (Jul. 1, 1997).

And there is more. Barely three months ago, News Corp. Chairman Rupert Murdoch made the following statement to Congress in connection with the then-proposed merger of DBS operators American Sky Broadcasting and EchoStar Communications:

For the first time, when consumers choose between cable and DBS offerings, the choice before them will be between two equivalent offerings - - choices with equivalent programming packages, equivalent service to multiple sets in the home and equivalent sign-up costs. SKY is pro-competitive both because it will give consumers a choice and because SKY will spur cable to improve its plant and its service to subscribers faster than any government regulation ever could. Video competition is coming - - although perhaps not in the exact way Congress envisioned when it passed the Telecommunications Act last year.^{10/}

Unfortunately, the “competition” trumpeted by Mr. Murdoch never arrived: just weeks after Mr. Murdoch’s testimony, Fox’s parent company, News Corp., agreed to sell American Sky Broadcasting’s high-power DBS orbital slot and two satellites to DBS operator PrimeStar Partners which is jointly owned in large part by the top four cable MSOs, *i.e.*, TCI, Time Warner, Comcast and Continental/US WEST.^{11/} In return, News Corp. received \$1.1 billion worth of securities in PrimeStar. Fox has already entered into carriage agreements with PrimeStar for its Fox News

^{10/} *Testimony of Rupert Murdoch, Chairman and CEO, News Corp., before the Senate Commerce, Science and Transportation Committee, at 1 (April 10, 1997) [the “Murdoch Testimony”].*

^{11/} Breznick and Stump, “A DBS Powerhouse: News Corp., PrimeStar Finally Make it Official,” *Cable World*, at 1 (June 16, 1997). Time Warner's wholly-owned cable programming services include Cartoon Network, Cinemax, CNN, CNN International, CNNfn (The Financial Network), HBO/HBO2/HBO3, CNN Headline News, TBS, TNT, and Turner Classic Movies. In addition, Time Warner holds a 50% interest in Comedy Central, a 49% interest in E! Entertainment, a 33.3% interest in Court TV, and a 15% interest in Black Entertainment Television (BET). *Third Annual Report*, Appendix G, Table 1.

Channel and fX programming service; both will be carried by PrimeStar after it introduces high-power DBS service on News Corp.'s satellites.^{12/}

In addition, the last year has seen Microsoft, which is 50% owner of the MSNBC programming service, make a \$1 billion investment in Comcast, which serves 4.3 million subscribers nationwide and holds ownership interests in Liberty and a variety of programming services.^{13/}

The past year has also eliminated any need for the Commission to speculate about whether vertically integrated cable programmers will attempt to evade the program access rules by migrating their programming services from satellite to fiber delivery. Cablevision Systems Corp., which controls the rights to virtually all major sports programming in the New York City metropolitan area and is "the uncontested powerhouse of television sports," will soon migrate its popular SportsChannel New York service from satellite distribution to a fiber system with the express purpose of avoiding its program access obligations to competing DBS and wireless cable operators. The New York Times recently reported that:

Even now, Cablevision is moving to circumvent a Federal requirement to share sports programming delivered by satellite with rivals in New York City. The law does not apply to programming services delivered by cable land lines, so the company is busily laying fiber-optic cables so it can switch its method of transmission.^{14/}

^{12/} Gibbons, "PrimeStar Must Roll Onto Cable Turf," *Multichannel News*, at 3, 54 (June 16, 1997).

^{13/} Ellis, "What Microsoft Wants with Comcast Corp.," *Multichannel News*, at 1 (June 16, 1997). Comcast-owned programming services include QVC, The Golf Channel, Viewer's Choice, Outdoor Life, Speedvision and the Sunshine Network.

^{14/} Fabrikant, "As Wall Street Groans, A Cable Dynasty Grows," *N.Y. Times*, Financial P. 1 (April 27, 1997); *see also*, Umstead and Thomas, "Cablevision Reaches for Sports Exclusivity," *Multichannel News*, at 1 (Feb. 10, 1997).

The potential anticompetitive effects of the above-described transactions acquire additional significance when viewed alongside concurrent developments within the wireless cable industry. At the present time, there are 252 operating wireless cable systems in the United States serving approximately 1.1 million subscribers, representing an approximately 50% decrease in the industry's subscriber growth rate since the end of 1995.^{15/} The slower growth of the wireless cable industry (and, correspondingly, the relatively small number of program access complaints filed by wireless cable operators) can be traced to one factor - - the coming digitization of many wireless cable systems.

Until recently, many wireless cable operators have been reluctant to expend significant funds in launching new analog systems or adding additional analog subscribers to existing systems when digitization is just around the corner. That corner will soon be turned, however, as a number of the larger wireless cable operators begin to launch digital wireless cable systems in direct competition with the large cable MSOs. The first digital wireless cable system has already been launched in Los Angeles by Pacific Bell, and BellSouth is scheduling digital wireless cable launches in 1997 and 1998 for New Orleans, Atlanta, Miami/Ft. Lauderdale, Jacksonville, Orlando and Louisville.^{16/} Other wireless cable operators are expected to follow suit, meaning that by the end of next year many incumbent cable operators in major markets will for the first time face competition from a

^{15/} Between the end of 1994 and the end of 1995, the total number of wireless cable subscribers had increased from 600,000 to 847,000, *i.e.*, by 41%. *Third Annual Report* at ¶ 53.

^{16/} *See, e.g.*, Breznick, "BellSouth Eyes Atlanta, New Orleans, Miami for '98 MMDS Launches," *Cable World*, at 12 (Dec. 2, 1996).

second multichannel provider with digital capability *and* the ability to deliver local television broadcast signals to the subscriber.^{17/}

WCA submits that the economic and technical restructuring of the cable industry, combined with the anticipated rapid growth of the wireless cable industry, will inevitably require the Commission to reevaluate whether its program access rules are adequate to deter anticompetitive behavior by cable programmers. First, as the Commission observed as recently as last year, concentration of ownership among cable operators is significant in the program access context because it demonstrates an increase in the buying power of the major MSOs and because it facilitates the ability of MSOs to coordinate their conduct.^{18/} Indeed, the following excerpt from a trade press report about the TCI/Cablevision deal speaks volumes about the potential effect of cable industry consolidation on program access:

[Cablevision chairman Charles] Dolan takes pains to describe the TCI deal as "stand-alone", with no side agreements for either MSO to push carriage of their programming services. "*But that doesn't mean that won't come later.*"^{19/}

^{17/} See, e.g., Gibbons, "PCTV's Story: Waiting for Digital," *Multichannel News*, at 54 (Dec. 9, 1996); Barthold, "A Foggy Road Ahead," *Cable World*, at 21 (Jan. 27, 1997); Barthold, "Going Digital," *Cable World*, at 22 (Jan. 27, 1997).

^{18/} *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996).

^{19/} Paskowski, "Dolan's Mother of All Clusters," *Multichannel News*, at 56 (June 16, 1997) [emphasis added].

Given that Cablevision has already been found to have violated the Commission's program access rules on two separate occasions with respect to SportsChannel New York, WCA believes it is fair to assume that Mr. Dolan's remarks are a precursor of things to come.^{20/}

Second, and perhaps more significantly, the above-described joint ventures between programmers not traditionally considered to be vertically integrated (Fox and Microsoft) with highly vertically integrated cable operators (TCI, Time Warner, Comcast, Continental/US WEST, and Cablevision) strongly suggest that the present definition of "vertical integration" is too narrow to encompass the broad variety of business relationships within the cable industry that clearly threaten the availability of programming to cable's competitors. In this regard, it must be remembered that a number of the more notable cable programming services introduced over the past year are owned by entities that would not be viewed as "vertically integrated" under a traditional analysis of that term, e.g., Fox News and fX (News Corp.) and MSNBC (Microsoft and NBC). Not coincidentally, wireless cable operators have been having trouble securing affiliation agreements with these very same programming services.^{21/} WCA expects that this problem will only become worse now that Fox and Microsoft have become even more closely aligned with the very same cable operators whose stranglehold on local distribution is critical to the success of any programming service.^{22/}

^{20/} See, *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation*, CSR-4983-P, DA 97-1452 (rel. Jul. 11, 1997); *CellularVision of New York, L.P.*, 10 FCC Rcd 9273 (CSB, 1995), *recon.denied*, 11 FCC Rcd 3001 (CSB, 1996).

^{21/} See, Kreig, "Wireless Cable, Connecting to the Future," *Multichannel News*, at 53 (June 23, 1997).

^{22/} Interestingly, in his recent testimony before Congress Mr. Murdoch stated the following:

[B]ecause Fox has experienced first hand the difficulty of achieving widespread

In addition, Cablevision's planned migration of cable programming from satellite to fiber demonstrates how technology is outpacing the Commission's current regulatory framework for program access. At the heart of that framework is Congress's intent that cable's competitors be provided access to cable programming on fair and equitable terms. Clearly, however, Congress had no inkling at the time it passed the 1992 Cable Act that within five years cable programming would be delivered to cable systems through fiber rather than satellite technology. Absent a modification of the Commission's Rules and/or the statute, this "end run" around program access will inflict the very same injury on cable's competitors which the 1992 Cable Act was supposed to prevent.

Finally, the joint ventures described above may have an equally deleterious effect on the wireless cable industry's ability to obtain retransmission consent from local broadcast stations. A broadcaster may also achieve *de facto* retransmission consent exclusivity with the cable industry by insisting that cable's competitors devote additional channels to the broadcaster's other programming services. This, for example, is how NBC was able to secure cable carriage for MSNBC in the New York City market, and how Fox secured carriage for fX in a number of major markets. Given that Fox and Microsoft have now become direct partners with the large

carriage of our own channels on cable platforms, [SKY] plans to widely carry unaffiliated programming on a non-discriminatory basis. Likewise, *we will not withhold Fox programming from unaffiliated [MVPDs].*

Murdoch Testimony at 3 (emphasis added). One wonders whether Mr. Murdoch will change his position now that News Corp. has made a substantial investment in PrimeStar, which competes with wireless cable and is controlled by the large cable MSOs who also compete with wireless cable *and* whose control over local distribution is essential to the success of Fox's cable programming services. Similarly, it is difficult to believe that MSNBC will now be motivated to deal fairly with wireless cable in the wake of Microsoft's enormous investment in Comcast, whose 4.3 million subscribers represent nearly four times the number of subscribers served by all wireless cable operators nationwide.

MSOs, there is every reason to believe that Fox and Microsoft's partner in MSNBC, NBC, now have unprecedented incentive to cripple competition to cable by withholding retransmission consent for their broadcast properties if wireless cable operators do not carry additional programming services on programmer-friendly terms and conditions. Indeed, in view of the difficulties wireless cable operators already have in attempting to obtain the Fox services and MSNBC, this scenario is by no means speculative.

Congress has already taken note of the above-described developments and is on the verge of considering legislation to eliminate their adverse effects on program access.^{23/} In view of the potentially devastating effects of the transactions described above, WCA submits that the Commission should undertake a thorough reexamination of its whether its current program access rules will continue to be effective in the face of dramatically changed market conditions and make such rule revisions and/or recommendations to Congress.^{24/} In this regard, it must be remembered that a Commission decision must sometimes rest on judgment and prediction rather

^{23/} Rep. Billy Tauzin, the chairman of the House Telecommunications Subcommittee and the principal author of the program access provisions of the 1992 Cable Act, recently indicated that he may introduce a bill that would deny all programmers the right to sell their products exclusively on the wholesale level, or require programmers to sell networks individually at the wholesale level rather than packaging them together with other networks. Glick, "Tauzin Concerned About Cable Consolidation, Program Exclusivity," *Cable World*, at 1 (July 7, 1997).

^{24/} One possible vehicle for such a reexamination is the Petition for Rulemaking filed by Ameritech New Media, Inc. (RM-9097), in which Ameritech has asked the Commission to streamline its procedures for resolving program access complaints and adopt a damages remedy to deter dilatory programmer conduct. In response, both WCA and DIRECTV have asked the Commission to expand the scope of that proceeding to include the additional program access issues discussed above. *See*, Reply Comments of The Wireless Cable Association International, Inc., RM-9097, at 3-4 (filed Jul.17, 1997); Comments of DIRECTV, Inc., RM-9097, at 3-4 (filed. Jul.2, 1997).

than be based solely on the situation that exists at the time of the decision.^{25/} In such cases, the Commission is well within its authority to adopt prophylactic rules aimed at resolving problems that have not yet fully materialized, since ““a forecast of the direction in which future public interest lies necessarily involves decisions based on the expert knowledge of the agency.”^{26/} The Commission thus is not required to defer consideration of the above-described issues until competition from wireless cable operators is obliterated by widespread abuses of the program access rules. Indeed, given the pro-competitive policies that are at the core of the 1992 Cable Act, it is impossible to argue that such a posture would serve the public interest.

Accordingly, the Commission is well within its authority to take a proactive stance and consider rule changes in anticipation of marketplace developments which, as demonstrated above, are likely to place alternative MVPDs at a further disadvantage when attempting to acquire popular cable programming on fair and equitable terms from *all* cable programmers. To that end, WCA strongly urges the Commission to initiate a rulemaking proceeding with the objective of adopting new program access rules or making recommendations to Congress which, at a minimum, (1) extend the program access rules to all cable programmers and television broadcast stations, regardless of whether they are vertically integrated or whether they are satellite-delivered, and (2) prohibit cable programming vendors and local television broadcast stations from requiring

^{25/} *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1980).

^{26/} *Id.* at 594-5 (footnote omitted).

video distributors to carry any other programming channel as a condition of granting retransmission consent.^{27/}

B. The Commission Must Act Expeditiously on the Wireless Cable Industry's Two-Way Petition for Rulemaking.

Over the past year it has become increasingly evident that two-way, interactive services will soon become a staple of multichannel video service. The cable industry has already made substantial inroads into testing and delivering two-way services to subscribers over coaxial cable plant; indeed, Microsoft's \$1 billion investment in Comcast is a loud and clear signal as to the cable industry's intentions in this area.^{28/} In light of these events, it is apparent that if wireless cable operators are to survive in the MVPD marketplace, they too must be able to provide a competitive array of interactive communications services.

Though to date the Commission has been very supportive of the industry's efforts to test wireless two-way services in the field, the fact remains that the Commission does not have formal rules that allow wireless cable operators and ITFS licensees to develop and market interactive services which take full advantage of digital technology, without the limitations, risks and inconveniences associated with short-term developmental authorizations or licenses that only permit

^{27/} Ameritech New Media, Inc. has already filed a Petition for Rulemaking (RM-9097) in which it asks the Commission to amend certain of its procedural program access rules and adopt a damages remedy for program access complainants. The Wireless Cable Association International, Inc. And DIRECTV have already asked the Commission to expand the scope of that proceeding to include consideration of the issues discussed above. *See*, Reply Comments of The Wireless Cable Association International, Inc., RM-9097, at 3-4 (filed July 17, 1997); Comments of DIRECTV, Inc., RM-9097, at 3-4 (filed July 2, 1997).

^{28/} LMDS appears to have a head start as well. Dawson & Estrella, "For MMDS, Data is Make or Break," *Multichannel News*, at 51 (June 30, 1997) [noting launch of high-speed Internet service by LMDS operator CellularVision USA, Inc. in New York City].

service to a small number of individually licensed receive sites. Accordingly, with the support of over one hundred participants in the wireless cable industry, on March 10, 1997 the industry filed a Petition for Rulemaking (the "Two-Way Petition") requesting that the Commission adopt comprehensive rules that will allow wireless cable operators to use MDS and ITFS channels to provide two-way services.^{29/} If granted, the Petition will enable wireless cable operators to supplement their digital multichannel video service with a broad variety of two-way and interactive services, including Internet access and high-speed data transmission. A grant of the Petition will also enable ITFS licensees, whether or not they lease excess channel capacity to wireless cable operators, to advance the national goal of providing students with high-speed Internet access for educational purposes.

WCA urges the Commission not to underestimate the significance of the Two-Way Petition not only to the wireless cable industry but to the prospects for *bona fide* MVPD competition. Whereas wireless cable operators have to compete against entrenched cable providers when they launch video services, they have an opportunity to be first to market with high-speed data at infrastructure costs much lower than those of cable.^{30/} Moreover, in the past year the Commission has adopted extremely flexible rules for the Wireless Communications ("WCS") and Local Multipoint Distribution ("LMDS") Services that allow WCS and LMDS operators to provide wireless multichannel video service *and provide two-way services without further authorization*

^{29/} Petition for Rulemaking re: In the Matter of Amendment of Parts 21 and 74 to Enhance the Ability of Multipoint Distribution Service and Instructional Fixed Television Service Licensees to Engage in Fixed Two-Way Transmissions, File No. RM-9060 (filed Mar. 14, 1997).

^{30/} *Id.* at 53.

from the Commission.^{31/} Now that wireless cable is on the verge of providing full-scale competition to incumbent cable operators, the public interest strongly militates in favor of giving wireless cable operators similar relief. WCA thus respectfully requests that the Commission release a *Notice of Proposed Rulemaking* on the Two-Way Petition as quickly as possible.

C. *Where Possible, the Commission Should Act Expeditiously to Conclude Pending Proceedings Which Directly Affect the Wireless Cable Industry's Ability to Compete Effectively With Incumbent Cable Operators.*

Over the past year the Commission has labored mightily to resolve a variety of pending rulemaking proceedings which directly affect whether wireless cable operators will be able to compete on fair and equitable terms with the cable industry. WCA recognizes that the Commission's difficulties in expediting these matters are largely attributable to chronic staff shortages, the large number of parties involved and the sheer complexity of the issues raised before the agency. Now more than ever, however, the Commission should where possible bring these matters to a conclusion so that wireless cable operators and other MVPDs will know the rules under which they must compete with one another. In particular, WCA urges the Commission to focus its attention on the following items:

- *Inside Wiring (CS Docket No. 95-184).* As indicated in the March 24, 1997 *ex parte* filing submitted on behalf of WCA, the Independent Cable & Telecommunications Association, OpTel, Inc. and Multichannel Technology Systems, Inc., there appears to be agreement between the cable industry and cable's competitors as to a number

^{31/} See, *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, FCC 97-50, GN Docket No. 96-228, at ¶ 63 (rel. Feb. 19, 1997); *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, FCC 96-311 (rel. July 22, 1996).

of key issues raised in the Commission's inside wiring docket.^{32/} Moreover, it appears that the Commission is actively attempting to reach a consensus as to how inside wiring should be disposed of once an MDU subscriber terminates cable service. Given that MDUs will be the principal battleground for MVPD competition in many markets (particularly larger cities), WCA urges the Commission to continue these efforts and issue inside wiring rules that clarify the obligations and responsibilities of MVPD providers, landlords and subscribers in the MDU environment.^{33/}

- *Antenna Preemption (IB Docket No. 95-59 and CS Docket No. 96-83).* In its *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking* released August 6, 1996 (the "*Report and Order*"), the Commission issued its rules implementing the over-the-air antenna preemption provisions in Section 207 of the Telecommunications Act of 1996.^{34/} As set forth in the Joint Petition for Partial Reconsideration filed on behalf of WCA and a number of major wireless cable operators, WCA believes that although the Commission's antenna rules are a useful first step, certain rules and policies adopted in the *Report and Order* must be modified somewhat if a pro-competitive marketplace is to emerge.^{35/} Moreover, it is clear from the antenna preemption complaints filed with the Commission that local governments and homeowners associations will not hesitate to use blatantly illegal antenna restrictions and scare tactics to discourage consumers from subscribing to wireless cable or other alternative

^{32/} *Ex Parte* Submission of The Wireless Cable Association International, Inc., *et al.*, CS Docket No. 95-184 (filed March 27, 1997).

^{33/} Hearn, "Home-Wiring Deadlock Could Be Broken," *Multichannel News*, at 18 (June 30, 1997).

^{34/} FCC 96-238 (rel. Aug. 6, 1996).

^{35/} *See*, Joint Petition for Partial Reconsideration filed by The Wireless Cable Association International, Inc. *et al.*, IB Docket No. 95-59 and CS Docket No. 96-83 (filed October 4, 1996). In particular, the Joint Petitioners asked the Commission to, *inter alia*, (1) preempt all non-governmental restrictions impairing wireless cable antennas, subject only to waiver in exceptional circumstances; (2) declare that the Commission has exclusive authority to determine whether a particular antenna restriction passes muster under the Commission's antenna preemption rules; (3) assure that all potentially affected Commission licensees are given actual notice of and sufficient opportunity to participate in any judicial proceedings regarding whether antenna restrictions are preempted under the Commission's Rules.

providers of multichannel video service.^{36/} WCA thus urges the Commission to adopt the recommendations set forth in WCA's Petition for Reconsideration as soon as possible and otherwise send a clear message to local governments and homeowners associations that any future attempts to flout the Commission's antenna preemption rules at the expense of competing MVPDs will not be tolerated.

- *Cable Act Reform (CS Docket No. 96-85)*. On April 9, 1996, the Commission released an *Order and Notice of Proposed Rulemaking ("Order & NPRM")* in which it proposes, *inter alia*, to adopt rules implementing the uniform pricing provisions of the 1996 Act.^{37/} As reflected in WCA's comments in that proceeding, the *Order & NPRM* raises significant issues vis-a-vis the scope of the "bulk discount" exception, the availability of State antitrust laws to deter predatory pricing by the cable industry, and whether it is appropriate to allow cable operators to justify below-cost pricing with a "meeting competition" defense. As in the case of inside wiring, these issues must be resolved soon in order provide competing MVPDs some guidance as to how the Commission will regulate cable industry behavior in the MDU environment.

III. CONCLUSION.

Now that Rupert Murdoch has placed his "DBS bet" on the cable-controlled PrimeStar, it is quite clear that burden of providing full-scale competition to the cable industry (*i.e.*, that which is capable of delivering local broadcast stations, cable programming networks and two-way services) now falls squarely on the shoulders of the wireless cable industry. Yet, as already recognized by Congress, recent marketplace developments reflect that the Commission's program access rules are in serious danger of becoming entirely inadequate to ensure that wireless cable operators have fair and equitable access to the cable programming that is essential to their survival. WCA

^{36/} See, e.g., the pleadings filed by WCA and various competing MVPDs in *CS Wireless d/b/a OmniVision of San Antonio*, CSR-4947-O, and *Star Lambert and the Satellite Broadcasting and Communications Association of America*, CSR-4913-O.

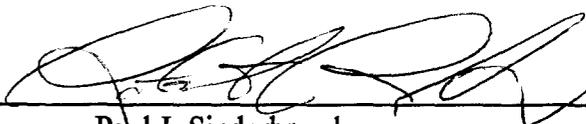
^{37/} *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154 (rel. Apr. 9, 1996).

strongly believes that a reassessment of the Commission's regulatory framework for program access, combined with expedited processing of the Two-Way Petition and other pending matters which directly affect MVPD competition, would represent exactly the type of proactive, public interest-minded regulation which the restructured MVPD marketplace requires at this time.

WCA thus urges the Commission to seize the opportunity to act ahead of the curve in this matter and initiate the actions recommended above.

Respectfully submitted,

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By: 
Paul J. Sinderbrand
Robert D. Primosch

WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Suite 600
Washington, D.C. 20006
202/783-4141

Its Attorneys

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