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July 7, 1998

1998

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Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, NW  
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Washington, D.C. 20554

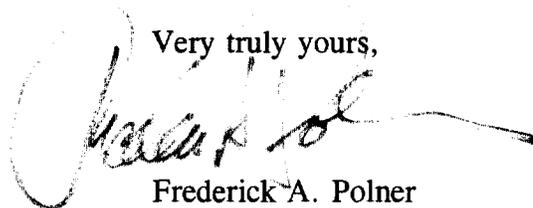
**RE: CS DOCKET NO. 98-54  
REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF  
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

Dear Ms. Salas:

On behalf of the National Association of Telecommunications Officers and Advisors ("NATOA"), we enclose an original and four (4) copies of the above-referenced Reply Comments.

If you have any questions, please call.

Very truly yours,



Frederick A. Polner

FAP/lmw

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
1998 Biennial Regulatory Review-- ) CS Docket No. 98-54  
)  
Part 76 - Cable Television Service )  
Pleading and Complaint Rules )  
)

To: The Commission

REPLY COMMENTS  
OF  
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS  
OFFICERS AND ADVISORS

AND NOW COMES, the NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS ("NATOA") by and through its special counsel, Frederick A. Polner and Rothman Gordon Foreman & Groudine, P.C., and hereby respectfully submits this REPLY COMMENTS in the captioned proceeding.

**Introduction**

NATOA is the leading national association of cable television franchise authority administrators, officers and advisors. Its members actually administer or advise local franchise authorities ("LFAs") from small towns to major metropolitan areas. Its depth and breadth of experience in matters of cable television are matters of public record and are well known to the cable industry and to the Commission.

## Discussion

### **I. Burden of Proof in Matters Relating to Effective Competition**

The Notice of Proposed Rule Making ("NPRM") in the captioned proceeding requests comments relating to burdens of proof.

The Wireless Communications Association ("WCA") filed Comments suggesting that a cable operator's burden of proof should *not* be altered in matters relating to effective competition. NATOA replies by endorsing that suggestion.

Section 623(a)(2) of the Communications Act requires the Commission to "find" that a cable system is not subject to effective competition before authorizing rate regulation. The rules to implement that section of the Act, promulgated by the Commission, recognized Congress' intent for a simple, streamlined process for certification of local authorities, by adopting a presumption that, in any given locale, the cable operator is not subject to effective competition. The cable operator, of course, is not bound by that presumption and can challenge it; but the burden of rebutting the presumption squarely is placed on the cable operator. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation, 8 FCC Rcd 5631(1993); ("Implementation"): 47 C.F.R. § 76.906, 76.915(a). This delicate balancing is premised on the Commission's observation that the vast majority of cable systems is not subject to effective competition. Indeed, in the Commission's latest Annual Report on Competition in Video Markets, it is reported that 87% of all households that receive multichannel video programming are served by cable operators. Of the 13% not served by cable, almost half are not passed by cable and choose another provider not by choice, but by default. That report reflects how the cable industry continues to occupy the dominant position in the multichannel video marketplace. To require each local franchising authority to prove an obvious absence of effective competition, and concomitantly to require the Commission to adjudicate each such claim, would be horribly inefficient and an horrendous waste of precious resources. Accordingly, NATOA respectfully submits this burden of proof should not be changed.

In comments filed by TCI, even TCI does not suggest reallocating the burden of proof. Rather, TCI proposes a thirty (30) day deadline in which the Commission must rule on a challenged certification, or alternatively, that the Commission stay all rate regulation pending issuance of a Commission decision. NATOA replies by interposing its objection to each such alternative.

TCI limits its proposed thirty (30) day requirement to only those situations where no opposition to decertification has been filed. NATOA submits that such 30 day deadline is unrealistic and unworkable, given the limited resources presently available to the Commission. Even where no opposition to decertification has been filed, the showing propounded by the cable operator in support of decertification, often, can be quite fact specific and complex. This is evident from TCI's own comments, wherein TCI says, "...in many cases, TCI and other cable operators have filed pleadings containing extensive analyses and supporting data demonstrating that a particular cable system is subject to effective competition." TCI Comments, p.10.

As a sop to the Commission's possible concerns about a manifold increase in staffing and resources which inevitably would be required in order to implement the thirty (30) day deadline, TCI suggests that where no opposition is filed to a decertification request, the Commission abandon any requirement for issuing a written analysis. TCI forgets, however, that whereas its full-time occupation is attending to its cable business, local franchise authorities have myriad concerns, other than cable television. In this regard, it is well to note that, while it often is a difficult hurdle to surmount, the Commission's processes do contemplate that even an entity, (such as a LFA), which failed to earlier participate in a proceeding, upon good cause shown, can later seek to enter the proceeding in order to vindicate its rights, See e.g.: § 1.106, "Petitions for Reconsideration," § 1.115 "Application for Review of Action Taken Pursuant to Delegated Authority." Thus, the absence of a written analysis, or a mere cursory treatment, as TCI suggests, would rend fundamental due process by depriving a LFA of a reasoned articulation of findings and conclusions of law which then can be reviewed by the Bureau Chief, the full Commission, or a court. The out-of-context examples cited

by TCI in its footnote number 24 simply are inapposite. None of these examples pertain to a situation where the dominance of the market is so vast and a presumption is so warranted.

The alternative, suggested by TCI, to stay all rate regulation pending the issuance of a Bureau decision is no better. In promulgating Sections 76.906 and 76.915(a), the Commission was fully cognizant of the need to protect cable subscribers from unchecked and abusive cable TV rates. If the alternative suggested by TCI were to be adopted, the potential for misuse of the process is greatly increased. Cable subscribers would be at the mercy of profligate pricing, occasioned simply by a cable operator filing a petition to decertify a LFA.

TCI suggests that a stay of rate regulation is appropriate and analogizes to the automatic stay granted, pursuant to Section 76.911, when a cable operator files a petition for reconsideration of rate certification. Such analogy is not, however, well founded. A finding of the absence of effective competition is a jurisdictional predicate for a LFA to engage in rate regulation and, as the Commission concluded in Implementation, supra, an automatic stay, under such circumstances is appropriate. Where, however, as in the situation posited by TCI, a LFA certification already had become effective, there is no jurisdictional predicate at issue. Certainly, a cable operator can move to change the certification status of a LFA, but an automatic stay of rate regulation is unwarranted.

## **II. Status Conference Mechanism**

In its Comments, TCI strongly urges the Commission to institute a status conference mechanism for local rate appeals. In reply, NATOA, on behalf of its members, offers its vigorous opposition to such suggestion.

Section 623(a)(2) of the Communications Act states that rates for basic cable service "shall be subject to regulation by a franchising authority" or "by the Commission

if the Commission exercises jurisdiction pursuant to paragraph (6)." Paragraph (6) of that section only permits the Commission to exercise "the franchising authority's regulatory jurisdiction" when a franchise authority's certification is disapproved or revoked, and then only until a new certification is approved.

Ultimately, the cable rate regimen adopted by the Commission in Implementation, supra, envisions only a very limited and modest role for the Commission in matters of basic cable rate regulation. Thus, other than reviewing a local rate decision pursuant to Section 76.944 of its Rules, the Commission refrains from interceding in basic rates, except in situations where (i) a LFA can demonstrate it lacks the resources to engage in basic rate regulation, or (ii) a LFA lacks the legal authority to regulate basic service rates. See § 76.913.

Leaving aside the issue of whether the clear Congressional directive for the Commission not to become too far involved in local rate regulation matters wholly clips adoption of TCI's suggestion, NATOA submits, from purely a public policy stance, TCI's suggestion fatally falters. TCI blithely ignores the already strained resources of the Commission. TCI seeks to have the Commission commit additional time and attention to the shepherding of a large volume of status conferences.

Further, even a superficial reading of TCI's Comments reveals that TCI is suggesting more than a mere "status" inquiry. In its comments, TCI lists a half dozen very substantive matters to be discussed at a "status" conference, each one of which will soak up an enormous amount of Commission staff time. TCI Comments, p.8. NATOA submits there is no need to do so.

Under present regulation, there is no legal or practical impediment to informal dialogue between a cable operator and a LFA. Informal dialogue, looking toward conflict resolution between an operator and a LFA, often does occur and is in the best interests of both parties. Moreover, the opportunity for expedited, informal resolution is magnified if such discussions were to occur in face-to-face meetings at the local level.

This is because, if discussions were to occur in the local jurisdiction, face-to-face meetings between the cable operator and representatives of separate branches of local government, often necessary to achieve resolution, can be coordinated and scheduled, without the need for any Commission intervention. In contrast, requiring local personnel to disrupt their respective schedules and to meet in Washington, D.C., and further requiring a LFA to bear the additional financial burden of travel, food and lodging, only would discourage participation in an informal resolution, thereby making the process much less productive and achieving a positive outcome much less likely. Even if such conferences were to be held telephonically, there is no need to overlay the process nor to tax the Commission's limited resources.

### **III. Pre-Certification Notification**

In its Comments, TCI urges the Commission to impose a 10-day advance notice requirement on a LFA's request for certification to engage in local rate regulation. NATOA replies in opposition.

In reply, NATOA believes, first, it is incumbent to point out TCI's mischaracterization of the process. TCI wishes it to appear that a LFA must "petition" the Commission for certification. The truth, however, is, that, rightfully so, the Commission requires no petition to obtain rate certification. Instead, the process is quite simple, all in an effort to encourage a LFA to protect its residents from excessive cable rates. All that is required is the filing of a one page form.

Rather than streamlining the process, TCI advocates making the process more complicated by adding another procedural requirement. The additional requirement works well for TCI, because it would afford TCI an additional ground upon which to contest certification. In the event a LFA, even inadvertently, would fail to comply with the 10-day notice requirement, TCI can argue certification is ineffective. Further, if TCI were to contend such requirement would not be a material ground to deny, or to delay

certification, then merely inserting such requirement into the rulebook would be pure clutter and a fully nugatory effort.

In addition, there is no need for the 10-day notice desired by TCI. There presently exists in the Commission's Rules a procedure for TCI to challenge a LFA rate certification. See e.g.: §§ 76.911; 76.915. Moreover, there is no reason why a cable operator can not, at anytime, attempt to persuade a LFA that it is folly to continue to regulate cable rates. If it succeeds in such persuasion, a LFA readily can avail itself of the benefits of Section 76.917 which allows a LFA to notify the Commission that it no longer intends to regulate basic cable rates. Such withdrawal, even, is effective without FCC approval, becoming instantly effective when filed.

Likewise, there is no need for the 10-day notice desired by TCI with regard to filing a CPST complaint with the Commission. The present procedure already affords a 30-day advance notice to a cable operator of a LFA's intention to file a CPST complaint, during which time the cable operator has the opportunity to justify its rate increase by filing a rate application to support its increase.

#### **IV. Service Copies**

In its Comments, the National Cable Television Association ("NCTA") suggests changes to the service requirements presently set forth in the Commission's Rules. In reply, NATOA opposes changes where the likelihood of confusion or noncompliance will be increased.

NCTA suggests that, if a cable company is represented by counsel, the complainant be required to (i) attempt to identify that counsel; and (ii) serve that counsel, in addition to the party. Such suggestion, while well intentioned, is not workable, as it would apply to the multitude of LFAs, small and large across this country. Although some LFAs do

have full-time cable administrators, the vast majority of LFAs do not. As a practical matter, a LFA would have little or no means to ascertain the identity of a cable operator's counsel, or even which counsel is the proper one to receive service from among the several a cable operator may have engaged to represent it in its sundry dealings with a LFA. Certainly, NCTA would not think making service on a cable operator's local zoning counsel will have the effect of streamlining the process. Imposing the requirement, suggested by NCTA, is either not achievable or would impose a significant unwarranted burden on a LFA. To the contrary, only confusion would be engendered.

### Conclusion

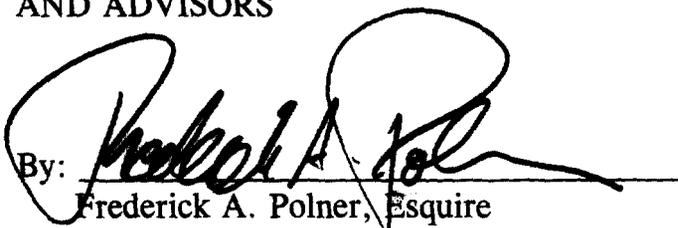
NATOA is in favor of expediting and streamlining the Commission's processes. It is in the best interests of its members, and of the citizenry protected by such members, to do so.

The suggestions made by TCI and NCTA, however, would have the opposite effect of "streamlining." Rather than streamlining the process, these suggestions, if adopted, will merely shift burdens from the entities with the resources to shoulder them, to those entities (the FCC and LFAs) with resources already strained.

The NCTA and TCI proposals referenced above would simply add needlessly to costs of rate regulation and make the process more complex and less reliable than it is at present.

For all of the reasons averred, NATOA respectfully requests suggestions made by TCI and NCTA discussed in this Reply be rejected.

Respectfully submitted,  
NATIONAL ASSOCIATION OF  
TELECOMMUNICATIONS OFFICERS  
AND ADVISORS

By:   
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July 7, 1998

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Reply Comments of National Association of Telecommunications Officers and Advisors were served upon the following individuals via First Class Mail, postage prepaid, this 7th day of July, 1998.

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