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**Lisa Chandler Cordell**

August 6, 1999

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Room TW-A325  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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**Re: CS Docket No. 99-230  
Comments of the American Cable Association**

Dear Ms. Salas:

On behalf of the American Cable Association ("Association"), we enclose for filing and original and nine (9) copies of the Association's comments in this proceeding. We ask that each of the Commissioners receive a copy.

We also enclose a "FILE COPY." We ask that you date-stamp it and return it to the courier.

Please call with any questions.

Very truly yours,

*Lisa Chandler Cordell*

Lisa Chandler Cordell

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

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In the Matter of )  
 )  
Annual Assessment of the Status )  
of Competition in Markets for the ) CS Docket No. 99-230  
Delivery of Video Programming )

**COMMENTS OF THE  
AMERICAN CABLE ASSOCIATION**

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**August 6, 1999**

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## SUMMARY

As smaller cable businesses and the owners of smaller cable systems continue to remain the principal providers of cable and advanced services committed to investing in facilities in rural America, these smaller businesses face challenges created by the imposition of regulation in some matters and the absence of regulation in others. Continued recognition of the unique attributes of smaller cable remains imperative to smaller cable's continued ability to successfully compete in the market for delivery of video programming and advanced video services.

Smaller cable has unique attributes that mandate special consideration. Smaller cable has higher per-subscriber costs. It has greater difficulty attracting capital investment, and it does not benefit from the economies of scale enjoyed by its competitors.

In preparing its *Annual Report* to Congress, the American Cable Association ("Association") urges the Commission to consider the following:

### **The need for a comprehensive policy regarding treatment of smaller cable issues**

Smaller cable faces different issues than its larger counterparts. Appropriate consideration of these issues remains critical to smaller cable's continued success. The Commission must adopt a consistent policy to address smaller cable's unique concerns. Smaller cable needs different treatment than the large cable operators.

### **Open Access**

The Commission should adopt a "hands-off" policy regarding imposition of regulatory measures regarding Internet over cable. The Internet provides an example of

how marketplace forces drive technological advancement without the need for government interference.

The Internet and related services embody some of the characteristics of other communication technologies. The Internet, however, remains unique. The Association cautions against the temptation to apply traditional regulatory models to Internet issues. Instead, should government intervention become necessary, the Commission and Congress should comprehensively study the traditional regulatory models for various communications technologies. This would provide an opportunity to restructure existing regulatory models to reflect current realities of the communications industry and create new regulatory models that accommodate the needs of new technologies.

### **Program Cost**

Program cost issues remain significant. Despite a recent Commission decision expanding the benefits to buying groups, the Commission failed to incorporate these changes into its regulations. The Commission must modify its regulations to reign-in the last of the renegade programmers that still refuse to deal with buying groups.

### **Development of the multichannel video programming market**

Recent Commission actions regarding direct broadcast satellite ("DBS") services signal the Commission's desire to improve the competitive posturing of DBS, even at the expense of long-established communications policy and in contravention of statutory mandate. The Association urges the Commission to revisit the issue of DBS public interest obligations and give meaningful consideration to how DBS can serve localism.

As DBS continues to grow, it is imperative that the Commission's desire to promote competition in the market for delivery of multichannel video programming does not result in a regulatory environment favoring DBS over other multichannel video programming distributors ("MVPD"). The development of this market should instead be driven by marketplace forces. Regulatory parity among MVPDs will serve to promote competition without affording particular services unfair and unreasonable advantages.

### **Digital must-carry and analog retransmission consent**

Digital must-carry issues pose unique concerns for smaller cable, largely due to smaller cable's unique characteristics. A range of Commission actions could have far-reaching adverse consequences for smaller cable. Should the Commission decide that it can, and will, impose digital must-carry obligations on cable systems, it must craft meaningful rules for smaller cable digital carriage that consider smaller cable's unique concerns.

The Commission must also act to prevent broadcaster abuses of retransmission consent. Due to smaller cable's lack of bargaining power, broadcasters frequently impose unreasonable demands in exchange for retransmission consent. Now broadcasters have continued this behavior by seeking digital carriage in exchange for analog retransmission consent. The Commission must act to ensure a consistent policy regarding mandatory digital signal carriage by smaller systems.

### **The Commission must craft meaningful small cable affiliation standards**

The Commission's recent decision to allow passive investor treatment for truly passive investors did not adequately consider marketplace realities. The limitations

imposed on passive investments would require investors to forego even the most minimal measures to protect their investments. This will discourage, if not prevent, investors from investing in smaller cable. Closing the doors to smaller cable investment will prevent smaller cable from effectively competing in the rapidly advancing MVPD market, inhibit its ability to introduce advanced services, and widen the “digital divide.”

Each of these issues remains fundamentally important to smaller cable’s continued success. The Association urges the Commission to consider its comments, take action where it has jurisdiction and make recommendations to Congress that embody smaller cable concerns.

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

<b>In the Matter of</b>	)	
	)	
<b>Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming</b>	)	<b>CS Docket No. 99-230</b>
	)	

**COMMENTS OF THE  
AMERICAN CABLE ASSOCIATION**

**I. INTRODUCTION**

The American Cable Association (formerly the Small Cable Business Association) ("Association" or "American Association") files its comments in this proceeding to apprise the Commission of issues that remain critically important to smaller cable businesses operating smaller cable systems (collectively "smaller cable") and impact smaller cable's continued ability to effectively compete in the delivery of video programming. The continued competitiveness and viability of smaller cable businesses remains crucial to the continued deployment of advanced video and data services to rural America.

**A. The American Cable Association**

The Association files this Petition on behalf of its nearly 300 member smaller cable businesses and their smaller cable systems that serve more than 2.3 million subscribers nationwide. The majority of the Association's members have fewer than 1,000 total subscribers. Then known as the Small Cable Business Association, smaller, independent cable businesses formed the Association in 1993 to represent the collective interests of

its members and to speak with a unified voice regarding issues affecting their businesses. The Association regularly represents its members' interests in Commission proceedings to inform the Commission of characteristics and concerns of smaller and independently owned cable businesses and to ensure that Commission decisions do not unfairly and adversely impact its members' businesses.

**B. A Complete Analysis of Competition Must Consider Issues Uniquely Impacting Smaller Cable.**

The Commission's analysis of the status of competition in the market for delivery of video programming remains incomplete without considering the impact of certain regulatory issues on smaller cable. Many regulatory matters that have come before the Commission since last year's report or remain unresolved before the Commission uniquely impact smaller cable. As the Commission prepares its report to Congress in this proceeding, the Association implores the Commission to conduct a comprehensive analysis of the impact of these issues on smaller cable.

**II. BACKGROUND**

**A. Many of the Issues Raised by the Association Last Year Remain Unresolved and Continue to Impair Smaller Cable's Ability to Effectively Compete.**

The Association has routinely submitted comments in connection with the Commission's *Annual Report* ("Report") to Congress on competition in the video programming delivery market. Many of the issues the Association has addressed in prior years' comments continue to hamper smaller cable. They include: the disparate cost of programming; absence of regulatory parity between cable and direct broadcast satellite

service; overly-restrictive small cable affiliation rules; and, unregulated pole attachment issues. As discussed in these comments, new issues have now come to the forefront that add to the list of regulatory inequities that injure truly fair and long-term competition.

**B. Smaller Cable Continues to Make Progress Despite the Regulatory Imbalances.**

Despite legal, technological and financial impediments, smaller cable continues to attempt to compete with larger providers that do not invest in local facilities or local programming, such as direct broadcast satellite (DBS) providers. Smaller cable strives to provide its customers with the most advanced services at affordable prices. When feasible, smaller cable has introduced advanced services, including digital platforms and Internet access. The Association discusses smaller cable's successes more thoroughly below.

**C. A Number of Issues Remain Critically Important to Smaller Cable.**

A number of issues remain vitally important to smaller cable and its customers. They include: program cost; mandated open access; pole attachment rates, terms and conditions; digital must-carry and retransmission consent; and regulatory parity among multichannel video programming distributors. Failure to adequately address these issues will hinder smaller cable's ability to effectively compete -- competition that results in the diverse and competitive market for delivery of video programming.

**III. THE COMMISSION SHOULD ADOPT A COMPREHENSIVE POLICY REGARDING SMALLER CABLE ISSUES.**

Issues confronting smaller cable differ from those facing most other multichannel video programming providers. Two types of issues make it more difficult for smaller cable

to compete with its larger competitors -- (1) financial and (2) regulatory impediments. Despite those obstacles, smaller cable has persevered. Continued success, however, requires a governmental policy that encourages, not discourages, smaller cable. This requires adoption of a comprehensive policy that recognizes smaller cable's unique attributes.<sup>1</sup>

**A. Smaller Cable Has Unique Attributes.**

Smaller cable's unique attributes mandate a different regulatory approach.

**1. Higher per-subscriber costs require special consideration.**

Smaller cable systems, particularly those that serve rural America, have higher per-subscriber operating and capital costs. Smaller cable systems frequently have increased construction and maintenance costs due to the amount of plant and facilities needed to cover the large, less densely populated areas they serve.<sup>2</sup> They generally do not benefit

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<sup>1</sup> The Commission has previously crafted special rules for smaller cable, recognizing that "a large number of smaller cable operators face difficult challenges in attempting simultaneously to provide good service to subscribers, to charge reasonable rates, to upgrade networks, and to prepare for potential competition." See *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 7393 at ¶ 25 (1995) ("*Small System Order*").

<sup>2</sup> See *id.* at ¶ 17 (discussing Comments of Avenue TV *et al.*) ("[C]ommenters observe that a smaller system serving a large rural area faces increased construction costs due to the increased amount of cable that must be installed to reach the entire area and increased operating costs given the greater amount of facilities that must be maintained.")

from programming and equipment discounts offered to larger systems and competitors.<sup>3</sup> These higher per-subscriber costs reduce cash flows and lower rates of return.

## **2. Smaller cable has difficulty in obtaining capital.**

The higher per-subscriber costs raise the inherent risk of the smaller cable business, and the lower rates of return often fail to provide a sufficient risk component, making attraction of capital difficult. As institutional investors have explained in other Commission proceedings, "small operators pose capital risks that underscore the importance of maximizing revenue potential."<sup>4</sup> In a period of rapid advancement in the market for delivery of video programming, access to capital becomes even more crucial. Commission rules and policies that discourage capital investment in smaller cable hinders smaller cable's ability to effectively compete in existing services, and inhibits its ability to introduce new technologies and services.

## **3. Reduced operating economies of scale hinder smaller cable.**

Operating economies of scale available to smaller cable's competitors hinder smaller cable businesses. Smaller cable businesses often lack the expertise or personnel

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<sup>3</sup> See *id.* (internal citations omitted) ("[Commenters] point out that small operators do not qualify for programming and equipment discounts due to the low number of subscribers that they serve.")

<sup>4</sup> See *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order in CS Docket No. 96-85, FCC 99-58 at ¶ 72 (released March 29, 1999) ("*Cable Act Reform Order*") (discussing comments of institutional investors in connection with small cable affiliation rules for purposes of deregulatory status under the Telecommunications Act of 1996).

to deal with burdensome regulations.<sup>5</sup> They do not benefit from the same scale of volume discounts on programming or equipment. These factors impair smaller cable operators' ability to upgrade their facilities and compete with larger competitors who remain unburdened by comparable regulation.

**B. Commission Rules and Policies Must Reflect Smaller Cable's Unique Characteristics.**

The communications industry has experienced unprecedented growth and advancement. In some cases, the reasons for such progress go beyond entrepreneurialship and inventiveness but can be attributed to those technologies' ability to operate unrestrained by government regulation.

Communications policy is at a crossroads. As many technologies begin to converge and create new services, Congress and the Commission must reevaluate how to regulate these existing and new services. In undertaking this difficult task, the Association cautions against any regulatory model that fails to adequately consider the unique attributes of smaller cable. Any regulatory model that applies uniformly to all cable systems, regardless of size, will cripple smaller cable's competitiveness in the delivery of video programming and its ability to offer new services, thus widening the "digital divide."

The importance of adopting a comprehensive policy to address smaller cable's unique characteristics has become even more evident in light of several matters that have

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<sup>5</sup> See *Small System Order* at ¶ 17. ("Commenters note that for smaller operators facing regulation, as well as franchise demands to provide certain community services, time and expertise needed to analyze and comply with existing rules are in short supply. . . . [S]maller operators have too few subscribers to generate the revenues sufficient to cover the expense of hiring enough employees to comply with existing rules, or to retain outside legal and accounting expertise.").

come before the Commission this last year. They include: open access and eligibility of Internet service providers for leased access; the qualification of buying groups for volume discounts under the program access rules; development of direct broadcast satellite ("DBS") rules; digital must-carry and retransmission consent issues; and, affiliation standards for purposes of small cable deregulation. Each of these matters directly impact smaller cable's continued effectiveness in competing in the video programming delivery market.

#### **IV. THE COMMISSION SHOULD MAINTAIN A "HANDS-OFF" POLICY REGARDING OPEN ACCESS AND ISP ACCESS TO CABLE INFRASTRUCTURE.**

The Commission should leave development of broadband high-speed data access unfettered by government intervention. Mandating cable systems to make available their channel capacity to Internet service providers ("ISP"), whether by open access, leased access or otherwise, will hinder deployment of Internet services to rural America and serve as a disincentive to smaller systems to upgrade their facilities.

Attempting to fit developing technologies into traditional regulatory models constitutes poor public policy. In a 1997 Office of Plans and Policy Working Paper, the Commission staff stated:

There are reasons to believe that a simple process of drawing analogies to familiar services will not be appropriate for the Internet. The Internet is simultaneously local, national, and global, and is almost infinitely plastic in terms of the services it can support. As a result, it confounds any attempt at classification. Failure to consider such category difficulties is, however, itself a form of line drawing. As long as some communications services are subject to regulatory constraints, legal boundaries will be necessary. New approaches may

therefore be necessary to avoid inefficient or burdensome results from existing legal and regulatory categories.<sup>6</sup>

That the explosive growth of the Internet results from its ability to develop in a largely unregulated operating environment provides an important reason to forbear from applying existing regulations to Internet services. As Chairman Kennard commented during recent testimony before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Business Rights and Competition:

The Internet is a testament to a wise regulatory policy: don't regulate unless there is a clearly demonstrable need to do so. The reality is that something as dynamic and revolutionary as the Internet probably can't be regulated and, unless and until there is a demonstrable market failure affecting the general public, we should resist calls to regulate it. The unregulated, highly competitive Internet is a useful model for the more traditional telecommunications sectors.<sup>7</sup>

The Internet provides an example of how effectively marketplace forces drive the advancement of technologies without the need for government regulation. Rather than further burdening existing technologies to foster the Internet and other advanced services' growth, the better policy involves allowing marketplace forces to drive their development.

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<sup>6</sup> Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper Series No. 29, Federal Communications Commission (March 1997) at 26.

<sup>7</sup> See Statement of William E. Kennard, Chairman, Federal Communications Commission, before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Business Rights and Competition on State of Competition in the Telecommunications Industry Three Years After Enactment of the Telecommunications Act of 1996, 1999 FCC LEXIS 753 at \*2.

## V. PROGRAM ACCESS ISSUES CONTINUE TO HAMPER SMALLER CABLE.

Smaller cable faces critical concerns arising from the cost of programming. Last year's program access decision appropriately recognized the importance of buying groups. That decision, however, failed to result in any changes to the actual regulations. The Commission must modify its regulations to make clear to the last of the renegade programmers that they cannot refuse to deal with buying groups that meet the criteria outlined in the Commission's Order.

The Commission correctly determined that, as an alternative to joint and several liability, buying groups may:

maintain liquid cash or credit reserves (*i.e.*, cash, cash equivalents, or letters or lines of credit) equal to cover the cost of one month's programming for all of the buying groups members. . . [E]ach member of the buying group will remain liable to the programmer for its pro-rata share of the buying group's programming."<sup>8</sup>

The Commission published this aspect of its decision in the Federal Register<sup>9</sup>; however, it failed to include this particular provision in the Code of Federal Regulations. The Association urges the Commission to take action to include this alternative to joint and several liability in the buying group definition, found at 47 C.F.R. § 76.1000(c).

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<sup>8</sup> See *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order in CS Docket No. 97-248, 13 FCC Rcd 15822 at ¶ 78 (1998).

<sup>9</sup> See 63 Fed. Reg. 45740, 45742 (1999).

## **VI. CHANGES IN THE MULTICHANNEL VIDEO PROGRAMMING DELIVERY MARKET.**

### **A. Regulatory Policy Should Support Smaller Cable's Progress in Upgrading Systems and Offering Advanced Services.**

Despite technological, regulatory and financial obstacles, smaller cable continues to make great strides in upgrading facilities and introducing advanced services. Continued success, however, hinges on Commission and congressional recognition of the unique issues smaller cable faces.

Where feasible, smaller cable systems and smaller cable businesses are aggressively seeking ways to deploy digital services, Internet services and other advanced services. Smaller systems, however, face a fundamentally different cost structure than larger systems and, consequently, different barriers to deploying new services. The higher per-subscriber costs of services requiring headend or system investments often make them unaffordable for many smaller cable systems.

Faced with economic limitations created by higher per-subscriber costs and a desire to keep subscriber rates reasonable, smaller cable businesses have sought, and continue to seek, creative solutions to offer to their subscribers the same services offered by their larger counterparts. Smaller cable has played an important role in pioneering Headend in the Sky ("HITS") to permit smaller systems to deliver digital video programming at an affordable price. For the smallest systems, where the per-subscriber cost of the original HITS digital platform remains unaffordable, smaller cable has worked with HITS to launch HITS-2-HOME, a digital add-on service inserted at individual customers' homes.

Smaller cable businesses have similarly sought creative solutions to offer advanced services, including Internet access. In some instances, they have forged agreements with established ISPs, e.g., the ISP Channel, HSA Corporation and others, to offer Internet services. Other smaller cable businesses continue to seek other unique solutions. The Association estimates that more than 40% of its members' subscribers have Internet and other high-speed data services available over their cable systems.

Smaller cable has successfully found competitive solutions to offer digital and other advanced services. Continued success, however, largely depends on remaining free from onerous and unnecessary government regulations.

**B. The Commission Should Not Create a Regulatory Environment that Favors DBS.**

Recent Commission actions suggest that its overarching concern with respect to DBS involves improving DBS' competitiveness, even at the expense of other long-standing communications policy objectives. For example, the Commission, in its *DBS Public Interest Obligations Order*,<sup>10</sup> circumvented its statutory obligation to consider how DBS could serve the principles of localism.<sup>11</sup> The Commission rationalized its inaction on two grounds — technological issues and legal impediments to DBS local service.

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<sup>10</sup> See *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Interest Obligations*, Report and Order in MM Docket 93-25, FCC 98-307 (1998).

<sup>11</sup> See *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Interest Obligations*, MM Docket No. 93-25, Petition for Reconsideration of the Small Cable Business Association (filed March 10, 1999). See 47 U.S.C.S. § 335(a) (outlining the Commission's obligation to consider how DBS could serve localism).

The Commission's decision, however, overlooked certain marketplace realities and legislative efforts designed to ensure that barriers to DBS local service do not exist. It failed to consider DBS providers' current practice of offering local signals and technological advances that permit widespread DBS local service.<sup>12</sup> It similarly disregarded significant legislative activity that would remove any legal impediment to DBS local service. To comply with Congress' will, the Commission must reopen the proceeding and consider how DBS can serve localism.

Commission reconsideration of its *DBS Public Interest Obligations* decision as it pertains to ways for DBS to serve localism is important to smaller cable. Smaller cable serves localism.<sup>13</sup> Offering local broadcast signals remains an integral component of smaller cable's competitive strategy. Any Commission decision that negatively impacts the continued availability of local broadcast signals, and thus abandons the principle of localism, similarly harms smaller cable and its customers.

## **VII. DIGITAL MUST-CARRY AND RETRANSMISSION CONSENT**

### **A. Digital Must-Carry**

A Commission decision to impose digital must-carry obligations on smaller cable businesses could have far-reaching negative consequences. "Mandatory digital carriage

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<sup>12</sup> See *id.* at 6-12.

<sup>13</sup> See *id.* at 17 ("[The Association's] members largely rely on local programming that they retransmit and that they create as integral services to their customers. In fact, small cable represents a significant and often the only multi-channel outlet for the distribution of local programming, especially in rural America. The loss of local broadcast signals as a component of small cable's product line-up would threaten small cable's financial viability.")

threatens to fully consume, even exceed, the limited resources of small cable.”<sup>14</sup> A number of Commission actions relating to digital must-carry could adversely affect smaller cable’s access to capital. Such actions range from “imposing unconditional digital signal carriage requirements on smaller cable businesses to postponing a decision about smaller cable beyond the date [the Commission] decides what burdens, if any, it will impose on other cable systems.”<sup>15</sup> If the Commission ultimately decides that it can, and will, impose digital must-carry obligations on cable systems, it must carefully craft the rules that will apply to smaller cable to accommodate smaller cable’s unique circumstances.

**B. The Commission Must Prevent Broadcaster Abuses of Analog Retransmission Consent.**

Due to smaller customer bases relative to broadcasters’ markets, smaller cable businesses lack sufficient bargaining power to reach equitable retransmission consent agreements.<sup>16</sup> Broadcasters, having no downside to withholding their analog signals from a smaller system, frequently make significant demands in exchange for retransmission consent. Broadcasters have required carriage of new programming services, e.g., a cable product distributed by the broadcasting company or its affiliates, or demanded cash

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<sup>14</sup> See *In the Matter of Carriage of the Transmission of Digital Television Broadcast Stations*, Comments of the Small Cable Business Association in CS Docket No. 98-120 (filed October 13, 1999) at 3 (“*SCBA Digital Must-Carry Comments*”).

<sup>15</sup> See *id.*

<sup>16</sup> See *SCBA Digital Must-Carry Comments* at 24.

payments in lieu of carriage of the cable product.<sup>17</sup> In addition, broadcasters historically have demanded from smaller cable higher rates for that programming product and for cash consideration.<sup>18</sup>

As cable operators and broadcasters proceed with the upcoming retransmission consent elections, smaller cable fears that broadcasters in many markets will demand carriage of digital signals in exchange for retransmission consent.<sup>19</sup> Because carriage of local broadcast signals remains an integral component of smaller cable's competitive strategy, the inability to secure reasonable analog retransmission consent agreements threatens smaller cable's continued viability.<sup>20</sup> The Commission should act to prevent such broadcaster abuses.

#### **VIII. THE COMMISSION MUST FURTHER REFINE ITS AFFILIATION STANDARDS FOR SMALL CABLE DEREGULATION.**

The Commission's recent decision relating to affiliation standards for purposes of small operator status under the Telecommunications Act of 1996 will harm smaller cable rather than help it. For purposes of determining affiliation under Section 301(c) of the

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<sup>17</sup> See *id.* at 25.

<sup>18</sup> See *id.* at 26.

<sup>19</sup> See *id.* at 24.

<sup>20</sup> See *id.* at 24.

Telecom Act, the Commission adopted a 20% ownership threshold.<sup>21</sup> The Commission included the much needed passive investor exemption; however, seeking to ensure that only truly passive investments do not count towards the 20% threshold, it placed certain limitations on passive investments.<sup>22</sup>

These limitations, however, fail to reflect marketplace realities and will hinder smaller cable investment. As a result, smaller cable, especially the smallest systems offering a single tier of service, have most of their revenue streams subject to regulation in perpetuity, while large cable businesses like AT&T and Time Warner have most of their revenue streams deregulated. This continuing regulation increases risk and makes smaller cable even less attractive to investors.<sup>23</sup> Furthermore, investors must have the ability to protect their investments. Under the Commission's current regime, investors would have to forego even the most minimal protective measures to ensure passive investor treatment and the operator's deregulatory status. Unlikely to forego measures only intended to protect their investments, not control the cable operator, investors will seek investment elsewhere.

Under the Commission's newly promulgated rules, many smaller operators' current and future relationships with investors threaten, or could threaten, their deregulatory

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<sup>21</sup> See *Cable Act Reform Order* at ¶¶ 69-70.

<sup>22</sup> See *Cable Act Reform Order* at ¶ 73. Specifically, the Commission deemed as active those investment arrangements that permitted (1) the investor to place a representative on the cable operator's board of directors or advisory committee or otherwise participate in operation of the business; or (2) the investor to approve or disapprove standard business transactions. See *id.*

<sup>23</sup> See *id.* at ¶ 72.

status. Capital infusion from institutional and other investors, however, remains vitally important for smaller cable and its customers in rural America. A regulatory regime that threatens to undermine these investment relationships will greatly inhibit capital investment in smaller cable and, therefore, hinders smaller cable's ability to effectively compete in this rapidly advancing multichannel video programming market. The inability to attract capital will also relegate much of rural America served by smaller cable to a lower quality of service and cripple smaller cable's ability to deploy digital and other advanced services to rural America, widening, not narrowing the "digital divide."

The Association recently filed a Petition for Reconsideration and Partial Stay to address these concerns.<sup>24</sup> The Association encourages the Commission to repeal the passive investor limitations and adopt instead the affiliation standards used by the U.S. Small Business Administration.

#### **IX. POLE ATTACHMENT ISSUES CONTINUE TO PLAGUE SMALLER CABLE.**

Pole attachment issues continue to plague smaller cable businesses. As the Association noted in last year's comments,

Small cable businesses suffer severe competitive disadvantages with respect to pole attachment rates. . . . Small cable pays significantly higher pole attachment rates than larger MSOs. The per subscriber cost is substantially greater. In addition, small cable businesses typically use a far greater

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<sup>24</sup> See *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Petition for Reconsideration and Partial Stay of the Small Cable Affiliation Rules in CS Docket No. 96-85, American Cable Association (filed August 2, 1999).

number of poles to reach fewer subscribers, because they largely serve rural areas.<sup>25</sup>

The problems smaller cable face regarding pole attachment issues have become more pronounced by the exemption of municipal utilities and cooperatives from pole attachment regulation, under 47 U.S.C. § 224(a)(1). For example, one Association member faced significant rate increases from a municipal electric utility that had plans to offer competing cable service. Another example involves a public utility district, with plans to compete with the cable operator, prohibiting the cable operator from constructing an upgrade of its cable system that would also use the utility's poles in connection with the offering of Internet services. Such abuses by municipal utilities, to gain a competitive advantage, impair smaller cable's ability to effectively compete.

In the wake of municipal cable competition, the municipal exemption under 47 U.S.C. § 224(a)(1) no longer serves a useful purpose. To balance the competitive environment, Congress should eliminate this exemption.

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<sup>25</sup> See *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Comments of the Small Cable Business Association in CS Docket No. 98-102 (filed July 31, 1999) at 6.

**X. CONCLUSION**

The Association has described a number of issues that have important consequences for smaller cable businesses. Adequate consideration by the Commission and Congress of these issues remains critical to smaller cable's continued ability to effectively compete in the market for delivery of video programming. The Association therefore requests that the Commission incorporate into all matters that come before it consideration of smaller cable concerns and make recommendations to Congress that incorporate smaller cable's unique standing.

**Respectfully submitted,**

**AMERICAN CABLE ASSOCIATION**

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August 6, 1999

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