

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

_____)
In the Matter of)
)
Implementation of Cable Act Reform)
Provisions of the Telecommunications)
Act of 1996)
_____)

CS Docket No. 96-85

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**OPPOSITION OF TIME WARNER CABLE
TO PETITIONS FOR RECONSIDERATION**

TIME WARNER CABLE

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SUMMARY

Time Warner Cable herein opposes the reconsideration petitions filed by the National Association of Telecommunications Officers and Advisors *et al.* ("NATOA *et al.*") and the Wireless Communications Association International, Inc. ("WCA") with respect to the Commission's Report and Order ("Cable Reform Report and Order") in the above-captioned proceeding. Neither petition has any merit and both should be denied.

Initially, the amendments made to Section 624(e) of the Communications Act through passage of the Telecommunications Act of 1996 ("1996 Act") unequivocally preempt state and local regulation of cable television technical standards, customer equipment and transmission technologies. Such preemption of state and local regulatory authority with respect to the technology employed by the cable industry is essential to achieving the pro-competitive, deregulatory goals of the 1996 Act and to avoiding, as the legislative history to the 1996 Act states, a "patchwork of regulations" that would be "inappropriate in today's intensely dynamic technological environment."

Despite the clear nature of the preemption language now contained in Section 624(e), NATOA *et al.* argue that this statutory section only applies to state and local regulation of a cable operator's selection of a format for scrambling and descrambling its signals and the associated customer premises equipment. Nothing in the relevant legislative history suggests that the broad language used by Congress in amending Section 624(e) should be given such a narrow interpretation. On its face, Section 624(e) refers to far more than just scrambling equipment or technology. Moreover, contrary to NATOA *et al.*'s suggestion, the expansive preemption provided for in Section 624(e) does not create conflicts with other provisions of the Communications Act. For example, local franchising authorities may still enforce a

contractual commitment that cable operators construct or upgrade existing systems so that they will be capable of providing certain types of services at a certain level of quality in order to meet a community's needs and interests, but local franchising authorities may not dictate the technological means by which cable operators fulfill such commitments.

NATOA *et al.* further assert that all existing franchise agreements are "grandfathered" from compliance with the restrictions imposed by Section 624(e) and that new technical standards and requirements may be imposed both through the franchise renewal process and through "voluntary" agreements between cable operators and franchising authorities. Nothing in the 1996 Act or its legislative history suggests that Congress intended to grandfather existing franchise provisions that conflicted with the preemptive language of Section 624(e). And at the very least, the clear and unequivocal amendments to Section 624(e) must be given prospective effect as of the effective date of the 1996 Act so that no franchise provisions adopted after that date that conflict with Section 624(e) can stand. Moreover, "voluntary" agreements allowing state and local governments to regulate any subscriber equipment or any transmission technology cannot be enforced. Such agreements would result in exactly the "patchwork" of local regulations Congress sought to avoid in amending Section 624(e). Plus, the flexibility to respond to marketplace developments that the 1996 Act was designed to promote is incompatible with binding franchise provisions addressing technical specifications.

With respect to the Section 301(b)(2) multiple dwelling unit ("MDU") bulk discount exception to the uniform rate requirement, Congress enacted this statutory exception in order to allow consumers to reap the benefits of competition within MDUs. In keeping with this pro-consumer focus, the Commission determined in its Cable Reform Report and Order that

the bulk discount exception would apply without regard to whether an MDU's property owner or manager is billed in total for the discounted programming services offered to residents of the MDU or whether each MDU tenant is billed separately for such discounted services.

While WCA argues that the bulk discount exception only applies in cases where the MDU owner or manager is billed on behalf of all MDU residents, it is clear that Congress left the Commission wide discretion to define "bulk discount" as appropriate to accomplish the pro-consumer benefits sought by the statute. Moreover, contrary to WCA's assertions, the Commission has not consistently defined the term "bulk" in any specific way in the past, and thus, it is free to interpret the term as appropriate for purposes of Section 301(b)(2) of the 1996 Act. Further, Section 301(b)(2) clearly places the initial burden of proof on any complainant, including a local franchising authority, in cases of allegations of predatory pricing in MDUs. If NATOA *et al.* wish to shift the initial burden of proof to cable operators to show that their bulk discount price is not predatory, such a plea should be made to Congress, not the Commission.

Finally, with respect to LEC-affiliated effective competition showings, in the Cable Reform Report and Order, the Commission was clear that a cable operator must demonstrate both that the LEC's video service area "substantially overlaps" the cable operator's franchise area and that the LEC's video service is "technically and actually available" to subscribers located within the franchise area. The assertion by NATOA *et al.* that the "offer" prong of the effective competition test can be satisfied merely by showing that a LEC has the potential to provide service is belied by the substantially more burdensome test actually applied by the Commission in numerous recent proceedings. In fact, the Commission's current construction

of "offer," in which a cable operator must additionally show that the LEC competitor's presence has precipitated immediate responsive measures by the cable operator, goes so far beyond the plain language of the LEC-affiliated test as to undermine Congress' intent that the LEC-affiliated test be self-executing.

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**OPPOSITION OF TIME WARNER CABLE
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Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L. P., by its attorneys and pursuant to Section 1.429 of the Commission's rules, submits its Opposition in response to the following petitions for reconsideration of the Commission's Report and Order^{1/} in the above-captioned rulemaking proceeding: (i) the "Petition for Clarification and Reconsideration" filed jointly by the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the United States Conference of Mayors, and Montgomery County, Maryland ("NATOA *et al.*") and (ii) the "Petition for Reconsideration" filed by the Wireless Communications Association International, Inc. ("WCA"). As discussed below, neither of these petitions has any merit whatsoever and both should be denied forthwith.

^{1/}Report and Order, CS Docket No. 96-85, FCC 99-57, _____ FCC Rcd ____ (rel. Mar. 29, 1999) ("Cable Reform Report and Order").

DISCUSSION**I. CONGRESS INTENDED TO BROADLY PREEMPT STATE AND LOCAL REGULATION OF CABLE TELEVISION TECHNICAL STANDARDS, CUSTOMER EQUIPMENT AND TRANSMISSION TECHNOLOGIES**

Section 301(e) of the Telecommunications Act of 1996 ("1996 Act")^{2/} amended Section 624(e) of the Communications Act by deleting the last two sentences of the provision and adding a new sentence in their place. The language that was deleted had permitted local franchising authorities to enforce technical standards adopted by the Commission and to apply to the Commission for waivers to impose more stringent standards than those prescribed by the Commission.^{3/} The language inserted in place of the deleted sentences provided instead that:

[n]o state or franchising authority may prohibit, condition or restrict a cable system's use of any type of subscriber equipment or any transmission technology.

The changes that Congress made to Section 624(e) broadly and unequivocally "prohibit[] States or franchising authorities from regulating in the areas of technical standards,

^{2/}Pub. L. 104-104, 110 Stat. 56 (1996).

^{3/}The deleted sentences read as follows:

A franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed [by the Commission] under this subsection. A franchising authority may apply to the Commission for a waiver to impose standards that are more stringent than the standards prescribed by the Commission under this subsection.

Cable Television Consumer Protection and Competition Act of 1992, § 16(a), Pub. L. 102-385, 106 Stat. 1490 (1992).

customer equipment, and transmission technologies."^{4/} This provision is in keeping with the fundamental deregulatory philosophy embodied in the 1996 Act and is entirely consistent with the preemptive approach historically applied to cable system technical performance issues. The principal purpose of the 1996 Act was to create a "pro-competitive, de-regulatory national policy framework" that will foster the rapid "private sector deployment of advanced telecommunications and information technologies."^{5/} Severely constricting state and local regulatory authority with respect to the technology employed by the cable industry was essential to the fulfillment of that purpose. As the legislative history of the amendments to Section 624(e) states:

The Committee intends by this subsection to avoid the effects of disjointed local regulation. The Committee finds that the patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today's intensely dynamic technological environment.^{6/}

Notwithstanding the broad deregulatory and preemptive purpose of the 1996 Act in general, and of the amendments to Section 624(e) in particular, NATOA *et al.* have asked the Commission to "clarify" that the phrase "any type of subscriber equipment or any transmission technology," as used in Section 624(e), refers only to a cable operator's selection of a format for scrambling and descrambling its signals and the associated customer premises equipment. NATOA *et al.* also ask the Commission to "clarify" that all existing franchise agreements -- even those that are plainly inconsistent with the restrictions imposed by Section 624(e) -- are

^{4/}H.R. Rep. No. 204, 104th Cong., 1st Sess. 110 (1995) ("House Report").

^{5/}H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 1 (1996) ("Conference Report").

^{6/}House Report at 110.

“grandfathered” and that new technical standards and requirements may be imposed both through the franchise renewal process and through voluntary agreements between cable operators and the franchising authorities. The “clarifications” sought by NATOA *et al.* are essentially a rehash of arguments made by certain state and local governments during the Commission's rulemaking to implement the amendments to Section 624(e). Those arguments were wrong then and they are still wrong now.

A. The Phrase “Any Type of Subscriber Equipment or Any Transmission Technology” As Used in Section 624(e), As Amended, Does Not Refer Only to Scrambling Formats

According to NATOA *et al.*, the 1996 Act's amendments to Section 624(e) represented Congress' response to a specific controversy that had emerged in early 1995 with respect to Time Warner's use of scrambling technology.^{7/} Consequently, it is argued, the Commission should narrowly construe the phrase “any type of subscriber equipment or any transmission technology” as referring only to an operator's choice of scrambling format and the customer premises equipment needed to receive that format.^{8/} The problem with this argument, of course, is that NATOA *et al.* does not, and cannot, cite to anything in the legislative history that would suggest that the facially broad language used by Congress was meant to be given

^{7/}NATOA *et al.*'s Petition for Clarification and Reconsideration in CS Docket No. 96-85, filed Aug. 2, 1999, at 8-9 (“NATOA *et al.* Petition”).

^{8/}Id.

such a narrow interpretation. Congress has shown that when it wants to refer specifically to a cable operator's use of scrambling technology, it knows how to do so in no uncertain terms.^{9/}

The fact is that the phrase "any type of subscriber equipment or any transmission technology" refers on its face to far more than just scrambling equipment or technology. Indeed, as the Commission found, the term "transmission technology" was used prior to the 1996 Act to refer to both the transmission medium (*i.e.*, microwave, satellite, coaxial cable, twisted pair) and to the modulation or communications format delivered over a particular transmission medium (*i.e.*, digital, analog, two-way, etc.).^{10/} An expansive interpretation of the term "transmission technology" also is consistent with the 1996 Act's legislative history. Congress was concerned that the development of a "patchwork" of "disjointed" local regulation would impede the development of innovative technologies and there certainly is no reason to think that when Congress referred to "today's intensely dynamic technological environment" it was referring only to the development of scrambling formats. Rather, it is

^{9/}See, e.g., 47 U.S.C. § 544A(a)(i) (finding that certain features of television receivers and VCRs may be affected by "scrambling, encoding, or encryption technologies and devices"); 47 U.S.C. § 544A(b)(2) (Commission directed not to limit use of "scrambling or encryption technology" in certain circumstances); 47 U.S.C. § 560 (requirement that cable operator fully "scramble" certain cable channels); 47 U.S.C. § 561 (same).

^{10/}Cable Reform Report and Order at ¶ 141 and nn. 389-90. See also First Report and Order, ET Docket No. 93-7, 9 FCC Rcd 1981, ¶ 110 (1994) (referencing cable systems' deployment of "two-way transmission technologies"); Memorandum Opinion and Order, MM Docket Nos. 91-169 & 85-38, 7 FCC Rcd 8676, ¶ 16 (1992) (referencing "microwave transmission technology"); Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, CC Docket No. 87-266, 7 FCC Rcd 300, ¶ 18 (1992) (referencing "optical transmission technologies"); General Electric Company Commercial Electronics Product Dept., CSR-2826, 1985 FCC LEXIS 3234 (describing "Comband" modulation and compression system as advancement in "cable transmission technology").

apparent that Congress carefully chose a phrase that covered all of a cable system's technological elements, using "any type of subscriber equipment" to refer to the customer premises component of the system and "any transmission technology" to refer to the headend and distribution components.

Perhaps recognizing the weaknesses in their assertion that Congress amended Section 624(e) simply to address a controversy over the use of scrambling, NATOA *et al.* also argue that a narrow interpretation of the preemptive scope of the amended provision (i) will avoid conflicts with other sections of the Communications Act; (ii) is necessary in order for local franchising authorities to ensure that local needs and interests are met; and (iii) will promote technological innovation.^{11/} None of these contentions can withstand scrutiny.

First, giving Section 624(e) the expansive preemptive effect that Congress intended for it to have will not create any conflicts with other provisions of the Communications Act. NATOA *et al.* specifically point to Sections 624(b)(1) and (2), which address the circumstances under which local franchising authorities may enforce franchise requirements for facilities and equipment, and to Section 626(b)(2), which allows a local franchising authority to request proposals for an upgrade of the cable system in a franchise renewal.^{12/} While the

^{11/}NATOA *et al.* Petition at 3-5, 9-15.

^{12/}*Id.* at 9-12. According to NATOA *et al.*, giving full effect to the broadly preemptive amendments to Section 624(e) also is inconsistent with Section 601(c) of the 1996 Act. However, Section 601(c) of the 1996 Act simply provides that the amendments made by the Act "shall not be construed to modify, impair, or supersede Federal, state or local law unless expressly so provided in such Act or amendments." The amendments to Section 624(e) specifically bar state or local regulation of cable technical standards and specifications and, thus, are expressly preemptive.

legislative history of Sections 624(b)(1) and (2) indicates that the term "facilities and equipment" originally was intended to encompass both the technological and non-technological components of a cable system, the fact that Congress, in 1996, prohibited local regulation of the technological aspects of a cable system's design and operation does not nullify or otherwise conflict with the authority that remains under Sections 624(b)(1) and (2). For example, franchising authorities can enforce franchise provisions regarding studios and production facilities and for equipment related to the provision of customer service, such as phone systems, trucks, and other repair facilities, to the extent that such requirements can be cost-justified in light of community needs. Similarly, local franchising authorities still can enforce a contractual commitment that a cable operator construct a system capable of providing certain types of services at a certain level of quality; however, what local franchising authorities may not do any longer is specify or otherwise regulate the technological means by which a cable operator fulfills such obligations. Similarly, a franchising authority, in accordance with Section 626(a)-(g), can require that a cable operator seeking renewal of its franchise propose to upgrade the system's capabilities and performance, but it is neither necessary nor is it permitted for the local franchising authority to dictate the design or other technological features of the upgraded system that will provide any such improvements as the operator may propose.

Second, the broad preemption that Congress adopted with respect to state and local regulation of the technological aspects of cable television service does not threaten in any way the ability of a local franchising authority to determine a community's needs and interests and to ensure that those needs and interests are being met. *NATOA et al.* assert that the

relationship between local regulation of a cable system's technical configuration and the fulfillment of community needs and interests is "axiomatic."^{13/} However, that characterization is nothing more than an attempt by NATOA *et al.* to shield their assertion from an analysis that it cannot survive. Cable subscribers are concerned with ends, not means. For example, a community has no particular "need or interest" in the size or configuration of a cable system's nodes. Rather, the community's needs and interests are in the services that a system can provide and the system's reliability and flexibility. The fact that the desired ends might be achievable by a specified node size today does not mean that the operator should be tied to meeting a particular technical specification if, in the future, the desired ends can be met utilizing technologies meeting different specifications. Simply put, the role that Congress now intends for local franchising authorities to play is limited to determining what level of services will meet the community's needs and interests, entering into franchises that require a cable operator to provide such a level of service, and holding the cable operator accountable if it fails to fulfill its obligations.^{14/}

^{13/}NATOA *et al.* Petition at 3.

^{14/}Section 626(c)(1) specifies that the quality of the operator's service, "including signal quality," is one of the areas that a local franchising authority is permitted to consider during the franchise renewal process. However, local franchising authorities need not directly establish or enforce technical standards in order to carry out this role. Rather, local franchising authorities can look to whether the operator has complied with the Commission's technical standards. In this regard, Time Warner notes that the Commission has decided that local franchising authorities can continue to enforce the Commission's technical standards. Cable Reform Report and Order at ¶ 135. Time Warner submits that this decision is inconsistent with Congress' repeal of those portions of Section 624(e) that had expressly empowered local franchising authorities to establish and enforce franchise provisions based on the Commission's technical standards. Furthermore, relying on local enforcement efforts will

(continued...)

Finally, the suggestion that the ultimate goal of the 1996 Act -- deployment of advanced telecommunications networks -- can only be met if state and local governments continue to regulate the technological design and components of a cable system is simply absurd. Congress recognized in the 1996 Act and its legislative history that the best way to promote investment in and deployment of innovative communications technologies is to get government out of the picture and allow the marketplace to operate. In an environment that is changing as rapidly and dramatically as the telecommunications technology environment, the nation cannot allow the establishment of specific technological specifications by thousands of state and local governments to impair the ability of cable operators to take advantage of innovations that best fulfill the needs of the future even though they may not conform to standards set in the past.

B. Franchise Provisions That Are Inconsistent With the Broad Preemption Embodied In Section 624(e) Should Not Be Regarded As "Grandfathered" Nor Should State and Local Officials Be Permitted To Establish or Enforce Any New Franchise Provisions That Are Inconsistent With Section 624(e)

The Commission has acknowledged that, in the three years since the 1996 Act was passed, franchising authorities and cable operators may have entered into new franchise agreements or renewals that contain provisions that conflict with the preemptive sweep of the

^{14/}(...continued)

produce disparate interpretations and applications of the Commission's standards, in direct contravention of the 1996 Act's goal of national uniformity. Nor is the burden of enforcing its own rules as unmanageable as the Commission seems to suggest. There are over 20,000 broadcast licensees (and additional thousands of licensees in other services) and the Commission manages to enforce the technical rules applicable to these licensees without relying on the assistance of state and local governments. Under the circumstances, Time Warner reserves the right to seek judicial review of this and other aspects of the Commission's interpretation of Section 624(e), as amended.

amendments to Section 624(e).^{15/} Addressing the status of these provisions, the Commission stated that "nothing in this *Order* is intended automatically to preempt or affect the enforceability of existing franchise agreements."^{16/} NATOA *et al.* argue that the Commission should "clarify" that, in fact, all existing franchise provisions that would be rendered impermissible by Section 624(e) -- including apparently even those provisions that state and local authorities themselves would concede are within the ambit of Section 624(e) -- are essentially grandfathered and may be enforced for the life of the franchise.^{17/} Furthermore, NATOA *et al.* ask the Commission to "clarify" that the preemptive effect of Section 624(e) is limited to obligations imposed by ordinance and does not reach provisions adopted as part of the formal franchise renewal process or agreed to "voluntarily" by cable operators.^{18/} These "clarifications" are, of course, utterly at odds with the plain language of the statute and their adoption would effectively gut the amendments to Section 624(e) and frustrate the accomplishment of the Congressional goals underlying those amendments.

Specifically, nothing in 1996 Act suggests that Congress intended to grandfather existing franchise provisions that conflicted with the preemptive language of Section 624(e). And even if it cannot clearly be said that Congress intended for the amendments to Section 624(e) to be given retroactive effect, there is no reason that the prospective application of the amendments should not begin as of the effective date of the 1996 Act. The language of the

^{15/}Cable Reform Report and Order at ¶ 143.

^{16/}Id.

^{17/}NATOA *et al.* Petition at 15-16.

^{18/}Id. at 17-19.

amendments is clear and unequivocal, so much so that Congress did not feel the need to direct the Commission to undertake an implementing rulemaking with respect to the changes to Section 624(e). The fact that the Commission undertook such a proceeding on its own, and then spent an unnecessarily long three years resolving that proceeding, should not provide cover for franchise provisions that were adopted in derogation of Congress' language and intent.

Nor is it permissible for the Commission to restrict the preemptive scope of Section 624(e), as amended, to requirements imposed by ordinance, thereby permitting local enforcement of technical specifications and standards adopted through the franchise renewal process or otherwise "negotiated" with the cable operator. Such an interpretation would turn the amendments to Section 624(e) upside down and inside out. As noted above, prior to the 1996 Act, Section 624(e) provided that a local franchising authority could enforce the technical standards that the Commission adopted, but only if provisions regarding such enforcement were included in the franchise agreement; technical standards more stringent than those adopted by the Commission could only be imposed by a local franchising authority upon the grant of a waiver by the Commission. Congress' repeal of these provisions, coupled with the enactment of an express prohibition on state and local regulation of the technological aspects of a cable system's operations, cannot reasonably be construed as enlarging the right of local authorities to include in a franchise agreement any provisions relating to technical matters that they wish.^{19/}

^{19/}NATOA *et al.* cite Section 611 as an example of a provision in the Communications Act
(continued...)

It also should not matter whether the franchise provisions in question were agreed to by the cable operator. Leaving aside the issue of how "voluntary" any agreement between a cable operator and a franchising authority really can be, it is clear that agreements allowing state and local governments to regulate any subscriber equipment or any transmission technology are contrary to public policy and cannot be enforced. Congress amended Section 624(e) expressly for the purpose of avoiding the development of a "patchwork" of regulations. Municipal efforts to micromanage cable technical matters on a franchise-by-franchise basis will be no less "disjointed" simply because such regulation is the product of negotiations with the cable operator. Moreover, the flexibility to respond to marketplace developments that the 1996 Act was designed to promote is incompatible with binding franchise provisions addressing technical specifications. For example, assume that a cable operator "agrees" that its system rebuild will serve no more than 1,500 subscribers per node. Who is to say that within five years technological innovations will not occur that will permit the operator to offer the same or greater level of service at the same or greater level of quality and reliability with 2,000 subscribers per node or that will render the concept of node size completely irrelevant? If a

^{19/}(...continued)

that allows franchising authorities to enforce requirements that are in a final franchise even though those same requirements could not be imposed unilaterally. NATOA *et al.* Petition at 18. This example, of course, is irrelevant since Section 624(e) plainly bars all regulation of subscriber equipment and transmission technology, without differentiating between unilaterally imposed regulations and regulations contained in a negotiated franchise. Moreover, for the record, it should be noted that NATOA *et al.* have miscited and misconstrued Section 611. Section 611(b) expressly authorizes local officials not only to establish rules regarding the use of PEG capacity, but also to require the designation of capacity for such use. Section 611(c), which allows franchising authorities to enforce requirements regarding both the provision (*i. e.*, designation) and use of PEG channels does not expand on the scope of the prior section in any way.

cable operator has to go back and renegotiate its franchise in order to take advantage of such technological developments, investment and innovation both will be inhibited and the public will suffer. That, of course, is exactly the result that Congress was seeking to avoid and is a result that the Commission may not promote through a narrowing interpretation of the preemptive language in Section 624(e).

In short, the Commission's statement that nothing in its Order was "intended to automatically preempt or affect the enforceability of existing franchise agreements" is a *non sequitur*. Any such provisions in franchise agreements or other local law relating to cable technical standards or transmission technologies have already been automatically preempted by statutory fiat.

II. CONGRESS INTENDED FOR CONSUMERS TO ENJOY THE BENEFITS OF DISCOUNTED MDU RATES, WITHOUT REGARD TO BILLING METHODOLOGY

Section 301(b)(2) of the 1996 Act created a statutory exception to the uniform rate requirement by allowing cable operators to deviate from their uniform rate structures in the case of bulk discounts offered to multiple dwelling units ("MDUs"). In keeping with the 1996 Act's general purpose of providing "for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition,"^{20/} the MDU discount exception was included in the 1996 Act because Congress felt that the Commission's prior regulations did "not serve

^{20/}Conference Report at 1.

consumers well by effectively prohibiting cable operators from offering *lower* prices in an MDU even where there is another distributor offering the same video programming in that MDU."^{21/} Accordingly, the focus of the statutory MDU discount exception is on allowing consumers to reap the benefits of competition within MDUs.

In its Cable Reform Report and Order, the Commission recognizes the benefits of MDU competition, noting that "[a]llowing cable operators to respond to competition in individual MDUs gives consumers the benefit of lower prices"^{22/} The Commission has recognized the importance of competition within MDUs in other contexts, noting for instance that

[a]ccess by competing telecommunications service providers to customers in multiple tenant environments is critical to the successful development of competition in local telecommunications services. . . . If a significant portion of [MDUs are] not accessible to competing providers, that fact could seriously detract from local competition in general and from the availability of competitive services to "all Americans."^{23/}

Indeed, as RCN Corporation recently pointed out in another Commission proceeding, "[a]ccess to [MDU] customers is . . . crucial for any MVPD competitor."^{24/}

^{21/}House Report at 109.

^{22/}See Cable Reform Report and Order at ¶ 96.

^{23/}Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141 (rel. July 7, 1999) at ¶ 29.

^{24/}Comments of RCN Corporation in CC Docket No. 99-230 (In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming) at 16.

Keeping in mind the desirability of allowing consumers to benefit from MVPD competition within MDUs, in its Cable Reform Report and Order, the Commission stated that it saw “no statutory or policy reason for conditioning a bulk discount on any particular billing arrangement with the building owner or manager” and went on to note that

the bulk rate exemption was codified to permit competitive responses as well as to reflect efficiencies in serving subscribers concentrated in an MDU. . . . To the extent that billing arrangements affect access to buildings . . . or have other competitive impact, we do not wish to create any competitive advantage or disadvantage or restrict consumer choice in services or service providers by imposing rules regarding the billing arrangements used by cable operators.^{25/}

WCA argues on reconsideration that the Commission must use a narrow definition of “bulk discount” that would hamper, rather than further, the competitive benefits Congress sought to achieve in enacting Section 301(b)(2) of the 1996 Act. WCA argues that a “bulk discount” only exists when an MDU’s property owner or manager is billed in total for the discounted programming services offered to the residents of the MDU and does not exist when the discounted rates are offered and billed separately to each MDU tenant.^{26/} WCA arrives at this erroneous conclusion by arguing that Congress effectively froze whatever meaning the term “bulk discount” had at the time of enactment of Section 301(b)(2) of the 1996 Act.^{27/} WCA’s argument fails because (1) Congress clearly left the Commission the discretion to define “bulk discount” as appropriate for purposes of the new statute, and (2) the sources cited

^{25/}Cable Reform Report and Order at ¶ 102.

^{26/}See WCA’s Petition for Reconsideration in CS Docket No. 96-85, filed Aug. 2, 1999, at 2-3; 5-8 (“WCA Petition”).

^{27/}Id.

by WCA do not establish that the Commission has consistently defined the term "bulk" in any specific way in the past.

First, as WCA recognizes, the 1996 Act does not specifically define the term "bulk discount." Nothing in the statute or the legislative history refers to any prior Commission usage of the term "bulk discount" or indicates an intent to codify any prior usages of the term. Instead, Congress left the Commission the discretion to define "bulk discount" in a manner that would best further the pro-consumer goals of the 1996 Act, *i.e.*, to allow consumers to obtain lower rates from cable operators seeking to compete with alternative MVPDs in serving MDU customers. Contrary to WCA's claims, the Commission does not need any special authority from Congress to supposedly deviate from any prior meaning of the term "bulk discount."^{28/} The 1996 Act sought to effect many changes in the regulation of the communications industry and as such, historical usages of certain terms are not immune from change. It is up to the Commission, as the relevant implementing agency, to use its discretion when certain statutory terms are not specifically defined. So long as the definition of "bulk discount" employed by the Commission is not inconsistent with the plain language or legislative history of the statute, it is well within the Commission's delegated authority to define "bulk discount" in a manner that would best implement and achieve the pro-competitive goals underlying the Section 301(b)(2) MDU discount exception.

Indeed, nothing in the statute or the legislative history precludes inclusion of bulk discounts that are billed to individual subscribers within an MDU rather than to the MDU

^{28/}Id. at 3, 7.

property owner or manager on behalf of all the subscribers in the MDU. In fact, the language of Section 301(b)(2) illustrates that Congress both anticipated and condoned individual billing of bulk discounts. Section 301(b)(2) states, in relevant part, that

[b]ulk discounts to multiple dwelling units shall not be subject to [the uniform rate requirement], except that a cable operator . . . may not charge predatory prices to a multiple dwelling unit.^{29/}

The statutory reference to prices charged to each individual unit in an MDU building demonstrates that Congress did not intend to exclude individually billed bulk discounts from the ambit of Section 301(b)(2).

Moreover, if the Commission were to limit the definition of "bulk discount" solely on the basis of the method of billing, as suggested by WCA, the Commission would be open to charges that it was not in fact implementing Section 301(b)(2) in a manner best suited for bringing the benefits of competition to MDU residents. The bulk discount exception should not act to deny MDU residents discounted rates in cases where, for example, an MDU owner or manager insists upon individual billing arrangements because the owner or manager does not want to be responsible to serve as the billing agent for those tenants who subscribe to MVPD services. Nor should MDU residents have to rely on the willingness of a landlord to negotiate a bulk rate on their behalf in order to obtain the benefits of competition. In fact, WCA's suggested approach could produce unintended results that elevate form over substance. For example, in many cases the MDU owner or manager is billed directly for the basic and

^{29/}1996 Act, § 301(b)(2) (emphasis added). See also Conference Report at 170 ("Bulk discounts to multiple dwelling units shall not be subject to the uniform rate requirement except that a cable operator may not charge predatory prices to a multiple dwelling unit.") (emphasis added).

cable programming service tiers on behalf of all MDU residents, thus meeting WCA's criteria for a "bulk discount," but the residents additionally are billed individually should they subscribe to any premium services. A strict application of WCA's proposed "bulk discount" definition would deny all residents of an MDU using this billing scheme the benefit of the bulk discount solely because some residents subscribe to premium services and are billed separately for such services.

The only definition of "bulk discount" that will accomplish the pro-competitive goals of the 1996 Act is one that takes into account bulk discounts that are billed either to individual MDU subscribers or to the MDU property owner or manager. As WCA itself recognizes, "now clearly is not the time for the Commission to retrench from its pro-competitive policies in this arena."^{30/} Moreover, allowing cable operators to bill MDU residents individually, but uniformly with regard to the applicable bulk discount for that MDU, will not eviscerate the bulk discount exception to the uniform rate requirement. Whether a subscriber receives an individual bill for cable service, or the MDU owner or manager receives one consolidated bill for all subscribers in the MDU, the effective rate charged to the subscriber is the same. Thus, the method of billing should not and cannot matter for purposes of the bulk discount exception to the uniform rate requirement.

Not only did Congress leave the Commission the discretion to adopt a definition of "bulk discount" that would best achieve the statute's pro-consumer goals, regardless of how the term had been defined in the past, but WCA has failed to make a convincing case that the

^{30/}WCA Petition at 12.

Commission has consistently used the term "bulk discount" to have one meaning and one meaning only. For example, at footnote 14 of its Petition, WCA cites a prior Commission statement that "[b]ulk basic rates are discounted service rates offered to multiple dwelling units, such as apartment buildings and condominiums"^{31/} for support that the Commission historically has used the term "bulk discount" only in cases where discounted rates are offered directly to MDU owners or managers and not to individual MDU subscribers on a "per unit" basis.

However, the quotation cited by WCA does not speak to the method of billing of bulk discounts within an MDU, but rather, simply notes that such discounts are offered to MDUs. Nor does the Commission statement referring to a cable operator's subscriber count that included "bulk and residential" subscribers^{32/} prove anything -- the reference to "residential" vs. "bulk" subscribers most likely points to the distinction involving those individual residential subscribers (including subscribers in apartments, condominiums, or single family homes) that do not receive any sort of bulk discount vs. those subscribers that do receive a bulk discount, regardless of the method of billing.

Similarly, the methodology for calculating a cable system's annual regulatory fees, quoted at pages 7-8 of WCA's Petition, specifically notes the distinction between "individual households in multiple dwelling units (*e.g.*, apartments, condominiums, mobile home parks, etc.) paying at the basic subscriber rate" and "bulk-rate customers." A "bulk-rate customer"

^{31/}Id. at 6 n.14, citing SBC Media Ventures, Inc., 9 FCC Rcd 7175, ¶ 20 n.46 (1994).

^{32/}Id., citing Falcon Cable Systems, 13 FCC Rcd 4425, ¶ 27 (1998).

can be an individual household in an MDU, only such a customer does not pay at “the basic subscriber rate.” The annual regulatory fee methodology further instructs cable operators to calculate bulk rate customers as the “total annual bulk-rate charge [divided by the] basic annual subscription rate for individual households.” This instruction says nothing about the method of billing for a bulk discount offered in an MDU. The billing of individual units in an MDU pursuant to a bulk discount still involves a total bulk-rate charge for the entire MDU.

Finally, NATOA *et al.* argue that the Commission should reconsider the procedure for determining whether bulk discounts to MDUs are predatory. NATOA *et al.* argue that the initial burden should be borne by cable operators to show that their bulk discount price is not predatory and that the current procedure “inappropriately places the initial burden of showing that a discounted price is predatory on LFAs.”^{33/} NATOA *et al.* have chosen the incorrect forum for attempting to make such a procedural change. Section 301(b)(2) of the 1996 Act leaves the Commission no discretion in determining which party should shoulder the initial burden of proof in cases of allegations of predatory pricing in MDUs. That statutory section specifically states that

Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.^{34/}

If NATOA *et al.* wish the burdens of proof to be allocated differently, they should seek a legislative amendment to the 1996 Act.

^{33/} See NATOA *et al.* Petition at 21.

^{34/} 1996 Act, § 301(b)(2).

III. THE COMMISSION'S CONSTRUCTION OF "OFFER" IN THE LEC-AFFILIATION EFFECTIVE COMPETITION TEST IS OVERLY STRINGENT

In their petition, NATOA *et al.* raise objections to the Commission's construction of the "offer" prong of Section 623(1)(1)(D)'s LEC-affiliated effective competition test.^{35/} These objections are misleading and ill-founded. Specifically, the NATOA *et al.* Petition argues that a cable operator's required showing under the Commission's construction is insufficient because it "could lead to a situation where a LEC can provide effective competition before it is providing service at all."^{36/} In making this assertion, NATOA *et al.* have mischaracterized the Commission's decision; the required showing under the "offer" prong is much more stringent than NATOA *et al.* suggest. The Commission was clear that in order to show that a LEC offers multichannel video service in its franchise area, a cable operator must demonstrate both that the LEC's video service area "substantially overlaps" the cable operator's franchise area, and also that the LEC's video service is "technically and actually available" to subscribers located within the franchise area.^{37/} Thus, the assertion by NATOA *et al.* that the "offer" test can be satisfied merely by showing that the LEC has the "potential to provide service in the

^{35/}NATOA *et al.* Petition at 19.

^{36/}Id.

^{37/}Cable Reform Report and Order at ¶ 13.

near future,^{38/} is belied by the substantially more burdensome test actually applied by the Commission in numerous recent proceedings.^{39/}

Furthermore, even if the cable operator makes the required showings, an effective competition determination from the Commission will not necessarily be as automatic as the NATOA *et al.* Petition suggests. The Commission has directed the Cable Services Bureau to scrutinize each cable operator's showings and make a fact-specific determination in each case as to whether the cable operator has presented sufficient evidence that the LEC's video service will cause it to restrain its cable rates and improve its service offerings.^{40/} Thus, even if a cable operator makes each of the required showings, they may not be sufficient for the Cable Services Bureau to deem the LEC's video service "offered" in the franchise area. Contrary to the suggestion in the NATOA *et al.* Petition, the Commission's construction of the "offer" prong is not unduly permissive.

Indeed, the Commission's construction of "offer" goes so far beyond the plain language of the LEC-affiliated test as to undermine Congress' intent. Congress clearly intended the LEC-affiliated test be self-executing and not require a cable operator to show, nor the Commission to analyze, whether the LEC competitor's presence has precipitated immediate responsive measures by the cable operator. Congress has already made the determination that,

^{38/}NATOA *et al.* Petition at 19.

^{39/}See Time Warner Cable - Orlando, FL et al., Memorandum Opinion and Order, DA 99-1651 (rel. Aug. 17, 1999); Cox Com, Inc. - New Orleans, LA et al., Memorandum Opinion and Order, DA 99-854 (rel. May 6, 1999).

^{40/}Cable Reform Report and Order at ¶ 11.

due to the LECs' prodigious financial resources and marketing presence, an immediate finding of "effective competition" is warranted whenever a LEC commences the provision of video service in competition with an incumbent cable operator. This is precisely why Congress included no pass or penetration threshold in the test. Accordingly, there should be no role for the Commission in determining the sufficiency of the competition presented by the LEC. Once a LEC begins to offer a comparable multichannel video service within the cable operator's franchise area, the test is met, and the cable operator is subject to effective competition.

CONCLUSION

Accordingly, for the reasons outlined herein, Time Warner respectfully requests that the reconsideration petitions filed by both NATOA *et al.* and WCA be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Barbara J. Chatman, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that copies of the foregoing "Opposition of Time Warner Cable to Petitions for Reconsideration" were served this 2nd day of September, 1999, via first-class mail, postage prepaid, upon the following:

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