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Lisa Chandler Cordell

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September 1, 1999

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

SEP 02 1999

FCC MAIL ROOM

**Re: CS Docket No. 96-85; Cable Act Reform
Supplemental Petition for Partial Stay of Small Cable Affiliation Rules**

Dear Ms. Salas:

On behalf of the American Cable Association, we enclose an original and eleven (11) copies of the above-referenced **Supplemental Petition for Partial Stay of Small Cable Affiliation Rules**.

In addition, we provide a "FILE COPY." We ask that you date-stamp and return it in the enclosed Federal Express envelope.

If you have any questions, please call us.

Very truly yours,

Lisa Chandler Cordell

Lisa Chandler Cordell

Enclosure

cc: American Cable Association
Eric E. Menge, Small Business Administration
Service list

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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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**SUPPLEMENTAL PETITION FOR PARTIAL STAY
OF SMALL CABLE AFFILIATION RULES**

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September 1, 1999

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

In the Matter of)
Implementation of Cable Act Reform) CS Docket No. 96-85
Provisions of the Telecommunications)
Act of 1996)

**SUPPLEMENTAL PETITION FOR PARTIAL STAY
OF SMALL CABLE AFFILIATION RULES**

I. INTRODUCTION

The American Cable Association ("Association") files this Supplemental Petition for Partial Stay of the small cable affiliation rules set forth in the Commission's *Cable Act Reform Order*.¹ In that decision, the Commission correctly decided that passive investments should not give rise to affiliation for purposes of small operator status under the Telecommunications Act of 1996.² The Commission's decision, however, fell short by imposing certain restrictions on passive investments that ignore marketplace realities.³ The Association timely filed a Petition for Reconsideration and Partial Stay, asking the Commission to reconsider its decision as it relates to these restrictions and stay their

¹ 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 (released March 29, 1999) ("*Cable Act Reform Order*").

² See *id.* at ¶ 73.

³ Specifically, the Commission determined that it would not consider an equity investor's interests as passive if the investor's representative sits on the cable operator's board of directors or advisory committee, or otherwise has involvement in the operation of the cable operator's business; or if the investor "retains authority to approve or disapprove the cable operator's standard business transactions." See *Cable Act Reform Order* at ¶ 73.

effectiveness pending reconsideration.⁴ The Association files this supplemental petition to more fully explain why a grant of stay remains critically important.

The Commission's newly promulgated rules regarding small cable affiliation for purposes of deregulation became effective on August 31, 1999.⁵ Enforcing the passive investor limitations pending Commission reconsideration, however, could have grave consequences for many small operators. For this reason, the Association requests that the Commission stay the effectiveness of this aspect of its passive investment rules.

II. GRANTING A STAY COMPORTS WITH COMMISSION POLICY.

Granting the Association's request for stay of the passive investor restrictions comports with Commission policy regarding petitions for stay. The Commission will grant a petition for stay where: (1) a likelihood exists that the petitioner will prevail on the merits; (2) the petitioner will otherwise suffer irreparable harm; (3) a grant of the stay will not harm other interested parties; and (4) the public interest favors its grant.⁶

A. The Association Will Likely Prevail on the Merits.

When the Commission fully understands the unintended consequences of its action, the Association remains confident that the Association will prevail on the merits. The Association's Petition for Reconsideration explains that the Commission's decision ignores

⁴ See *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Petition for Reconsideration and Partial Stay of Small Cable Affiliation Rules, American Cable Association (filed August 2, 1999).

⁵ See 64 Fed. Reg. 42855.

⁶ See *In the Matter of TCI Cablevision of Dallas, Inc., Request for Stay of Local Rate Order of the City of Farmers Branch, Texas*, Memorandum Opinion and Order in File No. CSB-A-0629 (released June 11, 1999).

marketplace realities, will hinder capital investment in small cable, and “cripple small cable’s ability to deploy digital and other advanced services to rural America.”⁷ The Association has explained throughout this proceeding that the most prudent course of conduct would involve adoption of the affiliation standards promulgated by the Small Business Administration (“SBA”). These standards, unlike the Commission’s present restrictions, adequately prevent investors from exercising control without compromising small cable’s ability to attract capital.

B. Small Cable Will Suffer Irreparable Harm Absent a Stay.

As the Association explains in its Petition for Reconsideration, enforcement of the passive investment restrictions pending a Commission decision on reconsideration would have grave consequences for small cable.

1. Enforcement will hinder small cable investment.

Enforcement of the passive investor restrictions pending Commission reconsideration will preclude investment relationships that remain critically important to small cable. Deregulatory status remains a key consideration for institutional investors.⁸ To guarantee such status under the Commission’s new rules, institutional investors would have to forego even the most minimal measures routinely taken to protect their

⁷ See Petition for Reconsideration of the American Cable Association at 6-8.

⁸ As some institutional investors have noted, “small operators pose capital risks that underscore the importance of maximizing revenue potential. Accordingly, these investors assert that they would not risk losing such advantages by taking their investment beyond the 20% threshold.” See *Cable Act Reform Order* at ¶ 72. Similarly, one institutional investor stressed the importance of such distinction “to ensure that investors do not shy away from cable operators when greater investment would fail to maximize the revenue advantages that stem from small operator status.” See *id.*

investments. Faced with a choice of protecting their investments or risking unfavorable regulatory treatment, investors will choose to not invest in small cable. Such a disincentive to small cable investment, no matter how temporary, will greatly impede small cable's continued ability to effectively compete and to deploy advanced services to rural America. The ground small cable loses now to competitors may never be recouped, resulting in irreparable harm.

2. Reversal of the Commission's decision will leave small cable without a remedy.

Should the Commission enforce the restrictions now but later decide to repeal them, small cable operators will also suffer irreparable harm due to their inability to effectively recoup costs associated with regulation. As the Association explained in its Petition for Reconsideration in this proceeding,

Notwithstanding the sunset of cable programming service tier "(CPST)" rate regulation earlier this year, basic service rate regulation remains a critical concern for many small cable operators. Many, mainly larger cable operators, have benefitted from rate deregulation; the same is not true for many of the smallest operators that do not offer multiple tiers of service.⁹

Basic-only small systems remain subject to rate regulation of virtually their entire revenue streams. Where a local franchising authority's continued ability to regulate rates stems from a Commission decision that goes beyond what Congress intended, these operators will unfairly suffer irreparable harm, as they have no recourse to recover the lost revenue.

⁹ See Petition for Reconsideration of the American Cable Association at 4.

C. Grant of a Stay Will Not Harm Other Interested Parties.

No harm will come from staying the effectiveness of the passive investment restrictions. The Commission intends that truly passive investments not become subject to the 20% threshold.¹⁰ A stay of the passive investor limitations will help maintain the status quo by permitting small cable operators to enter passive investment relationships without fear of jeopardizing their deregulatory status. Should the Commission ultimately decide to adopt the SBA's affiliation standards, no harm will come to these relationships. If, however, the Commission reaffirms its passive investor limitations, the Commission should grandfather those investment arrangements that exist on the date such decision takes effect. Staying the limitations on passive investment will serve to maintain the status quo pending the outcome of this matter.

D. A Stay Will Serve the Public Interest.

A meaningful passive investment exception to affiliation remains critical to small cable. Without it, small cable will remain crippled in its ability to secure additional capital, thus hindering its ability to effectively compete in this rapidly advancing multichannel video programming market and relegating much of rural America to a widening of the "digital divide." Any decision that would hinder small cable's ability to effectively compete and deploy advanced services to rural America will harm the public interest.

¹⁰ See *Cable Act Reform Order* at ¶ 73.

III. CONCLUSION

Granting the Association's Petition for Stay regarding the passive investment limitations pending Commission reconsideration of its *Cable Act Reform Order* comports with Commission policy. As the Association has explained, the Association expects to prevail on reconsideration; small cable operators will suffer irreparable harm absent a stay; grant of a stay will bring no harm to other parties but will instead serve the public interest. The Association therefore urges the Commission to grant this Petition.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

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September 1, 1999

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CERTIFICATE OF SERVICE

I, Lisa Chandler Cordell, an attorney with Bienstock & Clark, certify that I sent a copy of the foregoing SUPPLEMENTAL PETITION FOR PARTIAL STAY OF THE SMALL CABLE AFFILIATION RULES on this 1st day of September, 1999, via Federal Express, for delivery on September 2, 1999, to each of the following:

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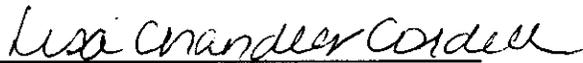
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