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

In the Matter of	)	
	)	
Tier Buy-Through Complaint	)	CSR 6313-B

REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

On April 30, 2004, NCTA and Cox Communications Inc. ("Cox") filed comments opposing the Tier Buy-Through complaint filed by the Cable Advisory Council of Enfield, Connecticut ("CAC') against CoxCom, Inc.[1] NCTA and Cox demonstrated that there is no factual, legal or policy basis for finding that Cox has violated the tier buy-through prohibition and, as discussed below, none of the parties supporting the complaint have made a case to refute this assertion.

Enacted twelve years ago, the tier buy-through rule prohibits cable operators from requiring a customer to subscribe to any tier other than the basic service tier as a condition of access to video programming offered on a per channel or per program basis.[2] CAC argues that Cox violates the rule by requiring customers who subscribe to only the basic tier of programming to pay a "digital gateway" fee in order to purchase digital premium and pay-per-view services. The "digital gateway" consists of an interactive program guide ("IPG") that

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[1] Tier Buy-Through Complaint, Public Notice, DA 04-897 (rel. March 31, 2004).

[2] See Communications Act, § 623(b), 47 U.S.C. § 543(b)(8); 47 C.F.R. § 76.921.

enables customers to navigate programming and select and order impulse pay-per-view services. The digital gateway also provides access to Cox's digital music service.

Only two parties filed comments in support of CAC's complaint, Richard Blumenthal, Attorney General for the State of Connecticut ("Connecticut AG"), and the National Association of Telecommunications Officers and Advisors ("NATOA"). The Connecticut AG's comments largely rest on a misunderstanding of Cox's schedule of rates and charges in its tariffs. The AG argues that Cox is requiring its customers to purchase the expanded basic service tier and the digital gateway as a condition of access to programming offered on a per channel or per-program basis in violation of the tier buy-through ban. This claim is not made in the CAC complaint and, in any event, is incorrect. As Cox has made clear to the pertinent Connecticut authorities and is addressing in its reply comments in this proceeding, customers who purchase the basic service tier and wish to receive premium per-channel and pay-per-view services are not required to purchase the expanded basic service tier. Cox has clarified the language in its tariff schedule of rates and charges to avoid any confusion about its ordering requirements.

NATOA and the Connecticut AG also argue that the digital gateway fee is not permitted under the tier buy-through rules because it constitutes a "tier" under section 602(17) of the Communications Act. Section 602(17) defines a "service tier" as "a category of cable service or other services" for which the cable operator charges a separate rate, 47 U.S.C. § 543(b). Under NATOA's expansive view of the law, "the nature and format of the buy-through tier is irrelevant" and it does not matter what services are associated with the charge in order for the buy-through rule to apply.[3] This ignores, however, Commission precedent and legislative

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[3] NATOA Comments at 2.

history. Both limit the term "tier" in the rate regulation provisions of the Act to its commonly understood meaning, i.e., channels of *video* programming.

As NCTA and Cox demonstrated in their comments, the drafters of the tier buy-through provision intended to restrict cable operators from "imped[ing] competition among *video* services" by compelling customers to purchase additional tiers of service in order to access unbundled programming services.[4] And the Commission interpreted the term "tier" to mean video programming services in explicating a provision closely related to the tier buy-through provision, namely the requirement for cable operators to provide customers with a separately available basic service tier to which subscription is required for access to any other *tier of service*.[5] The Commission specifically concluded that this requirement does not apply "to non-video services such as digital cable radio and Personal Communications Services."[6] Underlying its decision was the express recognition that rate regulation and other rules established under the Act were designed to address "competition in the *video* marketplace."[7]

The tier buy-through provisions similarly must be read in this context. The only reasonable and internally consistent construction of the Act would lead the Commission to conclude that Congress intended to limit the scope of the tier buy-through provision to requiring

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4 See Cox Comments at 18; NCTA Comments at 3; see also Statements of Senator Grassley and Senator Inouye, cited in the Connecticut AG's comments, explaining that the purpose of the buy-through provision "is to increase the options for customers who do not wish to purchase *upper cable tiers* but who do wish to subscribe to premium or pay-per-view programs." 138 Cong. Rec. S14608-09 (Sept. 22, 1992) (emphasis added). Connecticut AG Comments at 3.

5 Section 623(b)(7) of the Communications Act, 47 U.S.C. § 543(b).

6 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5742 at ¶ 166 (1993).

7 Id. (emphasis in original).

customers to purchase intermediate tiers of *video* programming as a condition to access programming offered on a per channel or per program basis.[8]

To stretch the tier buy-through prohibition to encompass *non-video* services or functionalities, such as digital music and navigation functionalities, would obliterate the Commission's stated intent in implementing the statute to encourage innovation and new modes of system operation and channel configuration. The FCC's initial Buy-Through decision plainly stated that the tier buy-through rule should not interfere with or inhibit cable operators' "flexibility to alter their channel configurations and signal access control mechanisms" in order to offer their customers the benefits of new programming options and technological developments.[9] As Cox explained, the digital gateway plays a "vital role" in "enabling customers to tap the full functionalities and programming on the digital platform."[10] The interactive program guide (IPG) is a navigational tool, designed to give customers the ability to search, sort, and access programming based on genre, content, title, time and other means to provide maximum choice and flexibility. It is essential for any customer wishing to access digital services, whether the full panoply of programming services or simply multiple channels of premium programming.[11]

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[8] Even the Connecticut AG recognizes that "the statute, the Commission's regulations and the Congressional Record clearly prohibit requiring customers to purchase *any tier of video programming service* other than the basic service tier as a condition of accessing premium or pay-per-view services." Connecticut AG Comments at 3 (emphasis added).

[9] Implementation of Section 3 of the Cable Television Consumer Protection And Competition Act of 1992, Tier Buy-Through Prohibition, Report and Order, 8 FCC Rcd 2274 (1993) at ¶ 20.

[10] Cox Comments at 2.

[11] NATOA describes the digital gateway as a "digital access" mechanism for ordering premium or pay-per-view programming. NATOA Comments at 3.

The fact that the digital gateway – as a means to access and operate programming services – is not a tier is not changed, as the Connecticut AG argues, because it also provides customers with access to music channels and "In Demand" pay-per-view and sports programming on a per channel basis.[12] First, the music channels are not video services. And, second, the digital gateway does not, as the Connecticut AG seems to argue, include pay-per-view and sports programming as a separate "programming tier" required as a condition to access premium service offerings. It simply gives consumers the technology to order such video programming services if they wish.

Another major flaw in NATOA's and the Connecticut AG's argument is that it equates multiple channels of premium services with "per channel" or "per program" offerings under the tier buy-through provisions of the Act.[13] But the statutory language is unequivocal: the tier buy-through prohibition only applies to cable operators conditioning the purchase of video programming offered on a "per channel" or "per program" basis.[14] As NCTA and Cox showed, the digital premium services at issue in this case are not "per channel" services.[15] They consist of a combination of multiple channels of independently programmed, and in most cases widely divergent, programming services whose primary connection is the premium channel brand. They are a far cry from the multiple time-shifted versions of "per channel" premium services that existed at the time the tier buy-through rule was enacted in 1992. NATOA and the Connecticut AG offer no factual or legal basis for treating such channels as "per channel" services in this case.

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[12] Connecticut AG Comments at 3-4.

[13] See NATOA Comments at 2-3; Connecticut AG Comments at 3-4.

[14] Section 623(b)(8) of the Communications Act, 47 U.S.C. § 543(b)(8).

[15] NCTA Comments at 6-12; Cox Comments at 9-16.

Finally, NATOA clouds its arguments with a host of factually and legally baseless claims about the cable industry's marketing of unregulated services that have nothing to do with tier buy-through. For example, it asserts that Cox's digital gateway charge constitutes a "deceptive marketing practice," alleging that "a customer is not likely to be aware of the "fine print" of having to pay the gateway fee until the customer has already ordered or decided to order the premium or pay-per-view programming.[16] This claim has no merit. The digital gateway charge is readily apparent to the customer on the face of the rate card provided by the Enfield, Connecticut system. Moreover, Cox has set up and operated the ordering system in such a way that a customer service representative cannot close a transaction over the phone or in person without reviewing all of the charges, including the digital gateway, with the customer and including it in the order.[17]

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[16] NATOA Comments at 3.

[17] See Cox Reply Comments for a full description of Cox's marketing practices with respect to the digital gateway.

CONCLUSION

The Connecticut AG's response to the CAC complaint is primarily based on a misunderstanding of the facts. And along with NATOA, its support of the complaint relies on a faulty interpretation of the tier buy-through provisions of the Act. Cutting through these arguments, the Commission should conclude, as NCTA and Cox have shown, that there is no factual, legal or policy basis to find that Cox has violated the tier buy-through prohibition. The Commission should, therefore, deny CAC's complaint.

Respectfully submitted,

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May 20, 2004

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, hereby certify that a copy of the National Cable & Telecommunication Association's Reply Comments were served via first class mail, postage prepaid, this 20th day of May 2004, upon the following:

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