

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.

In the Matter of)
)
Implementation of Sections 12 and 19)
of the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

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MM Docket No. 92-265

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF ADVANCED COMMUNICATIONS CORPORATION

January 25, 1993

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Comments of Advanced Communications Corporation

Advanced Communications Corporation ("ACC") hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. ACC is a pioneer in the fledgling direct broadcast satellite ("DBS") industry, having worked to deploy a fully operational DBS system since 1983. It is currently licensed by the Commission to offer 27 channels of digital DBS service throughout the country.

I. Introduction

Over a decade ago, the Commission authorized DBS to provide a multichannel alternative to cable television and to initiate multichannel service to rural areas unserved by cable operators and/or underserved by over-the-air broadcasters. ACC intends and expects its DBS system to achieve both of these goals. But ACC (like other potential multichannel competitors)

cannot hope to compete meaningfully with entrenched cable operators unless it has the same access as its cable counterparts to the programming that customers demand.

Until now, upstart DBS operators have been unfairly denied such access. The vertically integrated cable industry exploited its status as an unregulated monopoly to create and then deny access by other program distributors to popular programming services. It is precisely this inequitable competitive situation that Congress sought to remedy when it passed the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). Recognizing that cable had abused its market power to preclude competition, the 1992 Cable Act specifically prohibits unfair methods of competition or unfair or deceptive acts or practices that hinder the delivery of programming by multichannel service providers. 47 U.S.C. § 628. This proceeding was commenced by the Commission in order to draft implementing regulations.

In ACC's view, access to programming is essential for true competition to flourish in the public interest. It is therefore critical that the Commission adopt rules that ensure the availability of programming to all service providers on equal terms and conditions. To the extent that any price differences are permitted, the Commission must place a heavy burden on program vendors to demonstrate that the differential is justified. Otherwise, the vertically integrated cable

industry will use its market position to extract concessions and gain advantages that will leave it as dominant and unchallenged as before. Moreover, in order for the Commission's rules to have their intended impact, a swift and effective enforcement procedure must be established to address and redress instances of anticompetitive conduct. Only by following this basic framework will the Commission ensure realization of true competition in the multichannel video marketplace, as envisioned by the 1992 Cable Act.

II. **Vertically Integrated Cable Interests Must Be Prohibited From Denying Equal Access To Programming.**

In the NPRM, the Commission suggests that vertical integration by the cable industry stimulated the development of innovative new programming critical to fleshing out the promise of cable, and contributed to enhanced program quality because cable operators have a strong incentive to increase their penetration by offering more attractive programming. NPRM, at 5. But while vertical integration may have helped flesh out the promise of cable, it now is being exploited to flush out the promise of other multichannel services. The emergence of an unregulated and vertically integrated cable industry gave cable both the incentive and ability to unfairly discriminate against potential competitors. Indeed, the cable industry has successfully thwarted the onset of multichannel competition through its unfettered control of critical programming. To

remedy this imbalance, fledgling competitors like ACC must be given equal access to programming controlled by cable.

A. The Commission Should Apply the Broadcast Attribution Rules to Vertical Cable Operations.

At the outset, the Commission seeks comment on what threshold, if any, it should use to determine whether a cable operation is vertically integrated for purposes of applying its regulations. NPRM, at 6. ACC urges the Commission to adopt the standard set forth in the broadcast attribution rules, 47 C.F.R. § 73.3555. The broadcast attribution rules were developed to prevent concentration of media power, precisely the purpose for which the 1992 Cable Act's program access requirements were enacted. Moreover, the specific provisions of the attribution rules -- in particular the 5% ownership attribution benchmark -- are well-suited to the cable context. Given the enormous market power wielded by cable, especially by large multiple system operators (MSOs), a strict 5% ownership threshold is in the public interest. To allow any greater level of vertical integration without regulatory consequences would invite the continued exertion of undue influence by cable operators.

Another reason favoring application of the broadcast attribution rules is that the Commission has vast experience interpreting and implementing these provisions. The uncertainty bound to accompany new rules would provide an

opportunity for the cable industry to shape their interpretation and circumvent the purpose of the statute. By incorporating existing rules, cable interests could not complain about any misunderstanding or misinterpretation of the rules. All parties would be fully aware as to how and when the rule applies. 1/ ACC therefore supports application of the broadcast attribution rules as a framework for determining when a cable operation is vertically integrated.

B. Price Discrimination Among Multichannel Competitors Must Be Severely Restricted.

The Commission requests comment on a series of issues related to discriminatory pricing by program vendors between multichannel video distributors. NPRM, at 10-11. The inquiry, however, can be reduced to a single question: to what extent, if any, should a program vendor be permitted to differentiate in prices as between cable operators and their potential competitors?

The Commission's stated goals are to prevent (i) improper influence by cable operators on an affiliated program service in selling programs to unaffiliated services;

1/ The 5% benchmark of the broadcast attribution rules has also been followed in the cable-telco cross-ownership proceeding. See Second Report and Order, 7 FCC Rcd 5781, 5819 (1992).

(ii) discrimination in price, terms or conditions of sale or delivery of video programming; and (iii) contract exclusivity between cable operators and program vendors in the sale of satellite programming. NPRM, at 9. ACC fully supports these objectives, and believes that they can be accomplished by mandating a blanket prohibition on price differences in the sale or delivery of programming to multichannel service providers. Unaffiliated distributors must have equal program access in order to provide a popular service at reasonable prices. In ACC's view, all other aspects of the statute are secondary and will fall into place once the issue of program access is resolved because, without such access, competition will not materialize.

Because of the harm caused to both consumers and competition through differential pricing, strict control over such discriminatory practices is in the public interest. A competitor subject to the higher price -- particularly a fledgling operator like ACC -- will clearly confront the dilemma of having either to raise customer prices or to operate at low or negative margins. Obviously, this jeopardizes the ability of upstart operators to develop, market and sustain an economically viable service. In addition, differential pricing inevitably leads to inflated prices and reduced choices for consumers. For example, a household that subscribes to a DBS service will have to pay more than a cable subscriber for the

identical programming. In areas where DBS and cable systems directly compete, these higher prices will cause a migration of DBS customers to cable. This will cause the life expectancy of a DBS operator to be short, raising the likelihood that cable will remain the only viable multichannel program service provider (and that rural areas will continue to be unserved).

ACC nevertheless recognizes that the statute permits program vendors, among other things, to impose reasonable requirements for creditworthiness, to establish prices, terms and conditions to account for cost differences in the sale or delivery programming, and to afford price discounts based on economies of scale. The Commission seeks guidance on how to consider these factors in evaluating whether a particular price difference is justified. NPRM, at 10-11.

First, vertically integrated program vendors cannot be allowed to unilaterally determine the creditworthiness of a potential multichannel competitor. This would be tantamount to giving the cable industry a free hand in manipulating the growth (or lack thereof) of its potential competitors. Rather, in instances where questions of creditworthiness are raised, the Commission could permit program vendors to require multichannel distributors to provide some reasonable evidence, as determined by the Commission, of an ability to pay. As long as a distributor can objectively demonstrate adequate liquidity, it must be permitted to purchase the desired

programming. Only if such assurance cannot be provided would it be reasonable to deny program access.

In terms of accounting for cost differences, it must be understood that vendors incur no incremental cost by selling their product to additional distributors. The cost to the vendor of satellite delivery is the same regardless of how many customers receive the programming. Unless the vendor can specifically demonstrate some added cost associated with delivery of a program, multichannel distributors should have access at the same price. It also is not for the program vendor to determine the financial stability or character of a competing purchaser. These are subjective evaluations that should not be left to a competitor. If questions are raised, they should be referred to the Commission for a determination.

The Commission suggests, however, that different modes of delivery may be more expensive and less secure from piracy. NPRM, at 11. With respect to DBS, the delivery cost is the same as the cost associated with cable delivery. Moreover, DBS uses advanced digital signals that are more secure from piracy than any other known technology. Accordingly, there is no actual expense differential that would justify a price difference between cable and DBS.

Finally, regarding economies of scale as a justification for price differences, the Commission should not consider any factor beyond volume discounts. Other factors

-- such as discounts for prepayment or for marketing performance -- are unrelated to the number of subscribers served by the distributor and therefore fall outside the purview of the statute. In any case, it is imperative that the Commission strictly limit the factors which may justify a price differential. Cable operators are the only entities that will have the resources and the customer base needed to take advantage of this loophole, since upstart competitors like ACC do not yet enjoy sufficient economies of scale. Thus, expanding the circumstances under which a price difference is justified would be directly contrary to purposes of the statute.

Even with respect to volume purchases, the Commission should establish a high burden for cable operators to meet to permit the use of a bulk discount. And in view of the vast disparity in purchasing power between cable and other multichannel services, the Commission should strictly limit the amount or degree to which any cable operator may receive a discount. Adoption of provisions along these lines is necessary to ensure that cable does not use the availability of bulk discounts to undercut and undermine potential competition.

The Commission also seeks comment on the general standard it should apply in distinguishing between discriminatory and justifiable price differences. NPRM, at 12-15. ACC supports incorporation of the common carrier standard under which it is unlawful to engage in "unjust or

unreasonable discrimination" "in the provision of "like" services or to give any unreasonable preference or advantage to any person. 47 U.S.C. § 202(a). As with the broadcast attribution rules, the Commission is familiar with and has extensive experience applying this standard. Furthermore, the underlying purpose of the common carrier standard mirrors that of the program access requirements -- similar services should be available on equal terms without regard to the identity of the customer. ^{2/} In these circumstances, there is no reason to create a new (and uncertain) standard.

III. Enforcement Procedures Should Be Swift And Penalties Should Be Severe.

The Commission, noting that existing practices of programmers may no longer be valid upon adoption of the new rules, seeks guidance on how long vendors should be given to bring their arrangements into conformance. NPRM, at 16. ACC believes that 6 months is ample time to bring pricing and other practices into line. Cable interests should not be permitted to persist in unlawful practices for any longer period, nor should they be allowed to extend existing arrangements. Since

^{2/} In addition, the standard has been used before in evaluating discrimination in the video distribution marketplace. See, e.g., Report, 5 FCC Rcd 523 (1989); Second Report, 6 FCC Rcd 3312 (1991).

contracts will be essentially uniform with respect to terms and conditions, it should not be very difficult for vendors to adopt to the new regulatory environment.

To assure full adherence to the objectives of the Act and the Commission's rules, an effective enforcement mechanism must be established. The Commission has proposed several alternative enforcement approaches. NPRM, at 19-24. ACC generally endorses the antitrust approach. At its core, the 1992 Cable Act is one that promotes the cardinal antitrust principles of competition and consumer choice. Thus, penalties should be similar to those imposed in the antitrust arena. ACC urges the Commission to authorize the assessment of treble damages against those found to have engaged in discriminatory or anticompetitive conduct by unlawfully restricting access to programming. The threat of such severe damages will provide sufficient incentive for program vendors to fully comply with the Commission's standards.

In addition, the process for reviewing alleged anticompetitive practices must be swift to assure that the adjudicative process is not used by program vendors as another weapon against potential multichannel competitors. A process in which deep-pocket cable interests are able to impose delay could doom DBS or other competitive operators who simply do not have the resources to withstand an indefinite or protracted adversarial proceeding. As such, the Commission should

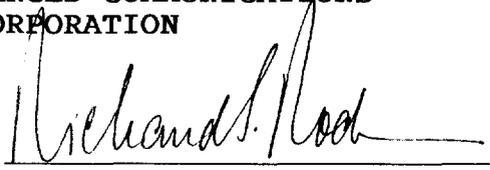
establish a process whereby disputes are resolved within 60 days of the filing of a complaint. Only limited discovery and no dispositive motions would be allowed. The presumption would be that no hearings are held unless there are irreconcilable disputes with respect to critical facts. Parties could have the option of alternative dispute resolution, so long as the issue is resolved within the 60 day period.

IV. Conclusion

ACC supports the Commission's initiative to ensure broad and equal access by all multichannel video distributors to critical programming. Vertically integrated program vendors cannot be permitted to exploit their market dominance to prevent the emergence of competition. Programming should therefore be available on equal terms and conditions, with a high burden imposed on vendors to justify any price differences. In addition, swift and effective enforcement of the rules should be a Commission priority. Establishing this framework is necessary to promote the public interest in full and fair multichannel competition.

Respectfully submitted

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