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

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In re:	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS OF EMI COMMUNICATIONS CORP.

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SUMMARY OF ARGUMENT

The Commission must implement the antidiscrimination provisions of Section 19 in a way that allows legitimate competitive pressures to determine the pricing strategies of satellite broadcast programming vendors ("SBP Vendors"). In order to do so, the Commission should implement a straightforward three-part test to analyze claims of unlawful discrimination.

The Commission must recognize that substantial cost differentials justify differences in the prices offered by SBP Vendors to different video distributors. An SBP Vendor's prices must also reflect the fact that some video distributors bring added value to the satellite broadcast programming service that others do not. SBP Vendors recognize these additional costs and benefits by offering different rates to different distributors.

In order to find unlawful discrimination, the Commission must always find that unjustifiable price

differentials had the purpose or effect of significantly hindering or preventing the distribution of programming to subscribers or consumers.

Under current law, any party is free to uplink and distribute superstation signals in the same manner as EMI. Therefore, if SBP Vendors are charging too much for a service, a competitor would likely emerge to offer comparable service at a lower rate. Requiring an SBP Vendor like EMI to offer the same rates to cable operators and, for example, HSD distributors, will likely result in EMI's dropping one of its two services, WSBK-TV.

Finally, the Commission should limit the complaint procedures under Section 19 to expedited paper hearings. In particular, discovery should be strictly controlled to prevent "fishing expeditions" and the Commission must protect any proprietary information submitted by an SBP Vendor in the complaint resolution process.

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To the Commission:

COMMENTS OF EMI COMMUNICATIONS CORP.

EMI Communications Corp. ("EMI"), by its attorneys, hereby submits its Comments in response to the Commission's proposal to adopt regulations implementing Section 19 of the Cable Consumer Protection and Competition Act of 1992 (the "Cable Act") concerning program access.[1/]

Introduction

Section 19 of the Cable Act, among other things, requires the Commission to enact regulations to prevent satellite broadcast programming vendors ("SBP Vendors") from engaging in unfair or deceptive practices that have the purpose or effect of significantly hindering or preventing the distribution of satellite broadcast programming to subscribers or consumers.

1/ Notice of Proposed Rulemaking, MM Docket No. 92-265, FCC 92-543 (December 10, 1992) ("NPRM").

The Commission must keep several considerations in mind in implementing these rules. First, an SBP Vendor such as EMI offers different prices, terms or conditions to distributors using differing technologies in recognition of both the cost differences involved in serving different industries and the value that different distribution technologies bring to EMI's business. EMI must offer incentives and/or rewards to a distributor, such as a cable operator or MMDS distributor, that incurs significant costs or obligations that ultimately benefit EMI. Other distributors, which do not exhibit a similar commitment to EMI's business, simply have no right to expect identical treatment.

Second, under existing law, there are absolutely no barriers to new vendors that would seek to deliver the same signals and programming that SBP Vendors now deliver. As a result, if a vendor sets prices too high or engages in unfair conduct that prevents distributors from obtaining programming, market forces would be very likely to produce a competitive vendor. The Commission must recognize that the marketplace itself would discipline discriminatory conduct.

Finally, the Commission must recognize that the result of overly restrictive regulation will be a reduction in the amount of satellite broadcast programming available to both backyard dish ("HSD") and cable consumers. The

Commission must, therefore, avoid promulgating rules that are contrary to Congress' stated intent of increasing program diversity and availability.

I. The Commission Must Permit a Vendor's Prices, Terms and Conditions to Reflect the Varying Costs of Providing the Service and the Value of a Programming Distributor's Commitment to a Programming Service

The Commission must avoid the temptation to micromanage the sales practices of SBP Vendors such as EMI.[2/] EMI strongly urges the Commission, therefore, to implement the antidiscrimination provisions of Section 19 in a way that allows legitimate competitive pressures to determine the pricing strategies of SBP Vendors. Rules that impose artificial prices, terms or conditions on carriage agreements will ultimately act to the detriment of competition and program diversity within the marketplace.

A. Alleged Discrimination Should Be Analyzed Under a Straightforward Three-part Test

EMI proposes that the Commission analyze complaints of alleged unlawful discrimination by SBP Vendors under a straightforward, three-part test. In order to find unlawful discrimination, the Commission would make a determination that:

2/ EMI delivers the signals of WWOR-TV, Secaucus, New Jersey and WSBK-TV, Boston, Massachusetts to cable systems and HSD customers.

1. the SBP Vendor offered materially different prices, terms or conditions to the complaining distributor and other distributors.

2. these differentials were not justifiable; rather, the vendor discriminated unlawfully.

3. the purpose or effect of such unlawful discrimination was to significantly hinder or prevent the distribution of satellite broadcast programming to subscribers or consumers.

EMI further submits that Commission reliance on any of the four options outlined in the NPRM for a discrimination analysis is unnecessary. Regulation of the satellite delivered video programming marketplace requires competitive considerations distinct from, for example, the common carrier or international trade arenas. Section 19 does not appear to liken the multichannel video programming market to any of these four models. The three-part test proposed by EMI attempts to track the statute.

B. Substantial Cost Differentials Justify Price Disparity Between Alternative Means of Programming Distribution

The second prong of the three-part test proposed by EMI requires the Commission to analyze whether material price differentials are justifiable or, in the alternative, discriminate unlawfully against a distributor. Numerous factors, including but not limited to those enumerated in

Section 19, influence the pricing decisions of EMI and other SBP Vendors.[3/]

EMI has incurred substantial additional costs to provide service to the HSD market. While the cable customer base has long supported EMI's transmission of WWOR-TV, the addition of service to the HSD market has required EMI to make significant copyright royalty payments to the U.S. Copyright Office, payments not required in its cable business. EMI has also incurred additional costs for marketing and advertising, customer service, anti-piracy, tier bit and other DBS authorization costs, and added employee, administrative and other overhead expenses. These additional costs, attributable specifically to the HSD business, would not be fairly borne by EMI's cable or MMDS customers.

Moreover, EMI launched WSBK-TV primarily as an HSD service. Almost all of these costs attributable to EMI's WSBK-TV service -- including copyright, transponder costs, and all of the types of costs outlined in the preceding paragraph must fairly be allocated to HSD customers, not cable or MMDS customers. These allocations justify, and

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3/ EMI encourages the Commission to compare the pricing practices of non-vertically integrated satellite cable programming vendors (like ESPN) with satellite broadcast carriers in order to evaluate price discrimination claims. Differentials common to both types of vendors should be presumptively lawful.

indeed require, different pricing structures for the two industries.

In addition, the Commission must clearly establish that vendors may legitimately recognize the added value certain distributors add to a programming distribution arrangement. Such value derives not only from a distributor's size, but its commitment to providing a quality service to subscribers. Moreover, certain types of distributors -- for example, cable and MMDS operators -- incur significant costs to create and maintain delivery systems that benefit subscribers and, ultimately, vendors such as EMI.[4/] These benefits and costs must be recognized in the programming agreement. As the Commission understands, the parties primarily address these elements of added value through pricing.[5/]

Section 19 directs the Commission, when analyzing discrimination claims, to consider a number of factors such as creditworthiness, offering of service, financial stability and character and technical standards. These

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4/ The legislative history of Section 19 indicates that price differentials may be justified by costs incurred at both the program vendor's level and at the distributor's level. See 138 Cong. Rec. S16,671 (daily ed., Oct. 5, 1992) (colloquy between Sen. Kerry and Sen. Inouye).

5/ Additionally, EMI encourages the Commission to recognize that, unlike cable and MMDS operators, HSD distributors do not retransmit or process EMI's signal in any way. In fact, the term HSD "distributor" is a misnomer.

represent significant considerations for a vendor like EMI. EMI will obviously value carriage by a well-capitalized company with a proven track record and the incentive to make a service successful more highly than carriage by a distributor with fewer resources and less motivation to expand the business.

Under the second prong of EMI's proposed test, the Commission would also consider the "actual and reasonable differences in the cost of creation, sale, delivery, or transmission of . . . satellite broadcast programming[.]" (emphasis added)[6/] As noted above, these costs must be analyzed at both the program vendor's level and at the distributor's level.[7/] This distinction is critical to an understanding of the pricing practices of carriers like EMI.

Unlike other satellite broadcast programming distributors, cable and MMDS operators incur major costs and undertake significant obligations that ultimately benefit carriers like EMI. For example, EMI's pricing structure must recognize a cable operator's investment in cable plant and equipment, its payment of the copyright license fees in the distribution chain and its local marketing and piracy prevention efforts. Vendors like EMI primarily recognize

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6/ Cable Act, Section 19(c)(2)(B)(ii).

7/ See supra note 4.

these investments through lower rates than can be given to, for example, HSD distributors, which do not undertake significant obligations in these areas. It would result in a windfall to HSD distributors if, in light of their more limited investment and resulting more limited performance, they were given the same rates as cable operators.

Cable systems and MMDS operators invest heavily to deliver programming to a subscriber's home and make repairs in the event of a service problem. In sharp contrast, HSD distributors generally do little more than "authorize" subscribers to receive EMI's programming, often on an a la carte basis (which does little to boost penetration rates for EMI's services), with little marketing or customer service and without a local presence.[8/] To carriers like EMI, therefore, cable and MMDS operators have proven to be committed business partners; HSD distributors, in contrast, often act as little more than sales agents.

C. Unlawful Discrimination Under Section 19 Requires a Finding of Actual or Intended Competitive Harm

Section 19(b) of the Cable Act clearly requires that discriminatory acts or practices, in order to be unlawful, either have the purpose or effect of significantly

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8/ HSD distributors generally conduct their back office operations from a distant location.

hindering or preventing the distribution of satellite broadcast programming to subscribers or consumers. The Commission's rules must similarly impose this threshold requirement of competitive harm.

Section 19(c)(1) of the Cable Act requires the Commission to "prescribe regulations to specify particular conduct that is prohibited by subsection (b)." (emphasis added). By this language Congress has expressly directed the Commission to only proscribe conduct that includes the element of competitive harm. The Commission must, therefore, incorporate the statutory requirement of actual or intended competitive harm within its rules implementing Section 19.

D. Forced Uniform Pricing For Programming Distributors Will Ultimately Reduce the Amount of Satellite Broadcast Programming Available to Subscribers

Applying rigid uniform (or nearly uniform) pricing requirements will ultimately reduce the amount of satellite broadcast programming available to both cable and HSD subscribers. In fact, the Commission appears to acknowledge that this could be the anomalous result of misguided regulation.[9/]

9/ NPRM at 10 (paragraph 15) ("We also seek comment on specific situations in which a 'uniform' pricing requirement could reduce the amount of programming available to subscribers.").

Section I.B., above, outlines the substantial additional costs that EMI incurs in serving the HSD market. An overly restrictive interpretation of Section 19 would force EMI to drop one of its two programming offerings, WSBK-TV. Ironically, as noted above, EMI launched the WSBK-TV service primarily to serve the HSD market.

If EMI were forced to provide the same (or nearly the same) rates to cable and HSD distributors, EMI would be forced either to lower its rates to HSD distributors or to raise its rates to cable operators. In either situation, EMI anticipates that it would ultimately have to terminate the WSBK-TV service. A forced rate reduction for HSD distributors would lower EMI's WSBK-TV revenues to a point well below the cost to EMI of providing the service. If, on the other hand, EMI raises the rates it charges cable operators to carry WSBK-TV, EMI would lose all of its WSBK-TV cable base because WSBK-TV would not be competitively priced with other programming services (and bear in mind that cable operators, unlike HSD distributors, must also pay a copyright royalty fee).

The preamble to Section 19 recites a legislative purpose of <u>increasing</u> diversity in the multichannel video programming market as well as the availability of satellite broadcast programming. In order to comply with the clear legislative intent of Section 19, therefore, the Commission

should avoid implementing unnecessary and inflexible rules that will ultimately force carriers like EMI to terminate programming services.

E. Competitive Forces Already Prevent SBP Vendors From Discriminating Unreasonably Against Multichannel Video Programming Distributors

The Commission should recognize that carriers such as EMI, because of the legal and regulatory framework in which they compete, do not have the requisite market power to discriminate unreasonably between multichannel video programming distributors. Unlike satellite cable programming vendors, satellite carriers normally do not control the primary portion of the programming of the stations they deliver. In contrast, vendors like Viacom and Time-Warner, as copyright owners or licensees, have the ability to foreclose others from offering their programming on a competitive basis and thus, within bounds, to dictate license fees to their distributors, including HSD distributors.

EMI distributes superstation signals to the HSD market under the compulsory license provisions of the Satellite Home Viewer Act.[10/] Under the SHVA, any party willing to pay the statutory fee can uplink and distribute

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10/ The Satellite Home Viewer Act (the "SHVA") is codified at 17 U.S.C. § 119.

satellite broadcast programming such as WWOR-TV and WSBK-TV to the HSD market. Thus, if EMI or any other superstation carrier charges HSD distributors too much, or imposes overly burdensome terms or conditions of carriage, other parties are free to compete and to offer the same programming on better terms. Similarly, the Copyright Act's "passive carrier" exemption[11/] allows any party to deliver superstation signals to cable operators, again affording potential competitors the opportunity to undercut a satellite carrier's prices, terms or conditions. There is no legal barrier to entry to any competitor.

EMI encourages the Commission to recognize this fundamental difference in market structure when implementing its rules under Section 19. EMI, and other SBP Vendors, should not be unduly burdened by regulatory oversight when the marketplace can be relied upon to achieve the policy aims of the Cable Act. See Cable Act, Section 2(b)(2). In this situation the Commission's rules must recognize, as even Congress did, that legitimate marketplace forces exist to restrain potentially anticompetitive conduct by programming vendors.

11/ 17 U.S.C. § 111(a)(3).

II. The Commission Should Strictly Control the Enforcement Process to Prevent Abuses

EMI encourages the Commission to limit grievance procedures to expedited "paper hearings" with limited pleadings. In particular, discovery should be strictly controlled both to prevent "fishing expeditions" and to protect proprietary information submitted by programming vendors in good faith in the dispute resolution process.

EMI submits that only the Commission should have the right to compel discovery. In addition, discovery should only be permitted after the Commission staff has conducted a status conference to determine if sufficient facts have been alleged to allow a complaint to go forward. Following this status conference and determination, discovery would only be conducted pursuant to a staff issued protective order restricting access to proprietary material, such as programming agreements, to the Commission. Programming agreements and other proprietary information must likewise be exempt from FOIA disclosure.

The Commission's procedural rules should recognize that complaining parties may file complaints in order to gain negotiating leverage or to gain access to confidential information. Therefore, EMI urges the adoption of strict forfeiture provisions for parties that abuse the Commission's processes by filing frivolous complaints of vendor discrimination. For example, complaints that fail to

allege facts that, if true, demonstrate both unlawful discrimination and the requisite anticompetitive injury or intent should be deemed frivolous and dealt with under the Commission's forfeiture authority.

Conclusion

Under Section 19 of the Cable Act, Congress has given the Commission the opportunity to significantly affect, for good or bad, the satellite broadcast programming marketplace. The Commission must recognize that numerous legitimate factors justify differing treatment of different distributors. Moreover, the Commission should focus only on discrimination that has an anticompetitive purpose or effect. The Commission should implement flexible, sensible rules so as to permit the continued vitality and diversity of satellite broadcast programming offerings to both cable and HSD customers.

Respectfully submitted,

EMI COMMUNICATIONS CORP.

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CERTIFICATE OF SERVICE

This will certify that an original and nine copies of the foregoing Comments were delivered by hand this 25th day of January, 1993, to the following:

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Michael J. Pierce

January 25, 1993