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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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JAN 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Implementation of the)
Cable Television Consumer)
Protection and Competition)
Act of 1992)
Rate Regulation)

MM Docket No. 92-266

COMMENTS OF ESPN, INC.

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COMMENTS OF ESPN, INC.

1. ESPN hereby submits these comments for consideration by the Commission in its rulemaking proceeding to implement the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").¹ ESPN is the most widely distributed nonbroadcast programming service in the United States. ESPN is distributed via cable, TVRO, MMDS and SMATV systems to over 61 million viewers, representing some 66 percent of American television households.

2. ESPN's programming philosophy is simply stated -- to present a wide variety of high quality, innovative and in-depth sports programming which includes both broad appeal and more

¹Pub. L. 102-385, 106 Stat. 1460 (1992). Notice of Proposed Rulemaking in MM Docket No. 92-266, ___ FCC Rcd ___ (adopted December 10, 1992) ("NPRM").

narrow interest sports. In support of this effort, ESPN televises over 5,000 hours each year of live or original sports programming covering over 65 different sports.

3. ESPN offers many hours of sports programming of interest to a large segment of its audience including the National Football League, Major League Baseball, the National Hockey League, college football and basketball and auto racing. Moreover, ESPN has offered cable audiences a wider variety of professional and college sports than available previously on network or local broadcast coverage alone. And while high profile professional and college sports programming is more highly publicized and receives the highest ratings, this represents only part of the remarkable success of ESPN over the years in bringing to millions of viewers dozens of sports events and programs which would never otherwise have been seen. Because of our commitment to diversity we are able to target narrow appeal audiences with quality shows therefore increasing the value of ESPN to more viewers and offering advertisers specialized opportunities to reach very desirable target groups.

4. It is this diverse choice of viewing options which differentiates ESPN and, indeed, other cable program networks from any other medium of video distribution. It is our fear, however, that rate regulation will raise substantial impediments to our continuing growth and development by cutting us off from the audience and revenues we need to continue to serve our viewers well.

DISTRIBUTION AND COMPETITIVE POSITION ARE VITAL

5. ESPN's goal in dealing with the 1992 Cable Act is no different from its goal since we signed on in 1979 -- to obtain the largest possible viewing audience. Overly stringent rate regulation has the clear potential to undermine our desire for broad distribution by driving ESPN off the basic cable tier with resulting harm to ESPN and our viewers.

6. In particular, ESPN competes directly with satellite-delivered superstations such as WTBS (Atlanta, GA), WGN-TV (Chicago, IL), and WWOR (Secaucus, NJ) for carriage on cable systems as well as for viewers and advertising. These stations already have an advantage in obtaining basic tier carriage by virtue of the substantial monetary incentives provided cable operators by the Copyright Act of 1976. ESPN urges the Commission not to put satellite cable networks such as ESPN at a further disadvantage by implementing the rate regulation provisions of the 1992 Act in a way that discourages the carriage of those networks on the basic tier of service.

DISTRIBUTION INCENTIVES

7. ESPN is carried on the basic tier -- the initial tier required to be received by all subscribers -- on a large number of cable systems. Those systems which do not carry ESPN on basic carry ESPN on the next most widely received tier above the basic service -- the non-basic level. The separate FCC rate formulas for the basic and the non-basic service tiers must not discourage

cable operators from inclusion of the cable networks on these widely distributed tiers.

8. Congress expressly provided cable operators with discretion to "add additional video programming signals or services to the basic service tier."² The only requirement with respect to the provision of such additional services was that they be "provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection."³ Similarly, a cable operator can place any number of cable networks on its non-basic service tiers.

9. Significant differences exist in the manner in which basic and non-basic rates are determined to be appropriate under the new law. But in both instances, whether a rate violates the statutory standard cannot be determined absent consideration of the number and nature of programming channels provided. The determination of what constitutes a reasonable rate must differ in cases where one cable operator offers, for example, a basic tier consisting of five broadcast channels and one public, educational or governmental ("PEG") access channel, and another operator offers a basic tier consisting of 15 broadcast stations, three PEG access channels and some number of additional discretionary satellite cable networks. The same holds true with respect to differences in the number of the satellite cable programming networks offered on non-basic tiers. Accordingly,

²47 U.S.C. §543(b)(7)(B).

³Id.

the FCC must implement rate regulation in a fashion that recognizes a price/value relationship in determining a particular permissible rate and which does not discourage cable operators from offering additional services as part of their most widely distributed tiers.

10. This requires that the FCC not impose artificial limits on the number of satellite cable networks that can be provided on the basic tier since that would only exacerbate differences between satellite superstations on the one hand, and competitive cable networks, such as ESPN, on the other. The FCC must also allow cable operators to charge a fair and reasonable rate, either on an overall basis or measured per channel, for the services which they choose to offer. The agency's rate formulas must not discriminate against the cable networks by the imposition of an overall price ceiling for the basic tier which would effectively limit the number and nature of discretionary services offered on basic service.

11. The FCC's rate guidelines should also allow cable operators whose rates exceed the level of reasonableness established by the FCC to improve service by adding additional cable programming services to the basic or non-basic tier as an alternative to reducing or restructuring its rates. The Commission has long recognized cable operators must be given maximum flexibility to experiment with different approaches to marketing their services in a manner that will most efficiently

distribute video programming.⁴ A regulatory approach which would give cable operators the option to increase the value of their service in lieu of arbitrarily rolling back rates is entirely consistent both with a price/value approach to rate regulation and with Congress' goal of fostering diversity of cable programming in the environment of the new cable law.

COST RECOVERY INCENTIVES

12. The FCC must consider programming costs as a special class of expense in developing its basic rate formula and its non-basic tier benchmarks. The Commission has recognized that programming costs are one of the direct costs of providing cable service and that allowing cable operators to pass these costs through to subscribers might reduce the cable operator's incentive to remove highly valued programming from the basic or other widely distributed tier.⁵

13. This view is supported by the legislative history of the 1992 Cable Act which states:

The Committee intends that the formula established by the Commission allow cable operators a full recovery of the costs identified in that formula as well as a reasonable profit (to be defined by the Commission) on the provision of the basic service tier. Further, the Committee recognizes that many of the costs involved in the provision of basic service are subject to change. Accordingly, the Commission may provide that such formula be sufficiently

⁴Community Cable TV, Inc., 95 FCC 2d 1204 (1983), recon. denied, 98 FCC 2d 1180 (1984).

⁵NPRM at ¶ 54.

flexible to take into account changes in such costs so that the maximum price for the basic service tier may be adjusted, upward or downward, by the operator as those costs change.

* * *

It is the Committee's expectation that the Commission will recognize that changes in the direct costs of programming are likely to occur during a rate cycle. This subsection is intended to permit the Commission to develop a system of "pass throughs" or other appropriate mechanisms (bearing in mind the need to protect consumers' interests) to permit cable programmers to be fairly compensated for the service they provide to cable subscribers and to encourage cable systems to carry such systems in the basic tier.⁶

This language clearly demonstrates that Congress did not intend to discriminate against satellite cable networks by inadvertently forcing cable operators through an oppressive regulatory environment to offer a stripped-down basic tier or to offer some cable networks on an a la carte basis that were previously available on the most popular non-basic tier.⁷

14. Thus, it is important that the Commission's rules permit cable operators to automatically pass through increases in the cost of satellite programming networks such as ESPN without the need for local government approval. Perhaps more than any other cost associated with cable television distribution, the

⁶H.R. Rep. No. 628, 102d Cong., 2d Sess. 82 (1992) ("House Report").

⁷See Comments of USA Networks and ESPN, Inc. in MM Docket No. 92-262 for a more complete analysis of the reasons why a la carte is highly undesirable.

cost of producing and acquiring programming -- particularly high quality sports programming for either mass or targeted niche audiences -- has increased at a rate greater than inflation. And while programming costs generally represent a relatively modest portion of a cable operator's costs, the failure of the Commission to permit the pass-through of such costs could force these networks off of the basic tier and impede their continued growth and development.

15. The Commission should also consider allowing the benchmark rates for both basic and non-basic services to be periodically increased in a fashion that takes into account the higher than annual CPI increases that are historically associated with cable programming production and distribution. The inflation index associated with entertainment services should be one component used to arrive at a realistic annual increase for cable services.

16. The FCC's rate formulas should likewise not penalize cable operators who do a good job of selling the local advertising spots provided on cable networks.⁸ Today, the availability of local ad spots on popular satellite cable networks gives the operator an important stake in the success of the network and added incentive to distribute advertiser-supported networks to the broadest possible audience. To require

⁸Advertising revenue is one of the factors which the FCC is required to take into account in judging the reasonableness of both basic and non-basic rates. See, e.g., 47 U.S.C. §543(b)(2)(C)(iv); §543(c)(2)(F).

the cable operator's local ad revenues to be offset against his permissible rates would undercut this commitment and drive him to retier to less widely viewed tiers in order to avoid this effect. The spots which cable programming networks make available to cable operators for local ad sales are a great resource for those desiring local advertising and are a growing sales opportunity for the cable industry. It would be wrong to discourage this opportunity through an FCC formula which mandates that all such ad revenues subsidize subscriber rates.

CABLE PROGRAMMING SERVICE RATES ARE ENTITLED TO A HIGH PRESUMPTION OF REASONABLENESS

17. Subjecting non-basic services to extensive rate regulation will force operators to either drop existing services or to refuse to add other services as a means of reducing the cable operator's own costs of providing service. Because the new law allows even a single subscriber or franchising authority to file a complaint challenging the existing non-basic rate or any future rate increase for non-basic services, all cable operators are at risk at having their present and future non-basic rates challenged regardless of how reasonable those rates are. The Commission must quickly serve notice to the public that a cable operator's non-basic rates will be given a high presumption of reasonableness and that such rates will be found unreasonable in only the small minority of situations where such rates can be considered abusive. If the Commission, through delay, inadvertence or the failure to follow Congressional intent does

not establish a mechanism to discourage the filing of frivolous and groundless rate complaints and for disposing quickly with such complaints, cable operators will be reluctant to make the financial investment required to support the development of new programming services and the continued improvement of existing services.

18. That rates for non-basic services were not to be subject to the same pervasive regulatory structure as basic service is also evident from the legislative history of the 1992 Cable Act. The House Report states that:

The Committee recognizes that since cable rates were deregulated in 1986, there has been an increase in the quality and diversity of cable programming. While most operators have been responsible about rate increases in this deregulated environment, a minority of cable operators have abused their deregulated status and have unreasonably raised subscribers rates.⁹

The FCC must be careful not to regulate non-basic rates in a heavy-handed manner that would reduce rather than foster program diversity.

19. The foregoing language clearly demonstrates that Congress intended non-basic rate regulation to be used sparingly as a means to correct isolated instances of abuse.

⁹House Report at p. 86.

WHEREFORE, based upon the foregoing, ESPN requests the Commission to adopt rate regulations which establish a price/value approach that will continue to encourage widespread programming growth and diversity.

Respectfully submitted,

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