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	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

Reply Comments of Advanced Communications Corporation

Advanced Communications Corporation ("ACC") hereby submits its reply comments in response to the comments filed in the above-captioned proceeding.

I. Introduction

There is virtual unanimity among the commenters in this proceeding that the vertically integrated cable industry is exercising unfettered market dominance to deny potential competitors access to critical programming services. Because of such anticompetitive conduct, the cable industry remains unchallenged in the multichannel video marketplace. To alleviate the cable industry's undue market influence and to fulfill the mandate of the 1992 Cable Act, the consensus is that the Commission must adopt rules ensuring the availability of programming to all multichannel video distributors on equal terms and conditions. In addition, most commenters urge the Commission to adopt an enforcement procedure that places the

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burden primarily on program vendors to justify any price differentials and imposes severe penalties for violations of the program access rules.

As set forth in its opening comments, ACC strongly believes that equal program access and strong enforcement of the rules are essential to ensure the emergence of true competition in the multichannel video marketplace. But like other commenters, ACC is concerned that the Commission's Notice of Proposed Rulemaking ("NPRM") contains numerous loopholes that will allow the vertically integrated cable industry to circumvent Congressional intent and to continue impeding access to programming. ACC therefore fully supports the numerous comments which are geared toward closing these loopholes, and establishing a framework under which program vendors will no longer be able to thwart the growth of multichannel alternatives.

In particular, ACC supports the comments of the National Rural Telecommunications Association and the Consumer Federation of America ("NRTC/CFA"), which identifies and seeks to reshape the many areas in which the NPRM would give the cable industry the ability to continue engaging in anticompetitive conduct. The 1992 Cable Act was adopted to promote competition and to prevent discrimination by vertically integrated and heretofore unregulated cable interests. The rules must therefore be designed to promote the emergence of multichannel competitors by firmly and unequivocally prohibiting anticompetitive conduct.

With that in mind, ACC seeks to clarify or expand on several points and issues raised in the opening round of comments.

II. The Commission Should Tailor the Broadcast Attribution Rules to the Cable Context.

In its NPRM, the Commission asked whether it should apply the broadcast attribution rules to determine when a cable operation is vertically integrated. In general, the comments urged adoption of a broad attribution standard. Most commenters argued, however, that the broadcast attribution standard is too narrow because it addresses control, not the potential for undue influence. 1/ Some parties also asserted that the 5% ownership benchmark was inadequate to prevent powerful cable interests from engaging in anticompetitive conduct and market abuse. 2/

ACC agrees that the Commission should adopt a broad attribution standard. Given that Section 628 of the 1992 Cable Act was designed specifically to promote multichannel diversity and competition, the new rules must countermand the potential for the cable industry to unilaterally determine the extent to which programming will be available to potential competitors.

1/ See, e.g. Comments of Wireless Cable Association, at 24; Comments of NRTC/CFA, at 25; Comments of Nynex Telephone Company, at 7-8; Comments of Small System Operators, at 3.

2/ See, e.g., Comments of American Public Power Association, at 9; Comments of Wireless Cable Association, at 26.

ACC believes that the broadcast attribution rules may be used as a guideline for establishing an attribution standard in the cable context. While certain aspects of the broadcast rules may not be applicable -- e.g. the single majority shareholder rule -- others can be tailored appropriately. For example, the broadcast rules set 5% as the ownership benchmark for control. However, because the critical issue in the cable area is not control, but rather the ability to exercise undue influence, an attribution benchmark broader than 5% would be appropriate. Indeed, the Commission should find that any common ownership between a program vendor and a cable operator is suspect and triggers application of the program access rules. At the very least, the attribution rules should apply at some level below 5%.

Moreover, since the program access rules are meant to limit the influence of the cable industry over programming, all ownership interests should be cognizable. Accordingly, the attribution standard should be based on equity ownership, not merely ownership of voting interests. Otherwise, cable interests will circumvent the Cable Act by accumulating nonvoting or limited partnership interests, through which they will retain influence over program vendors.

III. Exclusive Contracts in Areas Not Passed By Cable Are Per Se Violations of the Statute.

Numerous commenters note the Commission's misinterpretation of Section 628(c)(2)(C) prohibiting exclusive

contracts in areas not served by a cable operator, but allowing such contracts in an area served by a cable operator based upon a public interest finding by the Commission. 3/ Specifically, the Commission questioned whether the differing standard means that exclusive contracts in areas not served by cable are per se illegal, suggesting that a showing of "harm" may be required before the statute is violated. 4/

ACC concurs with those commenters who argue that the statute is abundantly clear; exclusive contracts in areas not passed by a cable operator are a per se violation of the statute. There is no basis for permitting a program vendor to refuse to deal with an unaffiliated program distributor in areas without cable service. And in areas served by cable, a heavy burden should be placed on program vendors to justify any exclusive terms. To permit discrimination would restrict the availability of programming to potential multichannel competitors, and thereby turn the statute on its head.

Nothing in the Cable Act or its legislative history suggests that a showing of harm is required to prohibit

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3/ See, e.g., Comments of NRTC/CFA, at 28; Comments of American Public Power Association, at 12-13.

4/ See NPRM at ¶¶ 28-36.

exclusive agreements. To the contrary, the language of the Section 628 clearly and specifically prohibits exclusive program arrangements. This prohibition is critical to ensure the viability of DBS providers, who seek to compete nationwide with cable opertors in the multichannel marketplace. Unless DBS (and similar alternative multichannel distributors) have unfettered access to programming, their ability to provide programming to unserved areas will be seriously jeopardized.

In addition, program vendors must be required to swiftly bring their contracts into conformity with the rules. To "grandfather" existing agreements would fly in the face of the statute by sanctioning ongoing discrimination. Thus, a sufficient period, no longer than six months, should be set aside to eliminate any anticompetitive program distribution agreements. Beyond that time frame, the Commission should not tolerate any contracts that frustrate the intent of the Cable Act.

IV. The Section 202 Standard Should be Adopted and Defined to Include Existing Technologies.

In its NPRM, the Commission offered four alternative standards it could employ to distinguish between discriminatory and justifiable price differences. 5/ ACC reiterates that the

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5/ See NPRM at ¶¶ 20-23.

Commission should incorporate the common carrier standard set forth in Section 202 of the Communications Act, tailored to the circumstances of the cable context. Under Section 202, 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. There is no reason to fashion a new standard. Section 202 requires that services be made available on a nondiscriminatory basis to all potential customers. This is precisely the purpose for which the program access provisions were included in the Cable Act.

In adopting the Section 202 standard, however, the Commission should tailor it to meet the conditions of the current multichannel video marketplace. Thus, the rules should specify that cable, DBS, wireless cable, MMDS (and perhaps others) are "like" services for purposes of the rules. In this way, the Commission could ensure that program vendors do not exploit meaningless technical differences between delivery modes to argue that certain services are not alike. The services listed above are all multichannel video services and should therefore stand on equal footing in seeking to acquire programming.

V. The Commission Should Adopt an Effective Enforcement Procedure that Places the Burden on Vertically Integrated Program Vendors.

The commenters in this proceeding proposed a number of alternative enforcement schemes to combat anticompetitive conduct. ACC's view, as stated in its opening comments, is that effective enforcement of the rules is crucial to ensure adherence to the rules. In particular, ACC believes that disputes should be resolved, whether by the Commission or through alternative dispute resolution, within a sixty period from the filing of a complaint. Such swift resolution is necessary to assure that potential competitors are not driven out of business in the interim. Furthermore, the Commission should be empowered to impose up to treble damages in appropriate circumstances. Authorizing the imposition of penalties along these lines will undermine any remaining incentive that cable interests may harbor to continue engaging in anticompetitive conduct.

ACC further agrees with those commenters who suggest that the NPRM would impose unfair burdens on complainants. 6/ It is unrealistic to assume that fledgling competitors will have the resources necessary to develop a prima facie case and then

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6/ See, e.g. Comments of NRTC/CFA, at 29-30; Comments of Wireless Cable Association, at 44.

withstand any serious and protracted challenge. Because the rules are intended to protect new competitors, they should encourage the filing of complaints against entrenched cable interests who have violated Commission rules. Thus, once a verified discrimination complaint is filed, the burden should be on the program vendor to justify, by clear and convincing evidence, that any discriminatory conduct or terms are justified. Since program vendors will possess any relevant documents, it is reasonable to place the onus on them to demonstrate that no violation has occurred.

VI. Conclusion

ACC urges the Commission to adopt rules that will ensure access to programming by all multichannel distributors on equal terms and conditions. The Commission should also adopt a swift and effective enforcement mechanism to prevent vertically integrated cable interests from exploiting their market dominance and undermining the intent of the Cable Act's program access provisions.

Respectfully submitted,

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