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Government Affairs

Charlene Vanlier

Vice President and Washington Counsel

February 16, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: Reply Comments in Dkt. 92-265

Dear Ms. Searcy:

On behalf of ESPN Inc., I enclose an original and four copies of reply comments in Dkt. 92-265.

Sincerely,

A handwritten signature in cursive script that reads 'Charlene Vanlier'.

Charlene Vanlier

A handwritten number '4' with a horizontal line extending to the right, possibly indicating a page number or a reference mark.

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the)
Cable Television Consumer)
Protection and Competition)
)
Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

MM Docket No. 92-265

Reply Comments of ESPN

Edwin M. Durso
Executive Vice President
and General Counsel
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605 Third Avenue
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Dated: February 16, 1993

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Reply Comments of ESPN

I. RELATIONSHIPS BETWEEN CABLE OPERATORS AND NON-VERTICALLY INTEGRATED CABLE PROGRAMMING SERVICES, SUCH AS ESPN, ARE OUTSIDE THE SCOPE OF SUBSECTION 628(b)

Some of the comments filed with the Commission suggested that subsection 628(b) be broadly interpreted as a basis for remedy for any conduct involving any cable system or satellite cable programming vendor, even ones not vertically integrated, whether or not the conduct is specifically prohibited by subsection 628(c). This expansive reading is not supported by the legislative language, statutory construction, or legislative history.

The Commission has correctly focused on the two elements in the 628(b) test. Section 628 requires the Commission to regulate specific conduct that both is (1) "unfair," "deceptive," or "discriminatory," and (2) could significantly hinder multichannel video programming distributors from providing satellite programming

to consumers.¹ This test, however, does not apply to relationships between ESPN, a non-vertically integrated programming vendor, and a cable system. Such relationships are outside the scope of section 628(b).

To be more precise, subsection 628(b) applies to the relationship between a cable system and a vertically integrated satellite cable programming vendor or to the relationship between a cable system and a satellite broadcast programming vendor. It does not apply to the relationship between a cable system and a non-vertically integrated cable programming vendor, such as ESPN. If Congress wanted to regulate the conduct of all cable programming vendors in section 628(b), it would have used the phrase "a satellite cable programming vendor". Instead, Congress limited the application of section 628(b) to vertically integrated cable programming vendors by using the phrase "a satellite cable programming vendor in which a cable operator has an attributable interest". Subsection 628(b) does apply to all cable systems, but not to all arrangements into which cable operators may enter. It applies only to the actions of a cable system in relation to a vertically integrated cable programming vendor or a satellite broadcast programming vendor.

A review of the legislative history reveals a congressional focus only on those cable systems vertically integrated with cable programming services. The debate by the House of Representatives over the Tauzin amendment upon which

¹ Implementation of sections 12 and 19 of the cable television consumer protection and competition act of 1992, MM docket No. 92-265, FCC 92-543 (Rel. Dec. 24, 1992) para. 10.

section 628 is based, focuses entirely on the Members' concern over vertical integration in the cable industry. Specifically, Rep. Tauzin, the sponsor of the amendment stated:

We prohibit the cable companies, those who control programming, from doing what they have been doing ever since we deregulated them...It is this simple. There are only five big cable integrated companies that control it all. My amendment says to those big five, "You cannot refuse to deal anymore."²

The Senate access provisions solely addressed vertically integrated programmers. The Senate Commerce Committee focused on two concerns: (1) that vertical integration provides cable systems both the incentive and ability to favor affiliate programming services; and (2) that vertically integrated program distributors have the incentive and ability to favor their vertically integrated cable operator investors.³

This is not to suggest that Congress was free from concern regarding the potential anti-competitive power of cable systems. Congress addressed those concerns directly in other sections of the cable bill: section 3 regulates the consumer rates of systems without effective competition; sections 4, 5, & 6 balance the relationship between cable systems and broadcasters; section 7 prohibits exclusive franchises; section 11 prohibits cross ownership between cable operators and MMDS or SMATV, sets limits on the number of subscribers, sets

² 138 Cong. Rec. H6534 (daily ed., July 23, 1992) (statement of Honorable W. J. Tauzin) (emphasis added).

³ S. Rep. No. 92, 102d Cong., 1st Sess. 25-26 (1991).

channel limits for vertically integrated programming; and section 12 regulates carriage agreements between cable operators and program suppliers.

Put simply, Congress addressed a myriad of potential anti-competitive cable operator activities in specific language throughout the 1992 cable law. To suggest that these provisions are somehow duplicated by a loose construction of 628(b) is not only inconsistent with the statutory construction of that section or the bill as a whole, but would require an inappropriate, duplicative use of limited and strained FCC resources. A reading of section 628(b) enforcement against all cable system conduct regardless of its relationship to vertically integrated satellite cable programming vendors or to satellite broadcast video providers does not reflect the legislative intent.

II. ESPN'S MARKETING EFFORTS ARE NOT UNFAIR OR DISCRIMINATORY

ESPN endeavors to provide a superior product for its viewers, affiliates and advertisers. This is an increasingly costly effort as sports rights fees have risen, but ultimately is reflected in the high value ESPN viewers place on that programming.

To enable it to acquire and provide a wide range of interesting and desirable sports programming, ESPN's marketing strategy requires delivery to the largest possible number of subscribers via all subscriber-based delivery modes. ESPN acquires programming with the revenue it receives from advertising and subscriber fees, and advertising revenue is based on the number of viewers

reached. As long as the advertising revenue reflects a large subscriber base and the costs are spread among the largest possible number of subscribers, the per-subscriber costs can be kept as low as possible. To achieve this goal, ESPN has specific market-place incentives to encourage cable operators and other multichannel video programming distributors to give the largest possible viewing exposure by offering ESPN to all of its subscribers on the lowest available tier.

As part of its effort to reach the largest number of subscribers, ESPN does charge multichannel video programming distributors a per-subscriber price based on its total number of subscribers. If the cable operator, for example, chooses not to supply ESPN to all of its subscribers, the relative per subscriber cost of ESPN increases, but nothing in this marketing strategy suggests that ESPN's twin goals of reaching as many consumers as possible at the lowest possible price is either improper or illegal. ESPN particularly disagrees with the suggestion of the Community Antenna Television Association (pp 5-7) that contracts including these marketing goals should be revised by the Commission.

ESPN does not control the retail price of its product and its marketing strategies are applied to both large MSO's and small cable operators and other multichannel video programming distributors alike.

Respectfully submitted,

ESPN, Inc.

By: 

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