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February 16, 1993

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By Hand Delivery

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

Re: Comments On Program Distribution and
Carriage Agreements -- Docket No. 92-265

Dear Ms. Searcy:

Kindly accept for filing the enclosed original and nine copies of the American Public Power Association's reply comments in response to the Notice of Proposed Rulemaking on Program Distribution and Carriage Agreements, 58 Fed. Reg. 328 (January 5, 1993).

Also, kindly date stamp and return the additional copy to the messenger.

Sincerely,


James Baller

Enclosures

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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 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)
)

MM Docket No. 92-265

TO THE COMMISSION:

REPLY COMMENTS OF THE
THE AMERICAN PUBLIC POWER ASSOCIATION
IN SUPPORT OF
NONDISCRIMINATORY ACCESS TO VIDEO PROGRAMMING

In its opening comments on program access, the American Public Power Association ("APPA") addressed in detail the key statutory, procedural and practical issues that are of critical importance to municipalities that have begun to compete with existing cable operators or may seek to do so in the future. In this paper, APPA replies to the opening comments filed by several major vertically-integrated cable operators and/or satellite programming vendors, to which APPA refers below as "the Incumbents."

I. OVERVIEW

As the Commission, APPA and numerous other commenters have noted, Congress enacted the Cable Act of 1992 in large part

because widespread vertical and horizontal concentration in the cable industry has resulted in poor service, excessive prices and anti-competitive practices that have stifled competition. As succinctly summarized in the Senate Report on S.12, "[t]he purpose of this legislation is to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service." Senate Comm. on Commerce, Science and Transportation, S. Rep. No. 102-92, 102 Cong., 1st Sess. 1 (1991) ("Senate Report").

Despite this history, the Incumbents would have the Commission pretend that undue concentration and anti-competitive practices simply do not exist in the cable industry. On issue after issue, the Incumbents read the Act and legislative history through the prism of their economic self-interest and insist that the Commission must adopt rules that would effectively leave them free to continue the very abuses that the Act was intended to curtail.

In the sections that follow, APPA will show that the Commission should reject each of the principal contentions that the Incumbents have made in their comments. Before turning to that discussion, however, APPA would urge the Commission to step back and reflect on the astounding underlying philosophy that pervades most of the Incumbents' comments.

A good case in point is the set of comments filed by Tele-Communications, Inc. ("TCI"), by far the largest and most dominant vertically-integrated cable operator, whose abuses of

its monopoly power were copiously documented in the public record on which Congress based its enactment of the 1992 Cable Act. ^{1/} Among other things, TCI has the temerity to suggest to the Commission that "Congress did not intend to force the cable industry to operate in a manner substantially different from other American businesses," that Congress "sought to ensure that the industry operated in a manner consistent with normal competitive forces," and that, therefore, "practices which are legitimate and common to other industries should not be barred in the cable industry." TCI Comments at 8. In other words, TCI would have the Commission assume that a competitive environment already exists in the cable industry and refrain from adopting measures necessary to make that assumption a reality.

But far from intending that the Commission give TCI and the other Incumbents *carte blanche* to continue their unfair and deceptive practices, Congress left no doubt that it intended precisely the opposite result. Thus, the House Committee on Energy and Commerce stated that

The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and the development of a competitive marketplace to regulation. The Committee also recognizes, however, that until true competition develops, some tough yet fair and flexible regulatory measures are needed.

^{1/} See particularly the comments of the Wireless Cable Association at 10-20.

H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 30 (1992) ("House Report"); see also H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 93 (1992) ("In adopting rules under [Section 628], the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices . . ."); 137 Cong. Rec. S582 (daily ed., January 14, 1991) ("once competition is allowed to develop, we can let the market, rather than regulation, protect consumers") (Statement of Sen. Danforth, sponsor of S.12).

TCI's approach, to which the other Incumbents subscribe, would thus plainly stand congressional intent on its head. 2/ Notwithstanding their protestations, however, the fact remains that the Incumbents have created an environment in the cable industry that is not "common" or "normal" or "consistent with other competitive markets." By engaging in a host of anti-competitive practices, they have brought the Cable Act of 1992 down on their own heads, and the Commission should now give full weight to Congress's intent "to encourage competition from alternative and new technologies, including competing cable systems, wireless cable, direct broadcast satellites, and

2/ For example, the Incumbents uniformly maintain that, regardless of the consequences or the realities of the market, the Commission should allow them to do anything that non-vertically integrated cable operators and programming vendors can do. See, e.g., Comments of Turner Broadcasting Systems ("TBS") at 16; Comments of Time Warner Entertainment Company, L.P. ("TWE") 8-9; Comments of National Cable Television Association ("NCTA") at 12-13.

satellite master antenna television services." House Report at 9.

II. THE ACT DOES NOT REQUIRE PROOF OF HARM, MUCH LESS OF A THREAT TO A POTENTIAL COMPLAINANT'S VIABILITY, AS A THRESHOLD ELEMENT OF THE COMPLAINANT'S CASE

It is gospel among the Incumbents that Section 628 does not merely require a complainant to make a threshold showing that "unfair" or "deceptive" practices have occurred, but also that such practices "hinder significantly" or "prevent" competition in the marketplace. ^{3/} The Incumbents also insist that, to prove the requisite level of injury, a complainant must show that the denial of the programming in question would threaten the complainant's competitive viability. ^{4/}

The Incumbents' contention that the Act requires proof of harm is supposedly based on the "plain meaning" of Section 628(b), which, they say, establishes the metes and bounds of the specific prohibitions listed in subsections 628(c)(2)(A)-(D). As APPA pointed out in its opening comments, however, the relevant language of Section 628(b) can readily be interpreted as a finding by Congress that "unfair" or "deceptive" practices -- including practices of the kind set forth in subsections 628(c)(2)(A)-(D) or otherwise discussed in the legislative

^{3/} See, e.g., Comments of TCI at 5-7; Comments of TBS at 9 n.11; Comments of TWE at 5, 9-10; Comments of NCTA at 6-10; Comments of Viacom International, Inc. ("Viacom") at 2-3.

^{4/} See, e.g., Comments of TCI at 30; Comments of TWE at 10; Comments of NCTA at 8-9.

history -- do, in fact, hinder significantly or prevent competition in the marketplace. Comments of APPA at 12-13. The Incumbents have not even acknowledged, much less refuted, this alternative interpretation. Nor have they said anything inconsistent with APPA's showing that the Commission has ample authority to presume significant hindrance or prevention of competition upon a showing that a complainant has been victimized by an unfair or deceptive practice.

Furthermore, the heavy and prohibitively costly burdens that the Incumbents would have the Commission impose upon claimants would surely discourage many (if not most) legitimate claims and effectively leave the Incumbents free to continue to stifle competition. It is absurd to think that Congress, serious as it was about encouraging entry of new competitors to break the Incumbents' stranglehold on the cable industry, would have intended such a result.

III. THE ACT DOES NOT APPLY MERELY IN LOCAL MARKETS WHERE VERTICAL INTEGRATION ACTUALLY EXISTS

Another point of consensus among the Incumbents is that the prohibitions of the Act apply only in local markets in which a vertically-integrated cable operator is in head-to-head competition with a claimant allegedly injured by a satellite programming vendor in which the vertically-integrated cable operator has an attributable interest. For example, according to TCI, "[a] vertically integrated programmer has neither the incentive, nor the ability, as a result of its verticality, to favor a cable

operator with which it has no ownership connection." Comments of TCI at 10. Similarly, TWE claims that a distributor would have "no ground to complain unless a programming vendor has acted on incentives resulting from vertical integration," because in local markets in which no vertical integration exists, the programming vendor would have "no incentive resulting from vertical integration to withhold programming from any distributor." Comments of TWE at 7. Rather, TWE continues, in such a case, the programmer would have an incentive "to sell as much programming as it can." Id.; accord Comments of NCTA at 13-14.

At the outset, even if the Incumbents were correct in their assessment of the economic incentives of programming vendors in local markets in which vertical integration does not exist, such an inquiry is foreclosed by the explicit requirements of Section 628. As APPA noted in its opening comments, at 10-11, Congress clearly and unambiguously made the prohibitions of Section 628 applicable in any market in which vertically-integrated cable operators or satellite programming vendors do business, regardless of whether vertical integration actually exists in a particular market. 5/

In any event, the Incumbents' analysis is both flawed and disingenuous. As the Incumbents know perfectly well, size and market power alone can give cable operators enormous "clout"

5/ See also, e.g., Comments of Wireless Cable Association at 30-31; Comments of the Attorneys General of Texas, Maryland, Ohio and Pennsylvania at 4-5; Comments of DirecTV at 15-16.

over programming vendors, without regard to whether vertical integration exists in any particular local market. Viacom flatly (although perhaps unintentionally) acknowledged this in its comments when it underscored "the recognized fact that Viacom's program[ming] services (like those owned by non-vertically-integrated owners) must routinely make contractual concessions to the largest MSOs in order to achieve the nationwide subscriber levels that are essential to business success." Comments of Viacom at 8. Similarly, the voluminous record that Congress compiled of TCI's use of its nationwide market power to bring programming vendors to heel belies TCI's contention that vertical integration must exist in local markets as a precondition to anti-competitive conduct. 6/

According to an ancient African adage, "When elephants dance, the grass is trampled." Like elephants, major multi-system cable operators and satellite programming vendors often dance together on a national or regional level. When they do, it is easy for potential competitors in local markets to get trampled, regardless of whether vertical integration exists in the local markets in question. Given Congress's focus in the Act upon the practices of the major cable operators and programming vendors, it is not at all surprising that Congress rejected an

6/ As indicated earlier, TCI's abuses of its power over programming vendors is well documented in the Comments of the Wireless Cable Association, at 10-20.

approach that would apply the prohibitions of the Act only where vertical integration exists in local markets. 7/

IV. THE ACT APPLIES TO ALL CONTRACTS EXCEPT THOSE EXPRESSLY EXEMPTED

Relying upon Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988), and other cases holding that statutes and rules should not be afforded retroactive effect unless congressional intent to do so is clear, the Incumbents assert that the Commission cannot apply the prohibitions of the Act to existing contracts. 8/ The Incumbents also contend that any effort to impose the Act's prohibitions on existing contracts would wreak havoc upon the cable industry. 9/

The Incumbents' reliance upon Bowen and similar cases is misplaced because Congress did indeed make clear that the prohibitions of the 1992 Cable Act are to be applied to existing contracts in all but certain limited circumstances. Thus, in Section 628(h), entitled "Exemptions for Prior Contracts," Congress expressly excluded only exclusive contracts that were in existence on June 1, 1990, from the prohibitions of the Act.

7/ In addition, none of the Incumbents has successfully rebutted the Commission's finding in footnote 18 of the Notice of Proposed Rulemaking that the prohibitions in Section 628(b) against unfair or deceptive practices applies to all cable operators, whether or not they are vertically integrated.

8/ See, e.g., Comments of TCI at 16-18; Comments of TBS at 2-5; Comments of TWE at 32; Comments of Viacom at 28-35; see also Comments of NCTA at 8-9.

9/ Id.

Subsection 628(h)(1). Then, in subsection 628(h)(2), Congress withdrew even that exemption from all exclusive contracts existing on June 1, 1990, that are renewed or extended after the date of enactment of the 1992 Cable Act.

In drafting Section 628, Congress drew a clear distinction between exclusive contracts and other kinds of unfair or deceptive contracts. Its conspicuous failure to exempt contracts other than exclusive contracts from the prohibitions of the Act furnishes compelling evidence that it intended to include such other contracts within the coverage of the Act. The Act is thus hardly silent on the question of retroactivity, as the Incumbents suggest.

As to the Incumbent's self-serving claims that chaos would reign in the cable industry if the Act were applied to existing contracts, the Commission should not simply accept these claims at face value. If the Commission is disposed to hear such claims at all, it should at most entertain case-by-case showings of special hardship or gross inequity. Furthermore, if the Commission believes it necessary and appropriate to give affected parties as a class a period of time to bring their contracts within the law, it could adopt a reasonable grace period -- certainly no longer than two years. In no event, however, should the Commission allow the Incumbents to defeat the will of Congress by perpetuating anti-competitive conduct for an indefinite or unduly lengthy period.

V. AS A LAST RESORT, APPA WOULD SUPPORT THE DEVELOPMENT OF "ZONES OF REASONABLENESS" WITHIN WHICH PRICING VARIATIONS WOULD BE DEEMED LEGAL

Several Incumbents have suggested that, to minimize the possibility of disputes and litigation, the Commission should develop "zones of reasonableness" within which distinctions in price would be deemed lawful. For example, TBS suggests a "safe harbor" for volume discounts within a range of at least 20 percent. Comments of TBS at 13. Viacom suggests a 30-percent zone of reasonableness for all price distinctions other than those caused by volume discounts. Comments of Viacom at 18-19.

First, APPA believes that the Commission should consider "safe harbors" or "zones of reasonableness" only as a last resort. Rather, APPA believes that it would be preferable for the Commission to require programming vendors to publish prices for their services and make them available on an equal basis to all applicants. For example, if volume discounts are offered, they should be made available to all purchasers that meet the relevant volume criteria, including buying groups. A good way for the Commission to achieve this would be to adopt a "rate card" approach such as the one proposed in the Comments of the National Private Cable Association, at 15-17. If the Incumbents object that prices for programming cannot be expressed in simple terms because they are comprised of many discrete components, APPA would urge the Commission to embrace the suggestion in the Comments of the Attorneys General of Texas, Maryland, Ohio and Pennsylvania, at 10, that prepayment discounts, marketing

allowances and other non-programming factors be unbundled from the prices of the programming itself.

If the Commission nevertheless decides to adopt "zones of reasonableness" or "safe harbors," then APPA suggests that the Commission establish such ranges as narrowly as can reasonably be justified, following careful study of the potential consequences for competition in the cable industry. The Commission should not simply accept the self-serving, "seat-of-the-pants" proposals that the Incumbents have thus far suggested.

VI. THE ACT UNAMBIGUOUSLY ESTABLISHES THE PROHIBITIONS AND PUBLIC-INTEREST FACTORS APPLICABLE TO EXCLUSIVE CONTRACTS

At pages 19-23 of its opening comments, APPA discussed at length the Act's requirements concerning exclusive contracts. Specifically, APPA noted that the Act renders exclusive contracts per se illegal in virgin territory, requires the Commission to grant prior approval of exclusive contracts for other areas, and imposes upon proponents of such contracts the burden of proving, on a case-by-case basis, that the contacts satisfy each of the five public-interest criteria specified in the Act. Id.

The Incumbents are obviously deeply dissatisfied with the Act's treatment of exclusive contracts. TBS, for example, would effectively reverse the burdens of proof set forth in the Act and have the Commission presume that exclusive contracts to launch new ventures are in the public interest regardless of duration. Comments of TBS at 5-8.

APPA submits that the Act is clear on its face. The Commission is bound by its terms and should apply them in the letter and spirit in which they were written.

VII. THE COMMISSION SHOULD NOT ADOPT COMPLAINT PROCEDURES THAT WOULD RESULT IN PROCEEDINGS SIMILAR TO CIVIL TRIALS

In its opening comments, APPA generally supported the Commission's procedural proposals and suggested safeguards that would ensure both expedition and fairness to all concerned. Comments of APPA at 25-28. The Incumbents, by contrast, maintain that the Commission's proposals are inadequate and recommend procedures that would make complaint proceedings tantamount to full-blown civil trials. See, e.g., Comments of TCI at 38-43. APPA urges the Commission to view these suggestions with deep skepticism, as they appear to be motivated by a desire to make the complaint process as time-consuming, expensive and unattractive as possible for complainants.

VIII. APPA REPRESENTATIVES

All communications and correspondence regarding this matter should be directed to the following representatives of APPA:

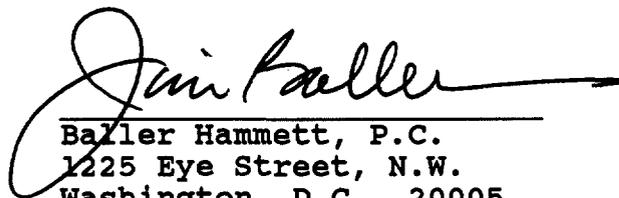
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IX. CONCLUSION

Again, APPA applauds the Commission for having made an excellent start on a surpassingly difficult assignment. APPA urges the Commission to reject the contentions of the Incumbents discussed above and to give full effect to Congress's overriding goal of fostering competition in the cable television industry.

Respectfully submitted this 16th day of February, 1993.



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