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

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

**REPLY COMMENTS OF CROSS
COUNTRY TELECOMMUNICATIONS, INC.**

Respectfully submitted,

CROSS COUNTRY
TELECOMMUNICATIONS, INC.

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February 16, 1993

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List A B C D E

SUMMARY

Cross Country Telecommunications, Inc., is the operator of one of the largest and most successful wireless cable operations in the country serving the Riverside-San Bernardino, California market. Despite substantial initial difficulties acquiring programming, a continuing handicap in the pricing of some programming services, and increasingly aggressive anticompetitive behavior from its cable competitors, Cross Country has established wireless cable as a viable and successful competitor to cable which is driving down cable prices, improving cable service, and providing substantial revenues for educational institutions.

The Commission can take great credit for the creation and development of wireless cable. But the continued success of Cross Country and the entire wireless cable industry is dependent upon the ability and willingness of the Commission to carry out the clear will of Congress in implementing the program-access provisions of the 1992 Cable Act. The Commission must not only resist the suggestions in the _Notice_ and in the comments of the cable industry to disregard the clear language of the Act but it must seek aggressively to promote the intent of the Act to foster facilities-based competition to cable.

Cross Country concurs generally in the comments filed by the Wireless Cable Association International, Inc., and emphasizes the following points:

1) Section 628 cannot be read to bar exclusive and/or discriminatory contracts only where there is proof of competitive harm or injury.

2) Section 628 cannot be read to exempt all existing exclusive programming contracts and renewals from its reach.

3) Section 628 cannot be read to exempt all anticompetitive behavior by integrated MSOs so long as independent programmers engage in the same behavior.

4) The Commission should apply to cable-programmer cross-ownership analysis the attribution rules formerly applicable to cable-telephone cross-ownership.

TABLE OF CONTENTS

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REPLY COMMENTS OF CROSS COUNTRY TELECOMMUNICATIONS, INC.

Cross Country Telecommunications, Inc., hereby replies to the initial comments filed in the above captioned docket on January 25, 1993, in response to the Notice of Proposed Rulemaking, FCC 92-543 (released December 24, 1992), initiating this proceeding.

I. Program Access Has Enabled Cross Country To Provide Effective and Viable Competition To Cable.

Cross Country is the operator of one of the largest and most successful wireless cable systems in the United States, a system which has been serving the Riverside-San Bernardino, California market since May, 1991. Using parts or all of 27 channels leased from MMDS and ITFS licensees, Cross Country's Riverside system now has more than 36,000 subscribers.

The development of this system, rapid though it may seem, has in fact been the product of a "slow growth" policy which has carefully restricted marketing to limited areas to demonstrate wireless cable's long-term penetration potential. In the areas it has marketed, Cross Country has achieved a penetration rate of more than 20 percent, despite the fact that nearly every home in the areas marketed is also passed by a franchised cable operator. Based on its current projections, Cross Country anticipates reaching 60,000 subscribers within the next 18 months and 100,000 subscribers within the next three to five years. Interestingly, while the bulk of Cross Country's subscribers are disaffected current subscribers to franchised cable providers, approximately 40 percent of those who have signed up for Cross Country's service were not then subscribing to cable and half of those have never before subscribed to any cable service.

The benefits of this competition to the public have been immediate and substantial. Wherever Cross Country has marketed, the price of franchised cable service has plummeted, additional services have been offered, plant has been upgraded and customer service has improved.[1/] Moreover, wireless cable has a unique partnership with its ITFS-licensee educational institutions. As part of the consideration for use of their excess channel capacity, Cross Country provides Southern California educators with a state-of-art transmission

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[1/] Cross Country competes against nine different franchised cable operators and their responses have varied. But in <u>every</u> instance, the operators have either substantially lowered their prices (though in some cases only to former subscribers and Cross Country converts) or substantially improved their program offerings.

facility carrying hundreds of hours every week of educational and informational programming. It is now funnelling more than $1 million in annual channel lease royalties to Southern California educators, a sum substantially larger than the entire annual distance learning budget for all of the educational institutions in the Riverside market when Cross Country initiated operations.

Cross Country's success is in no small measure the result of the Commission's continued efforts to provide adequate spectrum to wireless cable and to improve the efficiency with which the necessary licenses and authorizations can be obtained.[2/] But Cross Country's success in the marketplace also has been and remains today critically dependent upon its access to competitive programming.

Cross Country's founders and principal operating personnel were pioneers in the conventional cable field, constructing and successfully operating dozens of coaxial cable systems throughout the United States. Because of its superior performance record and close long-term relationships with virtually all major cable programming services, Cross Country was uniquely situated among wireless cable operators to obtain access to cable programming services. It nevertheless took more than two years of intensive and arduous

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[2/] See, e.g., Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of Frequencies in the 2.1 adn 2.5 Ghz Bands, 7 FCC Rcd 3266 n.8 (1992).

negotiations for Cross Country to secure programming which would have been offered without hesitation to a start-up franchised cable operator. Cross Country has no doubt that the continued threat of Congressional and FCC intervention throughout this entire period played a critical role in ensuring the eventual cooperation of the cable programmers.

As a result of these efforts, Cross Country's Riverside system has been able to secure an attractive complement of premium cable services (HBO, Cinemax and Disney), basic cable networks (ESPN, USA, CNN, Nickelodeon, MTV, Discovery Channel, American Movie Classics, Nashville Network, WTBS, WGN, and SportsChannel America) and pay-per-view services (Request and Action), in addition to carrying local broadcast stations and the requisite educational services. Still unavailable, however, are such "franchise" programming services as Turner Broadcasting's TNT and Prime Ticket, a local sports channel. Moreover, Cross Country, like other alternative providers commenting in this proceeding, continues to pay a substantial premium for many of its basic cable programming services than would a franchised cable operator with the same number of subscribers, market location, configuration, risk of piracy and operating history. See, e.g., Comments of CableAmerica at 4-8.

As Cross Country's presence in the Riverside market has grown, the responses of its cable competitors have intensified, not infrequently crossing the line from competitive to anticompetitive. Thus, a number of cable operators have lowered their prices not to competitive levels but to predatory levels and have engaged in discriminatory pricing targeted at disconnects, former subscribers and those with wireless cable antennas. They have also been aggressively marketing additional programming services and their channel capacity advantage, emphasizing, of course, the programming services which are not available to Cross Country.

Cross Country has responded by, first of all, being lean, efficient and responsive to its customers. Cross Country recognizes, however, that it will also have to continue to add channels and programming services.[3/] In the short run, Cross Country is working on securing the full remaining complement of MMDS channels; in the somewhat longer run, it is preparing for the conversion to digital transmission technologies which hold the promise of providing both advanced television technologies and of vastly increasing existing channel capacity through multiplexing.

[3/] In its comments, Viacom makes a curious and misguided effort to demonstrate that the competitors to franchised cable operators have an inherently lower cost structure. Comments of Viacom at 55. Viacom's methodology is grossly inadequate (e.g., it includes franchise fees on the ledger of conventional cable systems and deletes the comparable channel lease fees paid by wireless operators) and its conclusions are suspect (e.g., it argues the non sequitur that wireless cable's lower cost structure should be a reason why programmers should be able to charge it more for programming). Cross Country nonetheless concurs that in general wireless cable has a somewhat lower fixed delivery cost structure than that of coaxial cable. This does not mean, however, that the industry can withstand indefinitely the combination of overly aggressive pricing and preclusive programming contracts.

Cross Country has proven that wireless cable can be a viable competitor to cable and that competition provides precisely the type of benefits envisioned by Congress and the Commission. But Cross Country's efforts, even if supported by superior management and marketing capabilities and additional channel capacity, will go for naught, if the major players in the cable industry are permitted to leverage their full horizontal and vertical clout and deprive Cross Country of the ability to price and program competitively. Cross Country's continued success in Riverside and the ability of the wireless cable industry to provide an effective competitive check on cable operators are critically dependent upon the ability and willingness of the Commission to carry out the clear will of Congress in passing the 1992 Cable Act.

II. The Commission Must Interpret, Apply and Enforce Section 19 of the 1992 Cable Act to Assure the Development of Effective Competition in the Home Video Market.

Section 628 of the Communications Act (Section 19 of the 1992 Cable Act) is the product of an overwhelming consensus in Congress that a fair and competitive programming marketplace is critical to the development of effective competition to cable and that the efficient functioning of that marketplace has been effectively undercut by the practices of the integrated MSOs seeking to preserve their local distribution monopolies. See, e.g., Comments of Wireless Cable Association International Inc. ("WCA") at

4-7.[4/] The mandate of the statute to rectify this situation is not only grounded in an unusually extensive and compelling legislative record. It is also, for the most part, carried out in plain, clear and unequivocal statutory language.

The Commission is bound to take and implement these statutory provisions as it finds them. It must resist the suggestions found in the Notice and, more generally, in the comments of the cable industry, that it can ignore the clear language of Section 628. In those few instances where the statute entrusts to the Commission some discretion in implementing and enforcing the Act's requirements, the Commission should seek to enforce not just the letter but the spirit of the Act.

Cross Country is an active member of the Wireless Cable Association International, Inc. ("WCA"), and concurs generally with the comments filed by that organization. It comments here only to provide additional emphasis on a few specific issues:

1) Section 628 cannot be read to bar exclusive and/or discriminatory contracts only where there is proof of competitive harm or injury.

Exclusive and discriminatory contracts, with certain specified exceptions, are declared by Section 628(c) to be *per se* violations of Section 628(b). As numerous commenters have

[4/] If further evidence of the discriminatory and abusive use of the programming market by cable operators were relevant or necessary, it is manifest in this proceeding. See, e.g., Comments of NPCA at 6-10; CableAmerica at 4-8; Madison Communications at 2; Liberty Cable at 10-12.

demonstrated, the cable industry's effort to read into Section 628(c) the additional requirement of a showing of competitive harm or injury cannot be reconciled with the plain language of the Act: first, Section 628(b) on its face applies to acts with the "purpose" as well as the effect of hindering competition; second, Section 628(c) declares itself to be a bare "minimum" list of the acts the Commission must prohibit; and finally, the specified exemptions in Section 628(c)(2)(B) for discriminatory contracts and Section 628(c)(4) for exclusive contracts would be gratuitous and meaningless in the face of an additional threshold determination of injury. See, e.g., Comments of WCA at 34-36; DirecTV at 8-11; CableAmerica at 13-14.

Nor, indeed, would it make any sense as a matter of policy to impose such a requirement. Virtually by definition, every exclusive and/or discriminatory contract hinders or prevents a competitor from obtaining access to programming or causes them competitive harm. Rather than embroil the FCC or the courts in uncertain and expensive determinations as to how "significant" an injury must be to be cognizable, the Act states that certain kinds of contracts, i.e., exclusive and discriminatory contracts, are always actionable unless they are justified for certain specified reasons.[5/]

[5/] Equally unambiguous is the Act's mandate that all exclusive contracts be submitted to the Commission for a public interest determination. Section 628(c)(2)(D). That the Notice fears such a requirement would be administratively (continued...)

The 1992 Cable Act was not, as suggested by the cable industry and at places in the Notice, merely an effort to fine-tune the antitrust laws by adding an alternative enforcement mechanism solely for behavior which would otherwise already be illegal. See, e.g., Comments of NCTA at 5. The Act changes the substantive law and makes illegal acts which would be legal in some instances under the antitrust laws.

For the Commission to read into the Act the additional threshold requirement of significant injury even where the harms are inflicted by exclusive and/or discriminatory contracts would be arbitrary and capricious and clear error.

2) Section 628 cannot be read to exempt all existing exclusive programming contracts and renewals from its reach.

Section 628(h) is entitled "Exemptions for Prior Contracts". Subsection 1 states simply that Section 628 shall not apply to any satellite cable programming contract entered into on or before June 1, 1990. The clear and unambiguous implication of this narrow exemption is that all other contracts are included in the reach of the Act. Comments of WCA at 28-30; CableAmerica at 36. Once again, the suggestions to the contrary in the Notice and in cable industry comments

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[5](...continued)
unworkable is simply irrelevant. It is virtually certain, in any event, that the Commission will quickly specify permissible parameters for such agreements that will lead to a review process which is simple and perfunctory in the ordinary case.

are nothing more than invitations for the Commission to commit plain, and reversible, error.

3) Section 628 cannot be read to exempt all anticompetitive behavior by integrated MSOs so long as independent programmers engage in the same behavior.

The comments also demonstrate the bankruptcy in the suggestion that the behavior of non-integrated programmers can be used as a short-hand benchmark by which the actions of integrated programmers may be judged. Notice at ¶ 16. While it indeed may be argued that not every provision of Section 628 applies with equal force to non-integrated programmers, there is strong reason to believe that those programmers are as vulnerable to the abuse of MSO power as are the integrated programmers. Comments of WCA at 12. In any event, the statute requires the FCC to analyze the justifications and, where appropriate, the competitive effect and intent, of actions by integrated programmers whether or not their non-integrated brethren are similarly inclined. See generally Comments of CableAmerica at 11-12.

4) The Commission should apply to cable-programmer cross-ownership analysis the attribution rules formerly applicable to cable-telephone cross-ownership.

The proposal to apply to cable-programmer cross-ownership interests the attribution rules applicable to the broadcast industry is clearly inadequate. The commenters have observed that the broadcast rules apply to an industry which is not heavily concentrated and where the principal concern is control over the diversity of voices of communication.

Comments of WCA at 22-28; DirecTV at 15. With respect to Section 628, the context is one of admitted horizontal market power, see, e.g., Comments of Viacom at 56, and the concern is the presence of incentives for favoritism. These factors require a far lower and more sensitive threshold.

As noted by the WCA and others, the cable industry under very similar circumstances has and continues to argue that such concerns warrant retention of the attribution standards applied to telephone-cable cross-ownership interests prior to the adoption of video dialtone. Comments of WCA at 22-28. It seems incontrovertible that those standards, or something very close to them, are appropriate here.[6/]

III. Conclusion

The Commission has played a commendable role in seeking to enable wireless cable to serve as viable facilities-based competition for cable. Cross Country's Riverside system is visible evidence that that policy can bear fruit. But fair access to programming remains an indispensable prerequisite to effective competition from

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[6/] A number of the cable commenters appear to be fixated on the "single majority shareholder" exemption to the broadcast attribution rules. 47 C.F.R. §73.3555 Note 2(b). See, e.g., Comments of Turner Broadcasting System at 15. Cross Country would note only that even if the Commission were to adopt the single majority shareholder exemption, it would not exempt programmers with MSO board members. Nor would it encompass companies such as TBS which have MSO stock holders with nominal stock interests comprising less than a majority interest but which, through supermajority board voting requirements, retain effective control over all major company actions.

wireless cable or anyone else. The Commission should resist the entreaties of those who would have it vitiate these protections through narrow and illegitimate statutory interpretations.

Respectfully submitted,

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