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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Implementation of the Cable Television	)	MM Docket No. 92-259

respect to broadcast retransmission consent agreements.[7] To alleviate that concern, WCA called upon the Commission to adopt rules implementing Section 6 that would ban broadcasters from entering into exclusive retransmission consent agreements with cable operators.[8]

The same fears expressed by WCA led a variety of other potential competitors of cable to propose similar rules.[9] Indeed, even one of the nation's larger cable multiple system operators urged that:

> a retransmission consent agreement should not permit the exclusive carriage of a broadcast signal which precludes another cable system or multichannel video programming provider in the franchise area from obtaining access to that station's programming. Such an exclusivity provision would not be in the public interest.[10]

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[7]*See* WCA Comments, *supra* note 6, at 19-24. In the interest of brevity, WCA will refrain from repeating that showing, but instead incorporates it by reference.

[8]*See id.* at 24. WCA also urged the Commission to bar cable operators from entering into retransmission agreements that would require the broadcaster to discriminate against emerging competitors with respect to price or any other terms or conditions governing retransmission. *See id.* While WCA is disappointed that the Commission did not adopt this additional proposal, WCA has not sought reconsideration of that decision.

[9]*See, e.g.* Comments of Nat'l Private Cable Ass'n, MM Docket No. 92-259, at 6-13 (filed Jan. 4, 1993); Comments of WJB-TV Limited Partnership, MM Docket No. 92-259, at 4-5 (filed Jan. 4, 1993)[hereinafter cited as "WJB-TV Comments"]; Comments of Consortium of Concerned Wireless Cable Operators, MM Docket No. 92-259, at 3-4 (filed Jan. 4, 1993)[hereinafter cited as "CCWCO Comments"]; Reply Comments of the U.S. Telephone Ass'n, MM Docket No. 92-259, at 2-6 (filed Jan. 19, 1993); Reply Comments of Bell Atlantic, MM Docket No. 92-259, at 1-2 (filed Jan. 19, 1993).

[10]Reply Comments of InterMedia Partners, MM Docket No. 92-259, at 13-14 (filed Jan. 19, 1993).

As Congressman Rick Boucher succinctly stated in a letter to Chairman Quello endorsing WCA's proposal:

> Unless the Commission ensures that cable operators are not permitted to extract exclusivity or discriminatory provisions in retransmission consent agreements with local broadcasters, we will be handing cable operators a new weapon in their efforts to thwart competition. This would clearly be contrary to Congress' stated intent to increase competition and diversity in the multichannel video programming marketplace.[11]

The pleas of those who are attempting to compete with cable did not fall on deaf ears. To the contrary, in the *Report and Order* the Commission expressly recognized the validity of these concerns and took action to assure that cable operators not distort retransmission consent into a sword to be used against potential competitors.[12] As a result, the Commission "prohibit[ed] exclusive retransmission consent agreements between television broadcast stations and cable operators," while agreeing to "revisit this issue in three years."[13]

NCTA's arguments for reconsideration of the Commission's ban on exclusive retransmission consent agreements are a house of cards. For example, NCTA makes much of the fact that a three year ban on exclusive retransmission consent agreements "is clearly <u>not</u> compelled by the program access provisions of the Act."[14] That argument is a classic "red

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[11]Letter from Hon. Rick Boucher to Hon. James H. Quello, MM Docket No. 92-259, at 2 (dated Feb. 16, 1993)[hereinafter cited as "Boucher Letter"].

[12]*See Report and Order, supra* note 2, at ¶ 179.

[13]*Id.*

[14]NCTA Petition, *supra* note 3, at 23.

herring." Neither the *Report and Order* nor any party supporting the ban on exclusive retransmission consent agreements suggests that the ban is mandated by the cable program

> communities consumers will have the opportunity to choose between competing video programming providers, we must not permit cable operators to stifle competition by preventing their competitors from offering a local broadcast lineup similar to that offered by cable.[17]

That view is consistent with the legislative history of the 1992 Cable Act, which makes it quite clear that Congress has a strong preference for competition over regulation. The 1992 Cable Act represents Congress' effort to rein in the cable industry by promoting the emergence of competition, while imposing interim regulation appropriate for a monopoly where a competitive marketplace has yet to develop. The Senate Committee on Commerce, Science, and Transportation (the "Senate Committee") stated in no uncertain terms in its Report on S.12 that "[t]he purpose of this legislation is to promote competition in the multichannel video marketplace."[18] Similarly, the House Committee on Energy and Commerce (the "House Committee") made clear in its Report on H.R. 4850 that "[a] principal goal . . . is to encourage competition from alternative and new technologies, including competing cable

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[17]Boucher Letter, *supra* note 11, at 1-2.

[18]S. Rep. No. 102-92, 102d Cong., 1st Sess. at 1 (1991)[hereinafter cited as "Senate Report"]. *See also id.* at 12 ["the Committee prefers competition to regulation"]; *id.* at 18 ["It has been the longstanding policy of the Committee to rely, to the maximum extent feasible, upon greater competition to cure market power problems"]; *id.* ["A cable system serving a local community, with rare exceptions, enjoys a monopoly. . . . This demonstrates the need to encourage competition . . .."].

system[s], wireless cable, direct broadcast satellites, and satellite master antenna television services."[19]

The record before the Commission in this proceeding demonstrates that a wireless cable system can drive cable rates down in those communities where the local wireless cable operator has access to the programming consumers demand.[20] The record also establishes that wireless cable operators retransmit local broadcast signals for one reason and one reason only -- to satisfy consumer demand.[21] The Senate Committee correctly found that "Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on

marketplace. Consumers expect that their local multichannel video programming distributor will provide access to local broadcast signals. Indeed, in 1991 when the Commission first adopted a multichannel competition test for determining the presence of effective competition, it specifically acknowledged that a multichannel competitor cannot offer effective competition if its customers cannot receive local broadcast programming![24]

NCTA is being disingenuous when it proclaims that the Commission's three year ban on exclusive retransmission consent agreements "stands in stark contrast" to the Commission's statement in the *First Report and Order* in MM Docket No. 92-259 that "'as a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized.'"[25] In the very same paragraph of the *First Report and Order* from which NCTA selectively quotes, the Commission goes on to provide that:

> In the unique situation presented here, however, it is clear that exclusivity is not favored. Congress has clearly placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that impede this entry. In its 1990 Cable Report, the Commission itself articulated this balance as follows: "While we support exclusivity rights, we believe that the public interest in developing competition to the local cable operator justifies temporary, limited and targeted intervention to ensure that alternative multichannel program providers have fair and equitable access to programming." . . . Cable systems

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[24]*See Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd 4545, 4553 (1991)["While we do not believe it necessary to include as an explicit condition of the standard that these competitors provide [subscribers] access to local broadcast signals, we emphasize that it is implicit in our analysis that access to such service is also present and not impeded."].

[25]NCTA Petition, *supra* note 3, at 22, *citing Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, FCC 93-178, at ¶63 (rel. April 30, 1993)[hereinafter cited as "*Program Access Order*"].

> have generally developed without effective competition and it is recognized that if "facilities-based" competition is to develop, access to programming is an essential prerequisite.[26]

The Commission's findings in this regard come as no surprise -- they are fully consistent with those of the Senate Committee, which reported that:

> [t]he Committee received much testimony about cable operators exercising their market power derived from their de facto exclusive franchises and lack of local competition. This testimony provided evidence that programmers are sometimes required to give operators an exclusive right to carry the programming . . ..[27]

And, more importantly, the Commission's findings are consistent with Congress' acknowledgement that where there is no effective competition, exclusive arrangements establish barriers to entry and inhibit the development of competition.[28]

In short, the decision to ban exclusive retransmission consent agreements for three years is well-supported by the record before the Commission -- a record which establishes that Congress intends for the Commission to assure that the retransmission consent system not cause untoward rate increases, that Congress favors competition over regulation for lowering

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[26]*Program Access Order, supra* note 25, at ¶63 (footnotes omitted).

[27]Senate Report, *supra* note 18, at 24.

[28]*See* Senate Report, *supra* note 18, at 28. Because the Commission's syndicated exclusivity and network non-duplication rules have never been found to be material barriers to entry in the way that exclusive cable programming arrangements have been, NCTA's attempt to contrast the Commission's ban on exclusive retransmission consent agreements with its enforcement of the syndicated exclusivity and network non-duplication rules falls flat. *See* NCTA Petition, *supra* note 3, at 22-23. There is nothing inconsistent with permitting broadcasters to enforce syndicated exclusivity and network non-duplication rights that the Commission believes to be pro-competitive, while at the same time barring exclusive retransmission consent agreements that can impede the emergence of competition.

cable prices, and that alternative multichannel video programming distributors must make broadcast signals available to consumers in order to compete.

Thus, WCA urges the Commission to retain the three year ban on exclusive retransmission consent agreements between broadcasters and cable operators. The Commission's approach to retransmission consent is fundamentally fair to all concerned. It is fair to the broadcasters (who have not objected), it is fair to the cable industry (at least one member of which has supported a ban on exclusivity), and most importantly, it is fair to consumers (who will benefit from increased choice in the marketplace and lower rates).

Respectfully submitted,

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June 3, 1993

CERTIFICATE OF SERVICE

I, Candace J. Lamoree, hereby certify that a copy of the foregoing Opposition to Petition for Reconsideration was served this 3rd day of June, 1993 by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

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