

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

**JUL 26 1993**  
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

**REPLY**

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby replies to the opposition of Time Warner Entertainment Company, L.P. ("TWE") to WCA's request that the Commission clarify the *First Report and Order* in the captioned proceeding.<sup>1/</sup> Specifically, WCA urged the Commission to declare precisely when any party intending to enforce an existing exclusive programming agreement subject to Section 76.1002(c)(2) of the Commission's Rules must file a Petition for Exclusivity and secure a determination that such existing agreement is in the public interest. For the reasons set forth below, TWE's opposition merely confirms WCA's fear that unless a clarification is forthcoming, there could be unnecessary delays in achieving the public benefits that will flow from assuring that wireless cable operators and other competitors to cable have fair access to programming.

Section 76.1002(c)(5) of the Commission's Rules, which contains the specific policies governing the content of a Petition for Exclusivity and the procedures surrounding

<sup>1/</sup>*Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Competition and Diversity in Video Programming*

Commission consideration of such petitions, has been effective since July 16, 1993.<sup>2/</sup> The *First Report and Order* is clear that the Commission must make an affirmative public interest determination before any new exclusive programming agreement can be executed, and does not establish special procedures to be followed by parties to exclusive programming agreements executed before July 16. Thus, the enforcement of any non-grandfathered exclusive agreement is today banned, for the Commission has not determined that any such agreement advances the public interest.

TWE relies on Section 76.1002(f) of the Rules to support its contention that parties to exclusive agreements have until November 15, 1993 to bring exclusive agreements, as well as discriminatory agreements, into compliance with the Commission's new program access rules. While Section 76.1002(f) is not on its face limited to discriminatory agreements, it is clear from Paragraph 122 of the *First Report and Order* that the 120-day transitional period was intended merely so that parties to existing programming agreements would have an opportunity to bring those agreements into compliance with the program access anti-discrimination rules set forth in Section 76.1002(b).<sup>3/</sup> Not insignificantly, TWE fails to cite a single reference in the *First Report and Order* suggesting that the Commission intended to bar exclusivity complaints until November 15.

Even if TWE is correct in its interpretation of Section 76.1002(f), moreover, the need for clarification still exists. As WCA explained in its petition, it fears that some programmers

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<sup>2/</sup>*See id.* at 3429.

<sup>3/</sup>*See id.* at 3415.

or cable operators may choose to delay filing a Petition for Exclusivity until November 15 in a ploy to extend exclusivity as long as possible. TWE fails to address that concern; its filing is strangely silent as to what will transpire if parties to existing exclusive agreements fail to eliminate the exclusivity by November 15.

Given that the Commission has strived to provide effective relief to aggrieved multichannel video programming distributors by ensuring speedy justice,<sup>4/</sup> it would be absurd to delay for all practical purposes the effective date of Section 76.1002(c) several additional months beyond November 15 by permitting the filing of a Petition for Exclusivity on or about that late date. There is no reason why a party to an existing exclusive agreement cannot simultaneously seek a public interest determination now, while continuing to negotiate until November 15 to bring its agreement into compliance with the new program access rules. If an agreement is in the public interest, that case can be made now so that the Commission can render a decision prior to November 15.

Therefore, if the Commission adopts TWE's interpretation of Section 76.1002(f), it should also declare its intention to enforce Section 76.1002(c)(5) literally and ban the enforcement of any existing exclusive agreement that has not been found to be in the public interest on or prior to November 15, 1993. While that will allow programmers and cable operators to renegotiate exclusive agreements at their leisure, it will also make clear that it is they, and not aggrieved MVPDs, who bear the risk that such negotiations will be unsuccessful.

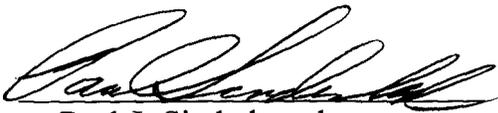
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<sup>4/</sup>*Id.* at 3362.

WHEREFORE, for the reasons set forth above and in WCA's initial petition, WCA urges the Commission to declare precisely when any party intending to enforce an existing exclusive programming agreement subject to newly-adopted Section 76.1002(c)(2) of the Commission's Rules must file a Petition for Exclusivity and secure a determination that such existing agreement is in the public interest.

Respectfully submitted,

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July 26, 1993

**CERTIFICATE OF SERVICE**

I, Candace J. Lamoree, hereby certify that the foregoing Reply was served this 26th day of July, 1993 by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to:

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