Original

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 94-48
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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Table of Contents

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The National Cable Television Association, Inc. ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In general, the comments filed in response to the Commission's Notice of Inquiry ("NOI") on the state of competition in the delivery of video programming reflect that multichannel competition is emerging, and in some major markets escalating, in response to recent technological and regulatory developments. Well-financed satellite and microwave competitors to cable have aggressively parlayed their program access rights under the 1992 Cable Act into burgeoning new businesses. And the giant local exchange carriers have accelerated their efforts to enter the video marketplace as major players, with over 25 pending video dialtone applications covering every region of the U.S.

While the increased growth of multichannel video distributors is an important indicator of the state of competition in the video marketplace, the cable industry believes that a variety of other factors should be taken into account in evaluating whether cable television is subject to effective competition for purposes of continuing rate regulation. Cable commenters urge the Commission to broaden its inquiry to consider the competitive effects of multichannel video providers in the market, or looming on the horizon, well before they reach the Cable Act's 15 percent penetration test. NCTA, in particular, established that the presence of multiple over-the-air broadcast signals alone constrains cable prices. Indeed, cable commenters believe that were the Commission to give sufficient weight to these and other factors, it could confidently report to Congress that some cable systems already face effective competition in major markets today.

Nevertheless, limiting the analysis to the presence of multichannel providers, there is no doubt that the video distribution market is witnessing increasingly vigorous competition. And the relatively small number of negative initial comments in this proceeding, with even fewer documented complaints, evidences that the marketplace is working to the benefit of all providers and consumers. Not surprisingly, however, the Wireless Cable Association, DirecTV and the National Rural Telecommunications Cooperative see this inquiry as an opportunity to put forth a "wish list" of subsidies and enhancements to virtually ensure their expansion in the market, often at the expense of cable operators, cable programmers and the public.

For their part, the telephone companies have used this proceeding as a forum to further their anticompetitive agenda to undermine the section 214 video dialtone process. They protest cable's efforts to unveil this strategy, but this only makes clear their intention to enter the cable business without any regulatory scrutiny and in direct violation of the Cable Act's cross-ownership ban. If telephone companies want to construct video-capable facilities and lease those facilities to independent programmers, they should not be allowed to deviate from the Commission's Video Dialtone Order and years of Title II precedent.

Many of the issues raised by cable's competitors in this proceeding, such as program access and cable home wiring, are being addressed through the complaint process or on reconsideration in other FCC proceedings. The Commission has emphasized that it does not intend to consolidate any issues pending in those proceedings in this inquiry.[1] Therefore, NCTA is not responding to these specific matters here, except to address several important principles that should guide the Commission in its analysis and report of the status of competition in the delivery of video programming.

First, the Commission should look beyond the 1992 Cable Act's "effective competition" test and consider the impact of multiple over-the-air broadcast signals and other factors on cable. Second, the Commission should recognize that exclusivity is a legitimate pro-competitive tool that serves the public interest in diverse programming. And, in particular, it should find that the Cable Act's program access provisions are not designed to outlaw exclusivity arrangements and price differentiation, unless they are used by vertically integrated cable programmers to unfairly favor their

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[1] Notice Of Inquiry at para. 11.

affiliated cable operators. Third, in its zeal to increase multichannel video competition to cable, the Commission should not unleash the telephone companies without adopting specific video dialtone rules, including clear jurisdictional separations and cost allocation rules. Such safeguards are essential to the goal of creating a competitive telecommunications marketplace for the benefit of consumers.

DISCUSSION

I. DEFINING THE RELEVANT MARKET

NCTA supports the initial comments by cable parties challenging the theoretical underpinnings of the Commission's analysis of cable competition.[2] By limiting the inquiry to the presence of competition from multichannel video programming distributors, as Time Warner points out, the Commission necessarily underestimates the true competitive situation. The relevant market should be defined to include other sources of information and entertainment that consumers would, and do, consider reasonably interchangeable with, or a substitute for, cable television, including broadcasting, video cassettes and discs, print media, movie and live theaters.[3]

Moreover, Tele-Communications, Inc. ("TCI") demonstrated that an analysis based solely on the 1992 Cable Act's numerical measure of "effective competition" -- the presence of multichannel video competition offering comparable programming to at least 50 percent of the households

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2 See e.g. Comments of Tele-Communications, Inc., Time Warner Cable.

3 See Comments of Time Warner at 2-16.

and serving 15 percent of the franchise area -- does not adequately assess the amount of competition and consumer choice in complex, dynamic markets such as the video programming distribution market.[4] In such markets, qualitative factors such as rapid changes in market structure, product offerings and technology may have a significant impact on prices. TCI appropriately urges the Commission, therefore, to recommend to Congress to revise the 1992 Cable Act's rigid quantitative 50/15 test of effective competition be revised to permit cable operators to submit evidence to show that competition exists even where alternative distributors have less than 15 percent market penetration.

We agree. The Commission should consider the constraining effects of nationwide DBS and the growing wireless and video dialtone competitors throughout the country. NCTA submits that competition from multichannel video providers, even those poised to enter the market, constrains cable prices well before competitors obtain the magical 15 percent market share.

The Commission also should give adequate consideration, as it has done in the past, to the competitive effects of multiple over-the-air broadcast signals on cable rates. There is demonstrable evidence that multiple over-the-air broadcast signals alone can and do exert competitive pressure on cable rates in larger markets today. The Arthur D. Little study, submitted in our initial comments, shows that among larger cable systems (those serving more than 5,000 subscribers) where many broadcast signals are available over-the-air, the price differential between competitive and

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4 Comments of Tele-Communications, Inc. at 3 - 6.

non-competitive systems is zero. [5] There is no doubt that the presence of multiple broadcast channels in large markets acts as a price constraint.

Therefore, we again urge the Commission to recommend to Congress that the "effective competition" threshold be revised to include a broadcast signal availability test and to take into account the presence of multichannel video providers before they attain 15 percent penetration of the market.

II. PROGRAM ACCESS AND EXCLUSIVITY

In their comments, alternative multichannel video distributors candidly admit that cable programming is widely available at fair and reasonable prices. [6] The Satellite Broadcasting and Communications Association, Inc. ("SCBA") anticipates that the trend toward increased C-Band and Ku-Band penetration will continue, citing the "vast number of program choices" and the "widest selection of program packages" available to consumers "within a broad range of rates."[7] Even the Wireless Cable Association concedes that "the relative paucity of complaints filed with the Commission on program access issues strongly suggests that most

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5 The Arthur D. Little study, submitted in NCTA's initial comments, demonstrates the fundamental flaw in the Commission's rate-setting methodology. The FCC based its estimated 17 percent price differential between competitive and non-competitive cable systems for the entire industry solely on survey data of "overbuild" systems in franchises serving fewer than 5,000 subscribers, These small systems, which are not representative of the cable industry, typically have lower per-subscriber revenue requirements, lower operating expenses and operate in atypical market environments. Many such systems also are not commercially viable. When cable system size is taken into account in calculating the competitive price differential, the study showed that the differential is reduced to almost zero.

6 See Comments of DirecTV, Wireless Cable Association.

7 See Comments of SBCA at 5.

programmers are making good faith efforts to comply with the letter and the spirit of the law."[8]

Nevertheless, in an effort to artificially and unfairly gain a leg up in the race to compete in the multichannel video marketplace, satellite, microwave and SMATV interests are attempting to thwart any exclusivity arrangements and price differentiations in the distribution of cable programming. DirecTV and its exclusive distributor in rural areas, NRTC, would like to ban all exclusivity arrangements between vertically integrated programmers and non-cable multichannel distributors. The Wireless Cable Association, Inc. and Liberty Cable Company desire an extension of the program access rules to all cable programmers, whether or not vertically integrated. And not satisfied with access to all satellite-delivered cable programming, Liberty also seeks amendment of the program access rules to cover video programming delivered by <u>any</u> means.

These proposals go well beyond the scope of the Act's program access provisions. Section 628 of the Act is clear, however, that Congress' concern was that vertically integrated programmers might, in some circumstances, engage in exclusivity or discriminatory pricing for the purpose not of competing more efficiently in the provision of programming but of unfairly favoring their affiliated cable operators. There is no record for restricting the programming affiliations of non-vertically integrated programmers.

The Act generally prohibits conduct that is "unfair" and that has the purpose or effect of "hinder[ing] significantly or . . . prevent[ing] any multichannel video programming distributor from providing satellite cable

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[8] <u>See</u> Comments of Wireless Cable Association at 13.

programming or satellite broadcast programming to subscribers or consumers."[9] It requires that the Commission prohibit certain discriminatory conduct with regard to prices, terms and conditions -- but only where that conduct cannot be justified as pro-competitive under several enumerated criteria. And it requires the Commission to treat exclusive contracts as a form of unfair conduct only if such contracts are determined not to be in the "public interest". Thus, the program access provision does not prohibit exclusivity or differential pricing undertaken for legitimate, efficient and pro-competitive reasons. [10]

In challenging the DBS exclusivity arrangement between HBO, Viacom and the United States Satellite Broadcasting Corporation ("USSB"), DirecTV and NRTC argue that section 628 mandates that all exclusive practices, understandings, arrangements and activities involving vertically integrated cable programmers and any multichannel video programming distributor are per se unlawful in non-cabled areas. However, the Commission appropriately interpreted the provision as applying only to exclusive contracts between vertically-integrated cable programmers and cable operators.[11] Indeed, there is nothing in the Act or its legislative history to suggest that Congress had any intention to address exclusivity

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9 Section 628 (b).

10 See 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, First Report and Order, 8 F.C.C. at 3384 ("the public interest in exclusivity in the sale of entertainment programming is widely recognized").

11 See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 92 (1992) (with regard to areas not passed by cable, the Act specifically prohibits "exclusive contracts and other arrangements between between a cable operator and a vendor")

agreements between programmers and DBS operators. Their only concern was the perceived problem of unfair dealings between vertically integrated cable companies. If Congress had intended to ban all exclusive contracts and price differentials, it could have plainly and unequivocally done so in the statute.

Moreover, as set forth in the ex parte presentations of HBO and Viacom in the pending reconsideration of the program access rules, the USSB limited exclusivity agreement serves the public interest in fostering greater program diversity and multiple retail distributors.[12] It also is procompetitive by allowing USSB to differentiate its product from other DBS providers and by allowing non-DBS providers, such as MMDS, SMATV, and C-Band satellite distributors, to access the programming. Indeed, it is remarkable that two of cable's DBS competitors, DirecTV and USSB, should square off on the exclusivity question -- clearly what problems are emerging here are not based on problems with cable operators.

Liberty Cable's push to obtain access to Time Warner's locally-originated programming, New York 1 News, is a further unwarranted attempt to turn program access regulation on its head. As noted earlier, Congress' express purpose in enacting section 628 was to "increase competition and diversity in the multichannel video programming market" and to "increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able

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[12] See Ex Parte Response of Home Box Office to Ex Parte Presentations of the National Rural Telecommunications Cooperative, MM Docket No. 92-265, filed April 1, 1994; Ex Parte Response of Viacom International, Inc., MM Docket No. 92-265, filed July 14, 1994.

to receive such programming".[13] There is no question that the program access provision was aimed at popular, national satellite-delivered basic and premium services, such as the Discovery Channel, CNN, MTV and Showtime, which arguably are critical to the success of alternative multichannel competitors. It was never contemplated that unique local origination programming would be subjected to the Act's mandates.

Indeed, the Commission recently recognized that a six-state satellite-delivered news service in which a cable operator has an attributable interest was different from national programming services due to the "regional nature of its programming and audience appeal." [14] In finding that a grant of exclusive rights to the service was in the public interest, the Commission noted that the limited distribution potential of such services necessarily places them in "a significantly more precarious financial condition than that of other competing programming services that enjoy broader audience appeal." [15] Similarly, in News 1's case, forcing the cable operator to give its competitors all locally originated programming, including non-satellite-delivered services, would be a strong disincentive to producing such costly and risky ventures as all local news.

With regard to allegations about price discrimination, the Commission's regulations provide ample means for multichannel distributors to demonstrate, in expedited Commission proceedings, whether

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[13] 47 U.S.C. section 548 (a).

[14] In the Matter of New England Cable News, Petition for Public Interest Determination Under 47 C.F.R. Section 76.1002(c)(4) Relating to Exclusive Distribution of New England Cable News, Memorandum Opinion and Order, released June 1, 1994.

[15] Id.

their complaints have merit. As we noted in our initial comments, the program access rules are relatively new and are being refined through the enforcement process. The Commission will apply the criteria set forth in the Act on a case-by-case basis. Where violations of the FCC's regulations are found, the Commission may impose sanctions under Title V of the Communications Act. But the Commission has properly determined that it has no authority under the 1992 Act, as NRTC contends, to require damages.

The initial comments in this proceeding reflect that cable's competitors still want to interpret section 628 not as a remedy for anti-competitive behavior by vertically integrated cable programmers, but as a mandate to force cable programmers to make their services available to all distributors at the same price and on the same terms and conditions, regardless of whether it serves the pro-competitive interests of the programmers or the public. We urge the Commission, in evaluating the status of the competition in the video marketplace, not to lose sight of the procompetitive benefits of exclusivity and the precise scope of the Cable Act's program access provisions.

III. VIDEO DIALTONE COMPETITION

The telephone companies have seized the opportunity in their comments to advance their rhetoric about cable's alleged attempts to derail video dialtone competition. Bell Atlantic's comments, in particular, represent an effort to convince the Commission to disavow the Title II regulatory process for video dialtone applications, at a time when their conduct indicates that they fully intend to cross-subsidize and discriminate at will to the disadvantage of consumers and competitors.

Indeed, the telephone companies have begrudged the Section 214 regulatory process at every turn -- with incomplete, vague and misleading information that would not permit any meaningful scrutiny of their proposed actions. They object to providing the most minimal information necessary for the Commission to establish whether the project is economically justified.[16]

As the Commission told New Jersey Bell in response to its failure to comply with even minimal application requirements, "we are concerned about preserving the integrity of the Section 214 process for permanent authorizations, particularly for the initial filings for authority to provide video dialtone service."[17]

In the face of attempts to thwart any meaningful analysis of their proposed actions, the Commission stated emphatically that it would not "streamline or eliminate as unnecessary the present Section 214 certification requirement because the Section 214 process plays an important role in our ability to ensure that the risk of anti-competitive conduct is minimized."[18] NCTA has urged the Commission to adopt cost allocation rules and other

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[16] Moreover, the notion that telephone companies should be allowed to circumvent the 214 process because of the disclosure of sensitive marketing data to their cable competitors is ludricrous. Cable operators do not need Bell Atlantic's marketing information to make assessments about subscribers in their markets,. In any event, the information supplied to date is so spurious that it would be useless to any cable system.

[17] Letter of William F. Caton, Acting Secretary, FCC, to Edward Young, III, New Jersey Bell, July 28, 1993 at 2.

[18] Telephone Company/Cable Television Cross-Ownership Rules, 7 FCC Rcd. 5781, 5827, n. 231.

safeguards against telephone monopoly abuses before it approves any additional video dialtone applications.

Even a cursory look at the state of telephone competition shows that in the vast majority of states, telephone companies do not face competition in their business. In response to a recent court decision that allows telephone companies to prevent rivals from installing switching equipment on their premises, Bell Atlantic General Counsel, James Young, declared "we're delighted with this court ruling. Instead of a flash cut to a completely competitive environment, there is now the opportunity to take a more deliberate approach. Today's decision prevents our competitors from setting up shop in our central offices."[19] Bell Atlantic obviously supports a "go slow" approach to competition in its local telephone markets, but it aggressively advocates the elimination of all restrictions to its entry into the cable business.

Bell Atlantic nonetheless chastises cable for seeking alliances and joint ventures "to move rapidly into local telephone services." But, as we have seen in recent weeks, Bell Atlantic and NYNEX have merged their cellular operations in an effort to create a giant wireless phone system covering the Northeast and Mid-Atlantic regions.[20] Obviously, the RBOCs believe that strategic alliances promote efficiency in the cellular business. Yet they begrudge the cable industry for positioning itself to be able to enter new areas that might compete with their businesses.

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19 "F.C.C. Can't Force the Bells to Let in Rivals, Court Says", The New York Times, June 11, 1994.

20 "The Big Nynex-Bell Atlantic Deal", The New York Times, July 1, 1994; "2 Companies Plan Cellular Merger", The Washington Post, June 30, 1994.

In light of their video dialtone strategy, the passage of legislation this year is all the more important to ensure that a truly competitive telecommunications environment develops in the United States. Indeed, the proposed legislation breaks down state barriers to competition in telecommunications, establishes safeguards to prevent the phone companies from abusing their monopoly power, and lays out the ground rules for the development of the national telecommunications infrastructure.

As the Commission reconsiders its video dialtone order, and as it develops its upcoming Report to Congress on the state of competition, it should also take concrete steps to ensure that a competitive telecommunications market develops in the U.S.

CONCLUSION

As the expert agency, the Commission should broaden its definitional analysis of the state of competition in the video distribution market to reflect the competitive impact of over-the-air broadcasting alone, and the effects of multichannel video distributors that have not yet attained 15 percent penetration in the relevant cable franchise area.

Respectfully submitted,

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