

DON NICKLES
OKLAHOMA

United States Senate
WASHINGTON, DC 205 10-3602

COMMITTEES:
APPROPRIATIONS
BUDGET
ENERGY AND NATURAL
RESOURCES

CSB
CAY 92

5/36

92-265

October 21, 1994

Respectfully referred to

Federal Communications Commission

for such consideration as the communication herewith submitted may
[REDACTED]
enclosure.

By direction of

DON NICKLES
U.S. Senator

Please reply to Drew Bond of my staff.

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92-265

KAMO POWER

July 25, 1994

The Honorable Don Nickles
Room 133
Hart Senate Office
Washington, DC 20510

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JAN 12 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Cable Competition Report - CS Docket No. 94-48

Dear Senator Don Nickles:

I am writing this letter to voice a concern I have regarding the implementation and enforcement of Section 19 of the 1992 Cable Act by the Federal Communications Commission.

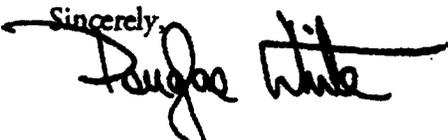
KAMO Power is a generation transmission utility and a member of NRTC. We provide wholesale electric service to 17 electric cooperatives located in northeast Oklahoma and southwest Missouri. Equal access to cable and broadcast programming at fair rates is essential for them to be competitive in their local marketplace.

I have attached a letter to FCC Chairman Reed Hundt from myself in addition to a letter from Representative Billy Tauzin and other members of Congress, that spells out my concerns on this issue.

It was my impression that with the passage of the 1992 Cable Act Congress had guaranteed equal access to cable and broadcast programming for all distributors. However, satellite distributors and consumers continue to be treated unfairly by the cable industry.

Although some programmers have lowered their rates most continue to charge discriminatory high rates for satellite distributors compared with cable rates. Programmers, like Time Warner and Viacom, have simply refused to sell programming to some distributors. These exclusive practices adversely affect rural consumers and defeat the implementation of Section 19 of the Cable Act.

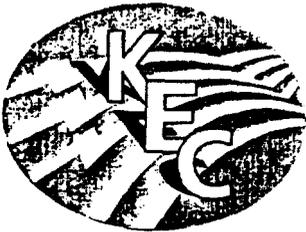
I would greatly appreciate your assistance on behalf of rural consumers everywhere in encouraging the FCC to correct this inequity.

Sincerely,


Douglas White, Manager
Corporate Development

DW/eah

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KIWASH ELECTRIC COOPERATIVE, INC.

120 WEST FIRST STREET

P. O. BOX 100

CORDELL, OKLAHOMA 73632

PHONE: (405) 832-3361

FAX: (405) 832-5174

July 22, 1994

The Honorable Reed Hundt, Chairman
Federal Communications Commission
1919 M Street, NW, Rm. 814
Washington, DC 20554

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Dear Chairman Hundt:

This letter is in support of the Comments of the National Rural Telecommunications Cooperative (NRTC) in the matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48.

Kiwash Electric is a rural utility and NRTC member providing television programming to rural consumers. These consumers live in rural areas that are sparsely populated and do not receive cable service. These rural families have little choice other than satellite for receiving television service. Because they have no other choice except satellite television service, we need complete access to all programming at fair rates, comparable to those paid by cable, in order to provide comparable service in rural areas.

We believed that Congress had already solved this problem two years ago with the passage of the 1992 Cable Act, but we are still being charged significantly more for cable and broadcast programming than comparatively sized cable companies in our area. We question why cable companies in our area should receive programming at lower rates than us.

Discriminatory pricing hurts both us and the consumer, because our consumers have no other choice for programming other than satellite and are forced to pay higher rates than those with access to cable. We agree with NRTC's position that the FCC should act to enforce the wishes of Congress as put forth in the 1992 Cable Act.

Chairman Hundt, we urge you to monitor and combat the problems we have mentioned by prohibiting abusive practices by rule and by making it clear that damages will be awarded for Program Access violations. Your consideration will be deeply appreciated.

Sincerely,

KIWASH ELECTRIC COOPERATIVE, INC.

Paul Lenaburg, General Manager

PL:m1

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ENERGY AND COMMERCE COMMITTEE
FOREIGN TRADE AND COMMERCE COMMITTEE
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Congress of the United States
House of Representatives
Washington, DC 20515-1803

June 15, 1994

The Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

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Dear Chairman Hundt:

We are writing to ask your help in strengthening the Commission's rulemaking on competition and diversity in video programming distribution.

During the past year a great deal of the energy has necessarily been devoted to the issue of cable rate regulation. Notwithstanding the immediate importance of that issue, many Members of Congress believe that the true answer to improving the video programming distribution marketplace is the promotion of real competition. In the long run we believe that competition - not regulation - will achieve the greatest benefits for consumers and result in greater vitality in the industry. Of the many provisions of the Cable Act that are designed to promote competition, none are more important than Section 19, which instructs the Commission to ensure nondiscriminatory access to cable programming by all distributors.

We strongly believe that section 19 is worthy of your serious and immediate attention. We respectfully request that you reexamine the Commission's First Report and Order implementing section 19 in order to eliminate potential loopholes that would permit the denial of programming to any non-cable distributor.

We wish to call to your attention certain disquieting developments heightening our concern about the FCC's program access regulations. We are troubled by the Primestar consent decrees and the effect they may have on program access. We believe the FCC's program access regulations need to be tightened if the full force and effect of Section 19 of the 1992 Cable Act is to be preserved.

As you may be aware, despite the Commission's well-reasoned brief opposing the entry of the state Primestar decree, the court entered final judgment. Among other things, the state consent decree will permit the vertically integrated cable programmers that own Primestar to enter into exclusive contracts with one direct broadcast satellite (DBS) operator to the exclusion of all other DBS providers at each orbital position. On the other hand, Primestar's ability to obtain all of the programming of its cable owners will be unimpeded by the state consent decree. In its opinion, the court made clear, however, that its ruling was in no way a judgment about the propriety of such exclusive contracts under Section 19 of the Cable Act

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The Honorable Reed Hundt
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or the FCC's implementing regulations and specifically left that question open to be decided by the FCC.

In essence, the state consent decree gives Primestar's cable owners the ability to carve up the DBS market to the competitive disadvantage of non-cable owned DBS providers. This is directly contrary to the intent of Congress. In enacting the program access provisions, Congress specifically rejected the existing market structure in which vertically integrated cable companies controlled the distribution of programming. Congress and the FCC recognized that vertically integrated programmers had both the means and the incentives to use their control over program access to discriminate against cables' competitors and to choke off potential competition, even in unserved areas. Moreover, Congress looked to DBS as a primary source of competition to cable, not as a new technology to be captured by the cable industry.

Congress enacted very strong program access provisions and gave the Commission broad authority to regulate against anti-competitive and abusive practices by vertically integrated programmers. Section 628 (b) makes it unlawful for a cable operator or vertically integrated cable programmer "to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor" from providing cable or superstation programming to consumers. Section 628 (c) provides the Commission with the authority to promulgate regulations to effectuate the statutory prohibition and delineates their minimum content.

Upon examination of the program access regulations, we have discovered a critical loophole that seems ripe for exploitation by the cable industry and is directly applicable to exclusive contracts between vertically integrated cable programmers and DBS providers. Section 628 (c) (2) (c) of the 1992 Cable Act contains a broad *per se* prohibition on "practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest" for distribution in non-cabled areas. However, Section 76.1002 (c) (1) of the Commission's new rules covers only those exclusionary practices involving cable operators.

The Commission's rule in its present form is inconsistent with both the plain language of the statute and Congressional intent. The prohibition against all exclusionary practices by vertically integrated programmers in unserved areas is clear. While it certainly includes exclusive contracts between cable operators and vertically integrated programmers, the language of the statute does not limit the prohibition to that one example. The regulations incorrectly turn the illustrative example into the rule.

This loophole must be closed and the program access regulation strengthened on Reconsideration. The Primestar consent decree alone makes it clear that the bare minimum regulation of exclusive contracts is insufficient to guard against anti-competitive practices by vertically integrated cable programmers. The Commission's final regulations should provide, as does the legislation, that all exclusive practices, understandings, arrangements and activities, including (but not limited to) exclusive contracts between vertically integrated video programmers and any multichannel video programming distributor are *per se* unlawful in non cabled areas. In cabled areas, all such exclusive contracts should be subject to a public interest test with advanced approval required from the Commission.

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The Honorable Reed Hundt
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There is one other vital point to note regarding the Commission's program access rules. It has become evident that the cable industry has been attempting to manipulate the Commission's reconsideration proceeding to obtain an overly broad Commission declaration as to the general propriety of exclusive contracts with non-cable multichannel video programming distributors. Any such pronouncement by the Commission would eviscerate the program access protections of the 1992 Cable Act.

Specifically, in addition to and independent of the explicit exclusive contracting limitations imposed by the Act, exclusive arrangements between vertically integrated programmers and non-cable multichannel video programming distributors (MVPD) in many circumstances also violate Section 628(b)'s general prohibition of "unfair practices" which hinder significantly or prevent any MVPD from obtaining access to cable programming. In addition, they may violate Section 628 (c)(2)(B)'s prohibition against discrimination by a vertically integrated satellite cable programming vendor in the prices, terms and conditions of sale or delivery of satellite cable programming "among or between cable systems, cable operators, or other multichannel video programming distributors." Accordingly, we urge the Commission to be extremely careful in its decision on reconsideration to avoid any ruling or language which could, in any way, limit the protections against discrimination afforded by Sections 628(b) and (c)(2)(B).

Lastly, Mr. Chairman, it is absolutely essential in overview that the Commission add regulatory "teeth" to its Program Access regulations. In the Program Access decision, the Commission generally declined to award damages as a result of a Program Access violation. Without the threat of damages, however, we see very little incentive for a programmer to comply with the rules. Nor is it practical to expect an aggrieved multichannel video programming distributor to incur the expense and inconvenience of prosecuting a complaint at the Commission without an expectation of an award of damages. There is ample statutory authority for the Commission to order "appropriate remedies" for program access violations, and we urge the Commission to use such authority to impose damages (including attorney fees) in appropriate cases. [Sec. 47 U.S.C. 548 (e) (i)].

DBS has long been viewed as a strong potential competitor to cable if it were able to obtain programming. In the 1992 Cable Act, Congress acted definitively to remove that barrier to full and fair DBS entry into the multichannel video programming distribution market. We think it is of the utmost importance that there be no loopholes which would allow cable or, in light of recent merger activity, cable-telco combinations to dominate the DBS marketplace.

Thank you for your consideration.

Sincerely,

cc: The Hon. James H. Quello
The Hon. Andrew C. Barrett
The Hon. Susan Ness
The Hon. Rachelle B. Chong

Rick Boucher

RICK BOUCHER
Member of Congress

Ron Wyden

RON WYDEN
Member of Congress

Jim Slattery

JIM SLATTERY
Member of Congress

Ralph M. Hall

RALPH HALL
Member of Congress

Billy Tauzin

BILLY TAUZIN
Member of Congress

Jim Cooper

JIM COOPER
Member of Congress

Blanche M. Lambert

BLANCHE LAMBERT
Member of Congress

Mike Synar

MIKE SYNAR
Member of Congress

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

NOV 14 1994

IN REPLY REFER TO:
CN-9405436

The Honorable Don Nickles
United States Senate
2206 Hart Senate Office Building
Washington, D.C. 20505-3602

Dear Senator Nickles:

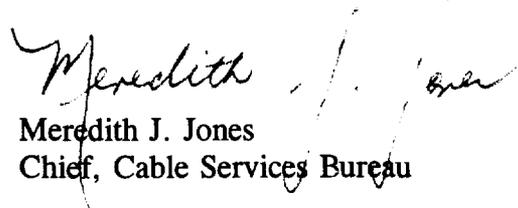
Thank you for your letter on behalf of your constituent, Mr. Douglas White, Manager, Corporate Development, Kamo Power, concerning the implementation and enforcement of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 by the Federal Communications Commission. I appreciate the opportunity to respond.

Mr. White expresses his support for the position of the National Rural Telecommunications Cooperative (NRTC) with respect to the legality under the program access provisions of the 1992 Cable Act of exclusive contracts between vertically integrated cable programmers and direct broadcast satellite providers in areas unserved by cable operators. NRTC has asked the Commission to determine that such contracts are prohibited.

NRTC's petition for reconsideration of the Commission's program access rulemaking currently is pending. Consequently, any discussion by Commission personnel concerning this issue outside the context of the rulemaking would be inappropriate. However, you may be assured that the Commission will take into account each of the arguments raised by the NRTC and the other parties to the rulemaking concerning this issue to arrive at a reasoned decision on reconsideration.

I trust that this information will prove both informative and helpful.

Sincerely,


Meredith J. Jones
Chief, Cable Services Bureau