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

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition	)	
Act of 1992: Rate Regulation	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	
Protection and Competition	)	MM Docket No. 93-215
Act of 1992: Rate Regulation	)	

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TO: The Commission

RESPONSE TO PETITIONS FOR RECONSIDERATION

On behalf of Black Entertainment Television, Inc. ("BET"), we hereby submit this response to the petitions for reconsideration filed in response to the Commission's Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking ("Sixth Order") in MM Dockets No. 92-266 and 93-215, released November 18, 1994. Briefly, BET is requesting modification of that part of the Commission's Sixth Order regarding the "per channel adjustment factor" discussed in paragraphs 72-75, as modified by the Commission's letter to BET released December 21, 1994 (DA 94-1473) ("BET Letter") . For the purpose of determining external programming costs, the Commission has stated that "any revenues received from a programmer, or shared by a programmer and an operator, must be netted against costs for purposes of calculating whether there has been an increase or decrease in external costs." Sixth Order, ¶74. In addition, BET supports those petitioners who have advocated changes in the going forward rules to encourage minority programming.

In the Sixth Order, the Commission concluded that "[o]ffsetting will apply on a channel-by-channel basis." Id. In response to an inquiry from BET, the Cable Services Bureau stated that, "where a single cable channel is shared by different program services, the channel-by-channel standard for offsetting may be applied on a programmer-specific basis." BET Letter at 2. On the other hand, where different program services under common ownership share a single channel, the Cable Bureau requires offsetting pursuant to FCC Rule § 76.922(d)(3)(x). This offset requirement works an unfairness on niche programmers like BET that discourages cable carriage of such programming and is inconsistent with the Commission's goals favoring program diversity and, accordingly, with the public interest as well.

I. Background of Revenue Offset Requirement

In its Sixth Order, the Commission codified the channel-by-channel approach to the revenue offset requirement at 47 C.F.R. §76.922(d)(3)(x). Prior to releasing the Sixth Order, the Commission had explained that the revenue offset requirement was to be applied on a channel-by-channel basis. In re MTV Networks (released August 3, 1994) at 2; In re The Home Shopping Network (released May 9, 1994) at 2; In re QVC Network, Inc. (released May 9, 1994) at 2. In its Sixth Order, the Commission formally amended Section 76.922(d)(3)(x) to clarify that "[o]ffsetting will apply on a channel-by-channel basis." Sixth Order at ¶ 74; 47 C.F.R. § 76.922(d)(3)(x). More recently, the Commission further limited the revenue offset requirement in cases where multiple unaffiliated programmers share a single channel. In the BET Letter, the Cable Bureau announced that cable operators may divide a single channel between **independently owned** home shopping programming and other non-revenue producing programming without having to offset the revenues and programming costs of the respective services. BET Letter at 3.

II. Factual Background

As the Commission has previously been informed, BET is planning to launch a new program service called BET on Jazz. Due to its niche market appeal and extremely limited channel capacity, BET on Jazz may be offered initially on a part time basis, e.g., 12 or 14 hours per day. BET proposes to fill the remaining time with a home shopping type service to help offset the costs of operating BET on Jazz and to increase the likelihood of obtaining carriage in view of limited channel capacity. Although the home shopping service may be provided by a separate programmer, such as Home Shopping Network or QVC, it is possible that it may be offered by BET itself. In any event, revenues from the home shopping service would be shared by the home shopping programmer and the cable operator.

In the BET Letter, the Cable Bureau indicated that revenues received from the home shopping service would have to be used by the cable operator to offset the programming costs of BET on Jazz **if** the home shopping service is provided by BET, as opposed to a separate programmer such as Home Shopping Network or QVC. In its Sixth Order, the Commission stated that offsetting would apply on a channel-by-channel basis. The end result, therefore, is that cable operators would **not** be required to offset revenues from a home shopping service against programming costs for BET on Jazz **if** the home shopping service were provided by BET on a separate channel **or** by a separate programmer on the same channel. However, if the home shopping service is offered by BET on the same channel as BET on Jazz, offsetting is required. This result is illogical and disserves the public interest by discouraging cable operators from carrying a new niche programming service such as BET on Jazz. If cable operators are required to offset the programming costs for BET on Jazz by the revenues received from the home shopping service offered on that channel, they would have no incentive to carry the channel at all.

III. Argument

A. The Commission's Offset Policy is Inconsistent With The Goals of the Communications Act

In deciding how to implement rate regulation, the Commission stated that it would permit cable operators to pass through external programming costs. Report and Order, ¶251, 8 F.C.C. Rcd. 5631 (1993). In permitting cable operators to pass through such external costs, the Commission stated that its primary objective was to assure the continued growth of programming which might otherwise be jeopardized by rate regulation. The Commission thus balanced the need to insure that subscriber rates were not excessive against the need to account for increased programming costs and thereby "attached greater importance . . . to assuring the continued growth of programming." Id.

In particular, and consistent with the Commission's goals to increase program diversity, the Commission has sought to further the development of niche programming and has recognized the inherent difficulties of promoting such programming. Thus, for example, the Commission has waived the prohibition on exclusive contracts where the cable service "by definition appeals to a much smaller potential subscriber base." New England Cable News, CSR-4190-P at ¶36 (June 1, 1994). In waiving the exclusivity prohibition, the Commission has also cited the "public interest in enhancing diversity of programming services." News Channel, a Division of Lenfest Programming Services, Inc., CSR-4295-P (December 16, 1994). BET on Jazz is a perfect example of just such niche programming which requires incentives to encourage cable carriage.

If BET is permitted to offer a home shopping service on the same channel that carries BET on Jazz without an offset requirement, such a service would help BET decrease operating costs associated with BET on Jazz, would provide the opportunity for additional revenue to both the programmer and cable operator, and would increase the ability of BET to obtain cable carriage for such programming. On the other hand, if cable operators are required to offset home shopping revenues against the costs of programming for BET on Jazz, the primary incentive to carry the channel will be lost.

Were the home shopping service to be provided by a separate entity, such as Home Shopping Network or QVC, the cable operator would **not** be required to offset revenues obtained from that service against the programming costs of BET on Jazz, even though the end result to the cable operator is the same, i.e., a home shopping service sharing a channel with BET on Jazz. It is simply illogical to require offsetting where both services are offered by the same programmer, since the end result discourages cable carriage and inhibits program diversity.

B. Revision of the Commission's Offset Policy Would Benefit Cable Subscribers

BET requires the revenues from a home shopping service to be able to provide BET on Jazz. Such revenues, when shared with the cable operator, provide an incentive for cable operators to carry BET on Jazz as well. Thus, offering the shopping service and BET on Jazz in combination helps make the channel available to the widest possible audience. Additionally, BET envisions that the home shopping service will be geared to the same minority niche audience as BET on Jazz, thereby providing such viewers with access to shopping services specifically tailored to them. If the Commission does not require that revenues from this service offset programming costs of BET on Jazz, the ultimate result will be better quality programming, fewer rate increases passed on to subscribers, and greater distribution of the service because the increased revenue requirements necessary for better programming can be met with the additional shopping revenues, rather than by increases in subscriber rates. The additional revenue provided, as well as the increased cable carriage likely to result if the offset requirement is eliminated, will help ensure the viability and availability of BET on Jazz.

C. The Current Competitive Environment for Both Cable Operators and Programmers Renders The Commission's Fears Unjustified

The Commission's offset requirements that would require revenues from a home shopping service to offset programming costs from a programming service such as BET on Jazz carried on the same channel are based on the assumption that cable operators will collude with programmers to undermine the Commission's rate regulation rules and that cable operators will constantly raise rates to the maximum extent permitted. However, this assumption is inconsistent with the current competitive environment faced by cable operators from such alternative programming sources as DBS, MMDS, etc. Indeed, hundreds of cable operators, both regulated and unregulated, have voluntarily refrained from permitted rate increases or have limited increases to less than the maximum amount permitted, in response to the competitive environment in which cable operators now find themselves. Thus, the fears underlying the Commission's offset policy are unfounded.

Not only are cable operators faced with competition from alternative programming sources, but cable programmers are themselves faced with competition from numerous other programmers for cable carriage. The environment for programmers, especially new services, is incredibly difficult due to the Commission's rate regulations and to limited channel capacity on most cable systems. Thus, unless a cable programmer can offer an incentive to a cable operator, such as the possibility of home shopping revenues, cable carriage may be difficult to attain. Yet, cable carriage is obviously the lifeblood of a new niche programming service such as BET on Jazz. Without the ability to offer such incentives, BET on Jazz will lack the incentive needed to attract widespread cable carriage.

Alternatively, there may be less restrictive means of addressing the Commission's concern that subscribers will be harmed without the offset requirements. The Commission could monitor the situation and take remedial action if abuses are found where the programming and shopping service are under common ownership. There are numerous checks and balances that could be placed on programming costs and/or rate increases to ensure that cable subscribers are not unfairly charged, but, for the reasons stated above, such conditions are unnecessary in today's competitive environment. Such a course, however, is certainly preferable to retarding the development of new programming services such as BET on Jazz.

IV. The Commission Should Grant Incentives For Carriage of Minority Programming

On a related matter, BET generally supports the comments of Children's Television Workshop ("CTW") in Section IV of its Petition for Reconsideration in this proceeding. Specifically, CTW asks the Commission to modify its going-forward rules for channels programmed by "qualified educational or minority programming sources," to increase the cable operator's cap for such channels. The additional profit potential for carriage of such channels would provide an incentive for cable operators to add new minority programming services. As suggested by CTW, the Commission could use the minority programming definition currently contained in FCC Rule § 76.977, relating to commercial leased access. Specifically, a "qualified minority programming source" is a programming source that "devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned."

Such action by the Commission to encourage minority programming is fully consistent with the 1992 Cable Act and the Commission's express policies in this area.

Conclusion

For the reasons stated herein, BET respectfully requests the Commission to modify the "clarification" in the BET Letter of FCC Rule § 76.922(d)(3)(X), to provide that revenues from a home shopping service need not be offset against programming costs from a separate programming service offered on the same channel, even if both services are provided by the same programmer.

Respectfully submitted,

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