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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Annual Assessment of the Status of) CS Docket No. 95-61
Competition in the Market for the Delivery)
of Video Programming)

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REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCAI"), by its attorneys, hereby submits its reply to the comments filed in response to the *Notice of Inquiry* ("NOI") commencing this proceeding.^{1/}

In its initial comments, WCAI demonstrated that the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") and the Commission's implementing rules require fine tuning in order to eliminate various unintended impediments to competition. Not surprisingly, the wireless cable industry was hardly alone in identifying flaws in the current regulatory scheme that hamper full and fair competition; other emerging competitors to the entrenched franchised cable industry are being frustrated by the same weaknesses in the regulatory system identified by WCAI.

For example, numerous parties joined WCAI in calling on the Commission to resolve the long-pending dispute over the appropriate demarcation point under the

^{1/}*Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 95-186, CS Docket No. 95-61 (rel. May 24, 1995).

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Commission's home cable wiring rules.^{2/} Liberty Cable Company, Inc. ("Liberty"), like WCAI, called for a recommendation to Congress that the program access provisions of the 1992 Cable Act be extended to programmers that use technology other than satellites to distribute their programming.^{3/} Liberty and Opted, Inc. joined WCAI in expressing concern over the ability of franchised cable operators to engage in price discrimination when serving multiple dwelling units ("MDUs"), despite the provisions of Section 543(d) of the Communications Act, as amended by the 1992 Cable Act.^{4/} And, the Satellite Broadcasting and Communications Association joined WCAI in calling upon the Commission to address the growing problem of homeowner covenants, conditions and restrictions that unreasonably restrict reception antenna

^{2/}Comments of WCAI, CS Docket No. 95-61, at 19-22 (filed June 30, 1995)[hereinafter cited as "WCAI Comments"]; Comments of OpTel, Inc., CS Docket No. 95-61, at 5-6 (filed June 30, 1995)[hereinafter cited as "Opted Comments"]; Comments of Liberty Cable Company, Inc., CS Docket No. 95-61, at 17-18 (filed June 30, 1995)[hereinafter cited as "Liberty Comments"]; Comments of Bell Atlantic Companies, CS Docket No. 95-61, at 11 (filed June 30, 1995).

^{3/}See WCAI Comments, at 18-19; Liberty Comments, at 11-12. Liberty has also called for the Commission to pre-empt state mandatory access laws that discriminate between franchised cable operators and other multichannel video programming distributors ("MVPDs"). See *id.* at 21-22. WCAI fully supports Liberty's position on this very important issue.

^{4/}See WCAI Comments, at 19-22; Liberty Comments, at 9-11, 20-21; Opted Comments, at 4-5. Heartland Wireless Communications, Inc. has brought to the Commission's attention a specific situation in which it appears that one cable operator is in violation of the Commission's uniform pricing rules. See Comments of Heartland Wireless Communications, Inc., CS Docket No. 95-61, at 1-3 (filed June 30, 1995). WCAI is aware of numerous similar situations.

installation.^{5/}

WCAI was also joined by a variety of parties in urging the Commission to request that Congress amend the 1992 Cable Act to extend the program access requirements to programmers that are not vertically integrated. While cable interests assert that “there is no evidence to suggest that non-vertically integrated programmers have failed to provide access to MVPDs at reasonable, marketplace rates,”^{6/} the anecdotal record developed in response to the *NOI* establishes that non-vertically integrated programmers have engaged in precisely the sort of conduct that would be unlawful if practiced by a vertically integrated programmer. Ironically, it is the non-vertically integrated programmers who complain the loudest against an extension of the program access rules that are alleged to be engaging in anti-competitive discrimination.^{7/}

^{5/}See WCAI Comments, at 27-28; Comments of Satellite Broadcasting and Communications Association, CS Docket No. 95-61, at 18-19 (filed June 30, 1995). On a related note, in IB Docket No. 95-59, WCAI and others recently have called upon the Commission to promote competition in the video marketplace by preempting unreasonable local restrictions on the installation of wireless cable reception antennas. See, e.g. Comments of WCAI, IB Docket No. 95-59 (filed July 14, 1995); Comments of Bell Atlantic, IB Docket No. 95-59 (filed July 14, 1995).

^{6/}Comments of Nat'l Cable Television Ass'n, CS Docket No. 95-61, at 37 (filed June 30, 1995)[hereinafter cited as “NCTA Comments”].

^{7/}Compare Comments of ESPN, Inc., CS Docket No. 95-61, at 3 (filed June 30, 1995)(“as a nonvertically integrated programmer, ESPN simply has no incentive to discriminate against noncable technologies.”) with Comments of PrimeTime 24, CS Docket No. 95-61, at 5-6 (filed June 30, 1995)(detailing constructive refusal to deal by ESPN) and Comments of Satellite Receivers Ltd., CS Docket No. 95-61, at 5-6 (filed June 30, 1995)(alleging refusal to deal by ESPN). Compare also Comments of Group W

Non-vertically integrated programmers responding to the *NOI* generally advance two arguments against extending the program access requirements to non-vertically integrated programmers; that those programmers lack any incentive to discriminate, and that extending the program access requirements will decrease the amount and diversity of programming. However, neither of these arguments withstand scrutiny.

While the non-vertically integrated programmers contend that they lack any incentive to discriminate,^{8/} both the record evidence developed in response to the *NOI* and the economic theory presented by WCAI in its initial comments demonstrate otherwise. Indeed, Prof. David Waterman has found that non-vertically integrated programmers have the same incentive to discriminate against non-cable MVPDs as

Satellite Communications, CS Docket No. 95-61, at 2 (filed June 30, 1995)(“there is no evidence of unfair discrimination by programmers in selling to different market segments.”) *with* Comments of Nat’l Cable Television Cooperative, Inc., CS Docket No. 95-61, at 5 (filed June 30, 1995)(alleging anti-competitive refusal to deal by Group W).

^{8/}*See, e.g.* Comments of Lifetime Television, CS Docket No. 95-61, at 7 (filed June 30, 1995); Comments of Viacom, Inc., CS Docket No. 95-61, at 4 (filed June 30, 1995)[hereinafter cited as “Viacom Comments”]. *See also* NCTA Comments, at 38-39. WCAI must note that NCTA’s reliance on the Commission’s decision to waive the program access rules as they relate to the Disney Channel is misplaced. The Commission there was faced with the fact that, while the Walt Disney Company did not own or operate any traditional cable systems, its wholly-owned subsidiary (the Madeira Land Company, Inc.) provided the Disney Channel free of charge to guests at certain hotels at Disney World. The Commission’s decision in *Petition of Walt Disney Company for Waiver of Program Access Rules* is limited, by its very terms, to “the unique circumstances of Madeira’s Disney World operation as currently constituted.” 9 FCC Rcd 4007, 4008 (1994). Moreover, because it was decided under the current version of Section 19 (which is limited to vertically-integrated programmers), the Commission’s decision did not address whether there is a public policy need for extending Section 19 to non-vertically integrated programmers.

vertically integrated programmers. As he puts it, "singling out program suppliers that are vertically affiliated with cable operators, as the regulations now do, essentially excludes from control numerous other suppliers having basically the same behavioral incentives to participate in the exclusion of competitors as integrated suppliers."^{9/} That view is shared by Home Box Office, which asserts that "there is [no] legitimate distinction between vertically integrated and non-vertically integrated programmers for purposes of applying the [program access] rules."^{10/}

Prof. Waterman also dismisses the unsubstantiated assertion that the program access rules deter investment in new programming.^{11/} Prof. Waterman concludes that:

In the long run, however, the nondiscriminatory access requirements should increase competition with established cable systems. If competition is effectively established, consumer prices should fall, and if alternative delivery systems sufficiently expand total consumer demand, the amount and variety of programming should increase as well.^{12/}

In short, the record developed in response to the *NOI* establishes that the public would be well-served by extending the program access obligations imposed under

^{9/}*Waterman*, "Vertical Integration and Program Access in the Cable Television Industry, 47 *Fed. Comm. L.J.* 511, 514-15 (1995).

^{10/}Comments of Home Box Office, CS Docket No. 95-61, at 24 (filed June 30, 1995). Home Box Office also asserts that the program access rules should apply to programming ventures that are vertically-integrated with non-cable MVPDs, such as local exchange carriers. WCAI endorses that proposal.

^{11/}*See id.*, at 23; Viacom Comments, at 4; Comments of Time Warner Cable, CS Docket No. 95-61, at 24-25 (filed June 30, 1995).

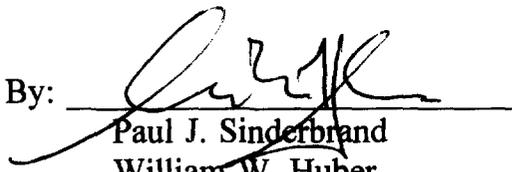
^{12/}*Id.* at 528.

Section 19 of the 1992 Cable Act to *all* programmers, whether or not vertically integrated. Until the marketplace recovers from years of cable monopoly power, assuring emerging MVPDs access to all of the programming services consumers demand is essential for competition to flourish.

WHEREFORE, for the reasons set forth above and in WCAI's initial comments, the Commission should adopt the suggestions WCAI has advanced for promoting competition in the video marketplace.

Respectfully submitted,

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