

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

NOV 30 1995

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)
)
Revision of Rules and Policies for the)
Direct Broadcast Satellite Service)

IB Docket No. 95-168
PP Docket No. 93-253

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**REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

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

Certain commenters in this proceeding propose that the FCC fundamentally rewrite the rules that have governed cable operators' participation in the DBS arena for the last 13 years. The record in this proceeding, however, is devoid of any evidence showing that a problem exists that justifies this radical overhaul of the rules. Not surprisingly, therefore, the commenters in this proceeding that urge FCC imposition of these restrictions rest only on wholly speculative assertions to support their position. In so doing, they ignore the reality that cable's existing presence as a DBS provider has had no anti-competitive effects, and they downplay the current vibrant state of the DBS marketplace.¹

¹ See Comments of Continental Cablevision, Inc. (filed Nov. 20, 1995) at 10-14 (detailing DBS competition).

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DISCUSSION

I. The Commission Should Not Adopt Further Restrictions on Cable Operators' Participation in DBS

The Department of Justice suggests that the Commission adopt a "simple structural rule which prohibits cable firms above a specified size from owning, controlling or using DBS channels in any of the three primary ... full-CONUS orbital slots."² The Justice Department's speculation about the potential for anti-competitive behavior simply fails to justify the proposed sweeping restriction.

The DoJ Comments rest on several speculative theories. First, they assume that only three high power DBS slots can provide multichannel competition to cable operators.³ But this theory fundamentally overlooks the fact that there are a host of locally-available video alternatives to cable television, such as MMDS, telco-provided video services, SMATVs, LMDS, over-the-air television, and others. These are in addition to the existing DBS providers -- DirecTV and USSB -- that have no cable affiliation, as well as the numerous satellite video providers soon to launch.⁴

² Comments of the United States Department of Justice (filed Nov. 20, 1995) at 9 (hereinafter "DoJ Comments").

³ DoJ Comments at 4 ("There may be room in the marketplace for viable DBS providers at only three orbital slots.")

⁴ See generally Comments of Time Warner Entertainment Co., L.P. (filed Nov. 20, 1995) at 5-6.

Second, DoJ contends that a cable operator-affiliated DBS provider “could have less incentive to offer DBS service that competes against cable.”⁵ Justice cites to no evidence that cable operators offering PrimeStar have been anything other than vigorous competitors. As described in PrimeStar’s comments filed in this proceeding, “PrimeStar has every incentive to compete, and in fact is doing so in a manner that is wholly consistent with the Commission’s goals.”⁶ Moreover, given the presence of two existing high power DBS providers, any failure to price competitively would likely cede market share to those other non-affiliated DBS providers.⁷ For these and other reasons, the expert economic analysis of Dr. Bruce Owen, contained in the comments of TEMPO DBS, Inc., concludes that “(1) PRIMESTAR (and by implication any cable-affiliated DBS operator) will have the incentive to promote vigorously its DBS service everywhere and could not even if it so desired ‘stifle’ DBS, and (2) ‘it is virtually impossible’ that TCI, PRIMESTAR or any other cable-affiliated DBS operator ‘could profitably engage in anticompetitive or predatory pricing.’”⁸ In short, the perceived threats to the DBS market by cable participation are not real, but imagined.

⁵ DoJ Comments at 6.

⁶ Comments of PrimeStar Partners, L.P. (filed Nov. 20, 1995) at 21.

⁷ *Id.* (explaining that “If PrimeStar failed, for example, to market or price its services competitively in ‘cabled’ areas, it would simply cede its potential market share to another DBS provider, which would hardly prevent erosion of cable’s market share to DBS.”)

⁸ Comments of TEMPO DBS, Inc. (filed Nov. 20, 1995) at 12.

Existing and potential competitors also seize upon this proceeding as an opportunity to propose a wish list of shackles to be placed on cable's ability to provide and market DBS service.⁹ The Commission should not confuse these efforts to gain a competitive leg up on cable with protecting competition. They would unreasonably inhibit cable operators' ability to respond to consumer demand.¹⁰ As NCTA's initial comments pointed out, a variety of mechanisms are already in place to ensure that competition in the DBS market continues to develop. These competitors have not shown any economic justification or factual predicate for imposing additional constraints.¹¹

II. There is No Need to Expand the Program Access Rules

As demonstrated in NCTA's initial comments, DirecTV and USSB have not shown any difficulty in gaining access to a full panoply of cable programming services. EchoStar reportedly already has lined up 65 channels of programming service.¹² Nevertheless, several commenters seek FCC intervention in this fully competitive programming marketplace in order to tip the scales in their favor. Such intervention is wholly unwarranted.

⁹ DirecTV, for example, comments that the Commission "[s]hould not engage in industrial policy or show favoritism to certain industry participants." Nonetheless, it proposes a laundry list of restrictions on cable that would hobble the industry's ability to market DBS service. Comments of DirecTV, Inc. (filed Nov. 20, 1995) at 7. USSB proposes to impose further restrictions on cable-affiliated DBS providers. Comments of United States Satellite Broadcasting Company, Inc. (filed Nov. 20, 1995) at 6.

¹⁰ See generally Continental Comments at 19-20.

¹¹ See Comments of TEMPO DBS at 19-21; Comments of PrimeStar Partners at 25-28.

¹² Comments of NCTA (filed Nov. 20, 1995) at 12-13.

The Commission has already examined and rejected many of these arguments. For example, the National Rural Telecommunications Cooperative (“NRTC”) ¹³ and EchoStar/DirectSat seek to reopen the Commission’s decisions reached, after thorough consideration, in its program access orders. NRTC, for example, argues again that the FCC should mandate damages for program access violations, and that no exclusivity should be allowed between vertically integrated programmers and DBS operators. EchoStar/DirectSat claims that the program access rules should incorporate certain cost presumptions to benefit DBS providers.¹⁴ But the Commission has already fully considered and rejected these arguments.¹⁵ Now is certainly not the time to reopen those sound conclusions.

EchoStar/DirectSat also claims that the Commission should extend its program access and non-discrimination rules to non-vertically integrated programmers.¹⁶ As described in our initial comments, there is no evidence of a problem justifying this

¹³ Comments of NRTC at 4.

¹⁴ Comments of EchoStar/DirectSat at 53-54.

¹⁵ See, e.g., First Report and Order, 8 FCC Rcd. 3359, 3406 (1993) (recognizing that vendors may take cost differences into account); First Report (Competition), 9 FCC Rcd. 7442, 7532 (1994) (affirming that this issue should be dealt with in the context of individual program access complaints); Video Programming Distribution & Carriage (Exclusive Contract Prohibition), 76 R.R. 2d 1177 (1994) (rejecting NRTC’s challenge to USSB’s exclusive programming agreements); Memorandum Opinion and Order on Reconsideration of the First Report and Order, MM Docket No. 92-265 (rel. Dec. 9, 1994) (rejecting NRTC’s petition to assess damages for program access violations).

¹⁶ Comments of EchoStar Satellite Corp. and DirectSat Corp. (filed Nov. 20, 1995) at 50. See also Comments of BellSouth at 9.

governmental intrusion into the business relationships of programmers. But, in any event, the Commission has no authority to extend the program access rules in this manner.¹⁷ As the plain language of the statute and the legislative history of the provision makes clear, Section 628 of the Cable Act only addresses conduct of vertically integrated programmers.¹⁸

There is no reason for the government to interfere with the dynamic program marketplace based on the paucity of any evidence of abuses in this record.¹⁹ Ample tools exist to combat anti-competitive conduct in particular cases should it occur. But there is absolutely no evidence that additional broad, prophylactic rules are necessary in this area.

III. HITS Should Not Be Restricted

Finally, the Justice Department's comments evidence a fundamental misunderstanding of the nature of HITS service and propose new rules that cannot be justified. HITS has not yet even begun service. Yet the Department's analysis suggests that a "firm, [what it terms a "wholesale DBS provider"] particularly the first mover, will

¹⁷ See NCTA's Reply Comments, CS Docket No. 95-61 (filed July 28, 1995) at 11-17.

¹⁸ The Commission itself has interpreted the statute in this manner, explaining that "Congress further concluded that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel distributors. To address this problem, Congress chose program access provisions targeted toward cable satellite programming vendors in which cable operators have an 'attributable' interest and toward satellite broadcast programming vendors regardless of vertical relationships." First Report and Order, 8 FCC Rcd. 3359, 3366-67 (1993).

¹⁹ See also TEMPO DBS Comments at 24.

be able to obtain monopoly power in the wholesale DBS market.”²⁰ The DoJ comments candidly concede that “[p]redictions as to how these markets may evolve are necessarily imperfect, in light of uncertainty about future changes in technology and market forces.”²¹ Nonetheless, the Department proposes to put the cart before the horse, advocating adoption of a wide range of restrictions on so-called “wholesale DBS” operations for at least five years.

Dr. Owen’s economic analysis underscores the flaws in this analysis. He concludes that “as it is recognized by the Commission in the NPRM at ¶ 61, HITS offers the potential for substantial efficiencies. But the provision of HITS is not a monopoly. It will have to compete with alternative methods of performing the same services, and any DBS provider can offer such service. In particular, TCI has no essential facility over which it could discriminate or inhibit competition.”²² HITS-type service can be provided by other DBS providers, as well as by other satellite services. Indeed, EchoStar and DirectSat have claimed they are “intensely interested in providing wholesale services.”²³ And just this week TVN announced that it was commencing an operation to compete against HITS.²⁴

²⁰ DoJ Comments at 14.

²¹ *Id.* at 18.

²² Comments of Tempo DBS, Inc. (filed Nov. 20, 1995), Declaration of Bruce M. Owen at 3.

²³ EchoStar/DirectSat Comments at 55.

²⁴ “TVN Will Compete with TCI’s HITS”, Multichannel News, Nov. 27 1995 at 2.

Thus, there is no basis for the concern that competing MVPDs will somehow be denied access to this service.

CONCLUSION

For the reasons stated herein, and in our initial comments in this proceeding, the Commission should refrain from imposing additional restrictions on cable operators' participation in DBS. The Commission should not interfere with the workings of the dynamic DBS arena by handicapping cable operators' and programmers' ability to fully compete.

Respectfully submitted,



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November 30, 1995