BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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In The Matter of	)	
	)	
Revision of Rules and Policies for the	)	**IB Docket No. 95-168**
Direct Broadcast Satellite Service	)	**PP Docket No. 93-253**
	)	
To: The Commission	)	

REPLY COMMENTS
OF
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

NATIONAL RURAL
TELECOMMUNICATIONS COOPERATIVE

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Pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission"), the National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Reply Comments in response to the Comments filed in connection with the Notice of Proposed Rule Making ("Notice") concerning the Commission's proposal to amend its Direct Broadcast Satellite ("DBS") service rules.[1/] In its Comments in this proceeding, NRTC generally supported the Commission's pro-competitive proposals for DBS. NRTC pointed out that the vertically-integrated cable programming industry stifles competition in the market for delivery of video programming by competing MVPDs.

[1/] Notice of Proposed Rule Making ("Notice"), 60 Fed. Reg. 55822 (November 3, 1995).

NRTC now reiterates its belief that cable operators and their affiliates must not be permitted to reduce or eliminate the competitive potential of DBS.

I. REPLY COMMENTS

I. Auctions Are Appropriate

1. NRTC believes that Advanced should not be rewarded for its dilatory conduct. Therefore, NRTC concurs with those commenters supporting the Commission's decision in the Advanced proceeding to auction the DBS channels. Auctions should provide a fast, fair and efficient means of assigning these frequencies to the party placing the highest value on them.

2. However, the suggestion made by Continental Cablevision, Inc. ("CCI") that the FCC should impose a spectrum fee on DBS operators which received their authorizations prior to the FCC's auction authority would produce anticompetitive results.[2/] The FCC should not penalize existing DBS operators for playing by the existing rules; if adopted, CCI's proposal would be unfair to existing DBS entities and would decrease their viability as future competitors to cable.

II. The Commission Should Apply Specific Restrictions to Cable Companies and Cable Affiliates

3. NRTC agrees with the Department of Justice, DirecTV, and all others interested in real competition in the MVPD marketplace, that the Commission

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[2/] CCI at 21.

deserves support for its effort to prevent cable entities and their affiliates from minimizing the effect of DBS as a potential competitor to cable.[3] Despite the predictable opposition of the dominant cable companies, the Commission is correct that restrictions are needed on participation by cable operators and their affiliates in the DBS marketplace.[4]

4. In fact, the Department of Justice ("DOJ") declared that the MVPD market today is essentially a series of local monopolies controlled by cable television firms.[5] DOJ concluded that the ability of DBS providers controlled by cable firms to reduce competition at the local level with their own cable system is a real threat to competition in the MVPD marketplace.[6]

5. The attempts by cable companies to characterize their dominant market position as "competitive" are disingenuous.[7] For example, despite their overwhelming dominance in the MVPD market, cable companies portray competition to cable as "robust."[8] DOJ, however, estimates that cable serves over 90% of the

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[3] See, e.g., American Satellite Network at 2; DOJ at 7; DirecTV at 13-14.

[4] Ameritech Corporation at 3; National Cable Television Association, Inc. at 5.

[5] DOJ at 2.

[6] Id.

[7] Time Warner Entertainment at 8.

[8] NCTA at 5.

MVPD customers; DirecTV, Inc. ("DirecTV") estimates that cable serves 94% of the MVPD market, while DBS serves just 1.5% of the MVPD market.[9]

6. Cable companies label the Commission's proposal to adopt particularly stringent standards for cable operators as "more than passing strange."[10] Far from being "strange," the Commission's concern is well-placed and based in marketplace reality. In fact, DOJ recommends that the Commission impose a 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.[11] NRTC agrees with DOJ's analysis and supports its proposed solution.

III. Only Exclusive Arrangements with Cable Operators or Affiliates Should be Prohibited

7. NRTC agrees with the Commission that it should forbid exclusive arrangements between DBS operators and cable companies and their affiliates. However, NRTC also agrees with the many entities that cautioned the Commission against forbidding *all* exclusive arrangements which involve a DBS operator, regardless of the affiliation, size, and nature of the MVPD involved.[12] As DOJ

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[9] DOJ at 2; DirecTV at 3.

[10] Notice, at ¶ 40; NCTA at 5.

[11] DOJ at 9.

[12] See, e.g., Bellsouth at 7; DirecTV at 13-14, 20; Echostar and Directsat ("ED") at 54; MCI at 18; Viacom at 4.

recognized, a DBS operator affiliated with cable systems is likely to offer DBS products and prices that will maximize its aggregate profits in both DBS and cable.[13/] Thus, the Commission is correct to be concerned that cross-subsidization and anticompetitive conduct will result from exclusive arrangements between DBS operators and cable operators or their affiliates. On the other hand, DOJ noted that DBS entrants who are unaffiliated with cable systems can be expected to offer products and set prices in ways that will maximize their profits in the DBS industry alone. [14/] Therefore, NRTC stresses that the Commission's proposed restriction should apply solely to exclusive agreements between DBS operators and cable companies or cable affiliates -- not all MVPD's.

8. NRTC agrees with NYNEX Corporation ("NYNEX") that since only incumbent cable firms have market power, DBS service rules should be aimed against them alone.[15/] Otherwise, as NYNEX points out, the FCC's rules would "balkanize" all other MVPD media by prohibiting relationships among non-cable MVPDs.[16/] NRTC concurs that DBS providers should not be barred or dissuaded

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[13/] DOJ at 5-6.

[14/] DOJ at 5.

[15/] NYNEX at 3.

[16/] Id.

from forming relationships with non-cable entities which might make them better able to compete with cable systems.[17]

9. NRTC also concurs with the view of PrimeStar Partners, L.P. ("PrimeStar") that exclusive arrangements between non-cable affiliated MVPDs and DBS operators promote, rather than hinder, competition from DBS to cable in the MVPD marketplace.[18] As PrimeStar correctly notes, such agreements between DBS operators and non-cable affiliated MVPDs promote investment in the necessary inventory, personnel and marketing required to sell DBS.[19] This is particularly true in the rural locations served by NRTC.

IV. The Program Access Rules Need to be Strengthened

10. The National Cable Television Association, Inc. ("NCTA") asserts that there is no indication that the existing DBS providers have been unable to secure cable programming services that they desire to provide their subscribers.[20] NCTA states that customers are assured access to cable programming through existing laws such as antitrust provisions and the Program Access provisions of the 1992 Cable

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[17] NYNEX at 4.

[18] Primestar at 27.

[19] Id.

[20] NCTA at 3.

Act.[21] NRTC strongly disagrees. As it pointed out in numerous proceedings, including its comments in this proceeding and in the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS 95-61, NRTC has been unable to secure certain desired cable programming controlled by cable entities. As Echostar Satellite Corporation and Directsat Corporation ("Echostar") note in their joint comments, the current Program Access restrictions are inadequate because they permit cable operators to circumvent the rules by channeling programming into unaffiliated programmers and entering into exclusive arrangements with them.[22] NRTC agrees with Echostar and others that the Program Access rules need to be strengthened.[23]

11. Cox Enterprises, Inc. states that there is no risk that vertically integrated programmers would engage in anticompetitive conduct because the rules implementing the Program Access provisions prohibit such conduct.[24] PrimeStar blithely states that "the fact that there have been few complaints under the [Program Access] rules is testament to the fact that access is not a problem."[25] However, Cox, PrimeStar and NCTA conveniently ignore the fact that as long as the

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[21] Id.

[22] ED at 48-49.

[23] ED at 51; Bellsouth at 8.

[24] Cox at 9.

[25] Primestar at 30.

Commission fails to make damages available to a successful complainant, vertically integrated programmers can continue to impose unjustified discriminatory rates with impunity and to retain the overpayments without liability. Program Access requirements will be ineffective so long as violators can refuse to disgorge the fruits of their discrimination.

12. NRTC urges the Commission to exercise its authority under the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act") to order "appropriate remedies" for Program Access violations by vertically integrated programmers who continue to control the market for delivery of video programming. 47 U.S.C. § 628(e)(1). At a minimum, NRTC requests the Commission to permit the recovery of documented overpayments. Otherwise, price discrimination by vertically integrated programmers will continue to go unchallenged.

V. New DBS Permittees Should be Required to Serve Alaska and Hawaii

13. In its Comments, NRTC supported the Commission's proposal to extend DBS service to Alaska and Hawaii. NRTC Comments, page 10. Although 400-600 residents of Alaska receive DBS signals (some with larger than 18" dishes), rural residents of Alaska and Hawaii currently are unable otherwise to obtain DBS service. NRTC agrees with USSB and others that new DBS permittees should be required to serve both states. USSB Comments, page 10.

CONCLUSION

NRTC applauds the Commission's efforts to fend off potential anticompetitive conduct by cable companies which seek to act in concert with related DBS providers. NRTC believes that there will not be full competition in the market for delivery of video programming until the Commission prohibits exclusive arrangements between vertically-integrated programmers and non cable operator distributors in areas unserved by cable. Further, the rules must provide for the recovery of damages by those distributors clearly injured due to violations of the Program Access rules. At a bare minimum, injured parties should be able to recover the amount of their demonstrated overpayments.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to consider these Reply Comments and to revise its rules in accordance with the views expressed herein.

Respectfully submitted,

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