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May 3, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

EX PARTE

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CS Docket 96-46, Open Video Systems (OVS)

On May 2, 1996, TELE-TV and Bell Atlantic met with Meredith Jones, John Logan, Bill Johnson, Mary Ellen Burns, Gary Laden, Rick Chessin, Lynn Crakes, and Steve Broeckaert of the Cable Services Bureau. TELE-TV was represented by Karen Stevenson-General Counsel, Mindy Herman-Senior Vice President and Austin Schlick-outside counsel for TELE-TV. The undersigned was present in the meeting representing Bell Atlantic.

The purpose of the meeting was to discuss the program access issues raised in TELE-TV's reply comments in the above-captioned proceeding. A copy of the material distributed and discussed in the meeting is attached.

Please call me if you have any questions concerning the meeting. This notice is being filed today due to the late hour at which the meeting ended.

Sincerely,

Marie Breslin

Attachment

cc: M. Jones
J. Logan
B. Johnson
M. Burns
G. Laden
R. Chessin
L. Crakes
S. Broeckaert

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OVS AND PROGRAM ACCESS

May 2, 1996

THE NEED FOR NON-DISCRIMINATORY ACCESS

Similar Programming Packages

- "[C]urrent cable subscribers are more likely to switch to the services of other MVPDs in response to a price increase if those other MVPDs offer bundles of attributes comparable to the attributes offered by the cable operator." 11 FCC Rcd at 2125.

- DBS adopts differentiation strategy, not price competition

Cost

- Programming accounts for about one-third of total costs

- Inability to secure discounts hampers MMDS

THE CURRENT RULES

- Protect MVPDs
- Cable-Affiliated Programmers
- Cable Programming
- Satellite Delivery

PROGRAMMER MARKET POWER

Broadcast Programming

- 64% of cable television viewing
  - 3 major networks account for half of all cable viewing
- 6 in 10 cable subscribers would cancel service if broadcast unavailable

Other Programming

- Cable entertainment and news services
- National and regional sports

Incentives

- Networks entering multichannel distribution (e.g., GE/NBC, News Corp./Fox)
- Broadcast station owners affiliated with cable

CABLE MONOPSONY POWER

Monopoly Status

- Cable market power "undisputed." Turner, 910 F. Supp. at 740 (D.D.C. 1995).
- 91% of MVPD subscriptions

Buying Power

- MSOs exercise "undue market power . . . as compared to that of . . . video programmers." 1992 Cable Act § 2(a)(2).
- Price differentials of up to 90%

Incentives

- "An incumbent may attempt to disadvantage its rivals by raising their costs or decreasing their access to a needed production input." 11 FCC Rcd at 2155.
- "MSOs may have used their programming purchasing power to deter the entry of new cable programmers or competitive alternatives to cable." 9 FCC Rcd at 7517.
- Waterman paper (47 Fed. Com. L.J. 511 (1995)).

DISCRIMINATION AGAINST TELE-TV

Broadcast retransmission consent

- cash premiums
- channel set-asides
- joint ventures
- failure to respond to retransmission requests

Non-vertically-integrated cable programming

- "new-entrant" or "technology" surcharges
- denial of discounts, marketing and other support

Vertically integrated cable programming

- refusal to negotiate
- regional non-satellite delivery

RECOMMENDED COMMISSION ACTION

Extension of Rules

- All programmers
- All programming
- All delivery methods

Clarification of Rules

- OVS programming providers are MVPDs
  - "[A]n entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming." 47 C.F.R. § 76.1000(e).
- Scope of satellite delivery

THE COMMISSION'S POWERS

Section 2(a)

- Commission's power extends to any regulation that is "reasonably ancillary to the effective performance of [the Commission's] various responsibilities." Southwestern Cable Co., 392 U.S. at 178 (1968); Southwestern Bell Telephone Co., 19 F.3d at 1479 (D.C. Cir. 1994).

- Commission has authority to regulate "with a view not merely to protect but to promote the objective for which [it] has been assigned jurisdiction." Midwest Video Corp., 406 U.S. at 667 (1972).

Section 4(i)

- "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."

- A "necessary and proper clause" to effectuate specific provisions of Act. New England Tel. & Tel. Co., 826 F.2d at 1108 (D.C. Cir. 1987).

SECTION 653

Congressional Purposes

- "[T]o promote competition, to encourage investment in new technologies and to maximize consumer choice of services that best meet their information and entertainment needs." S. Rep. 230 at 172.

- "[E]ncourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets." Id. at 178.

- "[E]ncourage telephone company entry and spur competition and new investment." OVS NPRM ¶ 2.

Objectives of OVS Rulemaking

- "[P]romote Congress's goals of flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice." Id. ¶ 4.

- Section 653(b)(1) establishes minimum contents of rules, not maximum (except for channel set-aside)

SECTION 628

Congressional Objectives

- Curb "undue market power" of cable and promote competition
  - "[E]ncourage competition . . . with the overwhelming majority of cable systems in this country which are monopolies and not subject to effective competition." S. Rep. No. 92, at 9.
  - "Section 628 is intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to cable systems . . . ." 8 FCC Rcd at 3360.
- Provide new entrants access to critical programming
  - "In enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public." 8 FCC Rcd at 3362.
  - "The program access requirements of section 628 have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors." 8 FCC Rcd at 3365.
- Satellite-delivered programming used as proxy for national and regional programming. S. Rep. No. 92, at 28.

Commission Implementation

- "[T]he Commission will continue its efforts to eliminate barriers that delay entry by competitive firms." 11 FCC Rcd at 2124.