

**ESPN**® ESPN, INC.  
ESPN PLAZA  
BRISTOL, CT 06010-7454  
(203) 585-2000

MICHAEL J. PIERCE  
COUNSEL  
(203) 584-4493  
(203) 585-2423 FAX

July 3, 1996

RECEIVED

JUL 05 1996

FCC MAIL ROOM

William F. Caton  
Acting Secretary  
Office of the Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

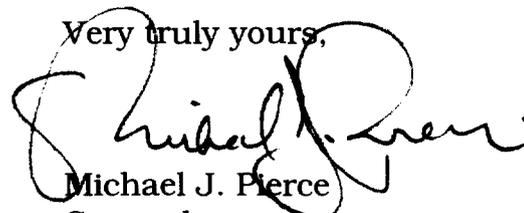
Re: *Open Video Systems: FCC 96-249, CS Docket No. 96-46*

Dear Mr. Caton:

Pursuant to 47 C.F.R. §1.429, enclosed is one original and eleven copies of a Petition for Reconsideration submitted by ESPN, Inc. in the above-referenced proceeding. (Per the directions in Paragraph 93 of the original NPRM, an additional copy has been delivered to Larry Walke of the Cable Services Bureau and to International Transcription Services.) In addition, enclosed is a "Stamp and Return" copy of the Petition. Please date stamp this copy and return it to me at the address listed above.

Thank you for your help in this matter. Please do not hesitate to give me a call (860-584-4493) if there are any questions regarding this filing.

Very truly yours,

  
Michael J. Pierce  
Counsel

/sc

cc: Larry Walke, FCC  
International Transcription Services

THE TOTAL SPORTS NETWORK®

No. of Copies rec'd  
List ABOVE

0/11

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

**ORIGINAL**

RECEIVED

JUL 05 1996

FCC MAIL ROOM

In re: )  
)  
Implementation of Section 302 of ) CS Docket No. 96-46  
the Telecommunications Act of 1996 )  
)

**ESPN, INC. PETITION FOR RECONSIDERATION**

Edwin M. Durso  
David R. Pahl  
Michael J. Pierce  
ESPN, Inc.  
ESPN Plaza  
Bristol, Connecticut 06010-7454

July 5, 1996

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

RECEIVED

JUL 05 1996

FCC MAIL ROOM

In re: )  
)  
Implementation of Section 302 of ) CS Docket No. 96-46  
the Telecommunications Act of 1996 )  
)  
To the Commission: )

DOCKET FILE COPY ORIGINAL

**ESPN, INC. PETITION FOR RECONSIDERATION**

ESPN, Inc. ("ESPN") hereby submits this Petition for Reconsideration in response to the Commission's Second Report and Order in the above captioned proceeding.<sup>1</sup> ESPN respectfully petitions the Commission to modify slightly several of the rules recently promulgated in this proceeding. ESPN's proposed rule modifications simply clarify the notion that adoption of an open video system ("OVS") regulatory structure must not in any way diminish a programming service's rights as a copyright proprietor *vis-à-vis* the OVS operator, the video programming provider ("VPP"), or any other entity that delivers copyrighted video programming to subscribers.

Overall, ESPN believes strongly, and believes that the Commission intended, that each programming distribution arrangement, even those between an OVS operator and a VPP, must be undertaken only in compliance with the specific terms and conditions of a copyright license agreement with the affected programming service. The OVS structure in and of itself cannot become the means by which distributors circumvent the rights of a

---

<sup>1</sup> In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, Second Report and Order (Adopted May 31, 1996; Released June 3, 1996) ("Second Report and Order").

programming service. ESPN submits its proposed rule modifications as a means of clarifying this proposition.

**I. Channel Sharing Arrangements Must Only Be Undertaken With the Explicit Consent of the Affected Programming Service**

In the Second Report and Order, the Commission affirmed its tentative conclusion “that nothing in our regulations concerning channel sharing should be construed to impair the rights of program services.”<sup>2</sup> The Commission expanded on this conclusion by stating that “a program vendor will still possess the right to negotiate over specific terms and conditions with each video programming provider.”<sup>3</sup> The Commission goes on, however, to state that it does “not believe that additional consent is necessary for the open video system operator to place the programming on a shared channel.”<sup>4</sup> ESPN does not disagree with either of these statements on its face; read together, however, there is a significant possibility that a VPP may misinterpret the Commission’s intent.

ESPN is concerned that the rules may be read to mean that once more than one VPP has negotiated a program license agreement with a programming service, the VPPs are then free to enter into a shared channel arrangement with the OVS operator, even if the program license agreements do not address a channel sharing arrangement. This would be inconsistent not only with the programming service’s rights as a copyright proprietor, but also with the Commission’s earlier position:

“Program vendors and licensors remain free to license or not to license their programming for shared use by multiple video programming providers. We tentatively conclude that each video provider that wants to provide a program

---

<sup>2</sup> Second Report and Order at para. 103.

<sup>3</sup> Id.

<sup>4</sup> Id.

service to subscribers that will be carried on a shared channel must first obtain permission from the program service to do so."<sup>5</sup>

ESPN believes that explicit permission must be granted to each VPP by the programming service in order for the VPP to participate in a channel sharing arrangement with the OVS operator. Therefore, in order to clarify the matter, ESPN proposes the following modification to the Commission's rule (new language underlined):

47 C.F.R. f 76.1503(c)(2)(iii) (note): Each video programming provider offering a programming service that is carried on a shared channel must have the contractual permission of the video programming service to so offer the service to subscribers. The placement by an open video system operator of a programming service on a shared channel, however, is not subject to further approval of the video programming service or vendor.

If -- and only if -- the VPPs that will be involved in a channel sharing relationship have obtained the explicit contractual consent of the programming service, ESPN agrees that it is not necessary for the OVS operator to itself obtain separate consent from the programming service in order to require the shared channel arrangement.

## **II. Joint Marketing Arrangements Must Similarly Be Subject to Approval by the Affected Programming Service**

Similar to the channel sharing arrangements discussed above, ESPN firmly believes that a programmer must have the right to approve all joint marketing or co-packaging arrangements for its programming service. The Commission tentatively concluded in the NPRM that subsection 653(b)(1)(B) of the 1996 Act permits an OVS operator and its affiliates to "enter into agreements to market to subscribers the programming services selected for carriage by unaffiliated video programming

---

<sup>5</sup> In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, Report and Order and Notice of Proposed Rulemaking (Adopted March 11, 1996; Released March 11, 1996) ("NPRM"), para. 41(emphasis added).

providers.”<sup>6</sup> The Commission affirmed this tentative conclusion in the Second Report and Order.<sup>7</sup> However, the Commission has not to date addressed a programming service’s rights to approve these co-packaging arrangements.

ESPN urges the Commission to clarify, in a manner similar to that used in the channel-sharing context, that these co-packaging or joint marketing arrangements may only be undertaken with the explicit consent of the affected programming service. As ESPN noted in its Reply Comments, program license agreements frequently contain heavily negotiated provisions related to the marketing of a programming service, including specific packaging parameters and trademark use guidelines. In addition, programming services themselves are often under contractual restraints as to the use of program vendor trademarks (*e.g.*, the titles of specific licensed programs) and the names and likenesses of persons appearing in programs. The approval of joint marketing or co-packaging arrangements, therefore, is of substantial importance to a programming service attempting to fulfill the obligations of its own program license agreements. Moreover, a programming service’s rights as a trademark holder or licensee may be severely compromised if there is no right to approve a joint marketing or co-packaging arrangement.

ESPN proposes that the Commission add the following “note” to its rules regarding co-packaging arrangements. This note is very similar to the one adopted by the Commission for use in the channel sharing context:

Note to 47 C.F.R. 1503(c)(3): Each video programming provider offering a programming service to subscribers pursuant to a co-packaging arrangement must

---

<sup>6</sup> NPRM at p. 13.

<sup>7</sup> Second Report and Order, para. 108.

have the contractual permission of the video programming service to so offer the service to subscribers.

This proposal is consistent with the Commission's statement in the Second Report and Order that "co-packaging arrangements . . . must be purely voluntary among the parties involved."<sup>8</sup> There is nothing in the record to indicate that a programming service is not properly considered one of the "parties involved" in such an arrangement. In fact, given the contractual obligations most programming services operate under *vis-à-vis* their own program vendors (and obligations under trademark law), a co-packaging arrangement that does not require the approval of the affected programming service could have a serious and negative impact on that programmer.

#### **SUMMARY**

For the reasons stated above, ESPN respectfully petitions the Commission to modify certain of its rules promulgated in the recent OVS proceeding. The minor modifications proposed by ESPN will help insure that programmers distributing their

---

<sup>8</sup> Id.

services via the OVS regulatory structure do not unexpectedly experience a diminution of their rights as copyright and trademark proprietors.

Respectfully submitted,

ESPN, Inc.

By

  
Edwin M. Durso

David R. Pahl

Michael J. Pierce

ESPN, Inc.  
ESPN Plaza  
Bristol, Connecticut 06010-7454  
July 5, 1996