

DOCKET FILE COPY ORIGINAL

ORIGINAL

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

RECEIVED

AUG 20 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Annual Assessment of the Status of)	CS Docket No. 97-141
Competition in Markets for the Delivery)	
of Video Programming)	

REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its reply comments in response to the Commission's *Notice of Inquiry* in the above-captioned proceeding.

The initial comments filed in this proceeding by WCA and a variety of alternative multichannel video programming distributors ("MVPDs") demonstrate why the current regulatory framework for program access must be reevaluated and modified to address recent marketplace and technological developments. For example, Bell Atlantic and Ameritech, who are providing "hardwire" competition to incumbent cable operators in New Jersey and throughout the Midwest, respectively, have documented their difficulties in obtaining programming and have asked the Commission to do whatever is necessary to expand the program access rules to encompass *all* programmers, regardless of whether they are vertically-integrated or use satellite technology to deliver their product.^{1/} DIRECTV has noted that

^{1/} See, Comments of Bell Atlantic and NYNEX, CS Docket No. 97-141, at 6-7 (filed July 23, 1997); Comments of Ameritech New Media, Inc., CS Docket No. 97-141, at 14-18 (filed July

No. of Copies rec'd
List ABCDE

089

increased consolidation within the cable industry “raises vast opportunities for anticompetitive harm to the MVPD industry,” and has urged the FCC to alleviate the problem by closing the program access loopholes noted above.^{2/} BellSouth Corporation, which through its subsidiaries is providing or will soon provide wired and wireless cable service within its telephone service area, has described in detail why current market conditions militate against full and fair access to programming for all MVPDs, and has asked for modifications of the 1992 Cable Act to address the problems described by WCA and others.^{3/}

Moreover, cable’s competitors have taken their case directly to Capitol Hill, and as a result Congress is considering whether to introduce legislation to close the program access

23, 1997); Comments of the United States Telephone Association, CS Docket No. 97-141, at 7-8 (July 23, 1997). In particular, Bell Atlantic describes the dilatory tactics of Rainbow Programming Holdings, Inc. which gave rise to Bell Atlantic’s successful program access complaint with respect to SportsChannel New York. *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc.*, CSR-4983-P, DA 97-1452, at ¶ 8 (CSB, rel. July 11, 1997). The Commission thus should not underestimate the ability of vertically-integrated cable programmers to delay selling their product to cable’s competitors for extended periods of time. In that regard, WCA and a number of alternative MVPDs have expressed support for Ameritech’s pending Petition for Rulemaking on program access procedures (RM-9097), or have otherwise urged the Commission to expedite the resolution of program access complaints. *See*, Comments of The Wireless Cable Association International, Inc., CS Docket No. 97-141, at 12, n.41 (filed July 23, 1997) [the “WCA Comments”]; Comments of BellSouth Corporation *et al.*, CS Docket No. 97-141, at 16 (filed July 23, 1997) [the “BellSouth Comments”]; Comments of The National Rural Telecommunications Cooperative, CS Docket No. 97-141, at 10-12 (filed July 23, 1997); Comments of Optel, Inc., CS Docket No. 97-141, at 5-6 (filed July 23, 1997).

^{2/} Comments of DIRECTV, Inc., CS Docket No. 97-141, at 4-6 (filed July 23, 1997). *See also*, Comments of Echostar Communications Corporation, CS Docket No. 97-141, at 16-17 (filed July 23, 1997).

^{3/} BellSouth Comments at 3-17.

loopholes left open by the 1992 Cable Act.^{4/} Indeed, the Chairman of the House Telecommunications Subcommittee, Rep. Billy Tauzin, has indicated that the Subcommittee will soon begin new proceedings to investigate whether Congress should amend the 1992 Cable Act to address the problems cited above.^{5/} In other words, Congress is beginning to recognize what cable's competitors have known for some time: given recent marketplace and technological developments, the current regulatory framework for program access is no longer adequate to prevent cable operators from keeping valuable programming away from their competitors.

Nonetheless, Home Box Office, Inc. ("HBO") insists that the FCC's program access rules have achieved their objective and thus are no longer necessary. In support, however, HBO only cites (1) the fact that HBO itself sells programming to non-cable MVPDs; (2) the fact that "very few complaints have been filed seeking access to vertically-integrated programming and even fewer have been decided against the programmer"; and (3) the channel lineups of three DBS operators, one wireless cable operator, one cable overbuilder, one OVS system and one LMDS system.^{6/}

While HBO deserves praise for its efforts to sell its programming to non-cable MVPDs, WCA believes that HBO misunderstands the nature of the problem: the "small" number of program access complaints filed at the Commission is attributable to the fact that the program

^{4/} See, Hearn, "Program Access Focus of House Hearing," *Multichannel News*, pp. 1, 55 (Aug. 4, 1997).

^{5/} Glick, "Will Congress Revamp Program-Access Rules?" *Cable World*, p.12 (Aug. 4, 1997).

^{6/} Comments of Home Box Office, Inc., CS Docket No. 97-141, at pp. 3-9, Attachment 1 (filed July 23, 1997).

access statute specifically *excludes* nonvertically-integrated programmers, which according to the Commission represent more than half the total number of satellite-delivered programming services.^{7/} In other words, the number of program access complaints merely reflects that the rules *are not broad enough*, and thus must be expanded to redress the anticompetitive behavior which has now been well documented before the Commission and Congress.^{8/}

^{7/} See, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133, FCC 96-496, at ¶ 142 (rel. Jan.2, 1997) [noting that in 1996 only 44% of satellite-delivered programming providers were vertically- integrated].

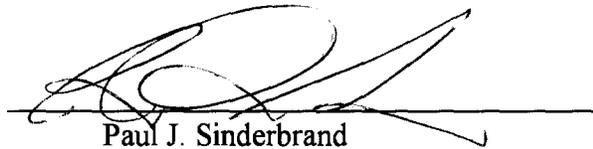
^{8/} WCA further submits that the HBO's extremely limited random sample of alternative MVPD channel lineups hardly constitutes the comprehensive study necessary to sustain its argument, particularly in light of the other evidence in this proceeding indicating that HBO's conclusions about program access are wrong. Finally, though HBO asserts that the FCC's current program access rules impose "significant costs," it does not offer any examples of whether and/or how those costs have imposed any material economic burdens on programmers.

In sum, the record before the Commission in this proceeding demonstrates that a reevaluation and modification of the regulatory framework for program access is in order. WCA urges the Commission to initiate that process as soon as possible.

Respectfully submitted,

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By:

A handwritten signature in black ink, appearing to be "Paul J. Sinderbrand", written over a horizontal line.

Paul J. Sinderbrand
Robert D. Primosch

WILKINSON, BARKER, KNAUER & QUINN
2300 N Street, N.W.
Suite 700
Washington, D.C. 20037-1128
202/783-4141

Its Attorneys

August 20, 1997

CERTIFICATE OF SERVICE

I, Sheryle Price, hereby certify that on this 20th day of August, 1997, caused to be delivered the foregoing Reply Comments by first class mail, postage prepaid to:

Henry Goldberg
W. Kenneth Ferree
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005

Andrew R. Raul
Satellite Broadcasting &
Communications Association
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

Leslie A. Vial
1320 North Courthouse Road
8th Floor
Arlington, VA 22201
Attorney for Bell Atlantic

Steven T. Berman
National Rural Telecommunications
Cooperative
2201 Cooperative Way, Suite 400
Woodland Park
Herndon, VA 20171

Richard G. Warren
1095 Avenue of the Americas
Room 3831
New York, NY 10036
Attorney for NYNEX Telephone Companies

Jack Richards
Paula Deza
Keller and Heckman, LLP
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001

Deborah H. Morris
Ameritech New Media, Inc.
300 South Riverside Plaza
Suite 1800
Chicago, IL 60606

Gary M. Epstein
James H. Barker
Nandam M. Joshi
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505

Lawrence R. Sidman
Jessica A. Wallace
Verner, Liipfert, Bernhard, McPherson &
Hand, Chtd.
901-15th Street, N.W., Suite 700
Washington, D.C. 20005

Wallace F. Tillman
National Rural Electric Cooperative
Associaton
4301 Wilson Boulevard
Arlington, VA 22203-1860

Larry Goldberg
Director of Media Access
The WGBH Educational Foundation
125 Western Avenue
Boston, MA 02134

Bonnie Richardson
Susan McDermott
Motion Picture Association of America
1600 Eye Street, N.W.
Washington, D.C. 20006

William J. Burhop
Executive Director
Independent Cable & Telecommunications
Association
5335 Wisconsin Avenue, N.W., #750
Washington, D.C. 20015

Julie H. Carroll
Director of Governmental Affairs
American Council of the Blind
1155 15th Street, N.W., Suite 720
Washington, D.C. 20005

Sid Amira
Chairman and Chief Executive Officer
PrimeTime 24
153 East 53rd Street
New York, NY 10022

Andrew R. Raul
Senior Vice President
Satellite Broadcasting & Communications
Association
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

James Baller
Lana Meller
The Baller Law Group
1820 Jefferson Place, N.W.
Washington, D.C. 20036

Helen Harris
RP International & Theatre Vision
P. O. Box 900
Woodland Hills, CA 91365

Dave Wheelihan
Montana Electric Cooperatives'
Association
501 Bay Drive
P. O. Box 1306
Great Falls, Montana 59403

Jeffrey Hops
Alliance for Community Media
666 11th Street, N.W., Suite 806
Washington, D.C. 20001

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
Brooks, Pierce, McLendon, Humphrey &
Leonard, L.L.P.
Suite 1600
First Union Capitol Center
P. O. Box 1800
Raleigh, NC 27602

Quincy Rodgers
Faye Morrison
General Instrument Corporation
Two Lafayette Centre
1133 21st Street, N.W., Suite 405
Washington, D.C. 20036

Donna N. Lampert
Sally Everett Williamson
James J. Valentino
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Jeffrey L. Sheldon
UTC
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

Michelle Hershel
FECA
2916 Apalachee Parkway
P. O. Box 590
Tallahassee, FL 32302

Rexford J. Carpenter
Nebraska Rural Electric Association
800 South 13th Street, Box 82048
Lincoln, NE 68501

Margaret Rockwell Pfanstiehl, Ed.D.
Coalition Chair
The National Coalition of Blind and
Visually Impaired Persons for Increased
Video Access
426 Branch Drive
Silver Spring, MD 20901-2617

Donald J. Evans, J.D.
Evans & Sill
1627 I Street, N.W.
Washington, D.C. 20006-4007

Barry J. Cronin
62 Pierpont Street 6B
New York, NY 11201

David H. Pierce
Kaleidoscope Television
1777 N.E. Loop 410, Suite 300
San Antonio, TX 78217

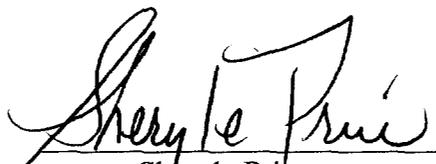
Mark Glaess
Minnesota Rural Electric Association
11640 73rd Avenue N
Maple Grove, MN 55369

Robert J. Sachs
Margaret A. Sofio
Viveca T. Kwan
The Pilot House
Lewis Wharf
Boston, MA 02110
Attorneys for US West, Inc.

Brenda L. Fox
Gregory L. Cannon
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036
Attorneys for US West, Inc.

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
Loretta P. Polk
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
Counsel for the National Cable Television
Association, Inc.

Eric E. Breisach
Christopher C. Cinnamon
Kim D. Crooks
Howard & Howard
107 W. Michigan Avenue, Suite 400
Kalamazoo, Michigan 49007
Attorneys for the Small Cable Business
Association



Sheryle Price