DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

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KAREN A. POST
DIRECT DIAL 202-776-2541
kpost@dlalaw.com

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. · SUITE 800 · WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 · FACSIMILE 202-776-2222

ONE RAVINIA DRIVE · SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

February 23, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Reply Comments of Comcast Corporation, CS Docket No. 97-248, RM No. 9097

Dear Ms. Salas:

Please accept for filing the enclosed original and eleven copies of the Reply Comments of Comcast Corporation in the above-referenced proceeding. We are filing eleven copies so that each Commissioner can receive a personal copy of the Reply Comments. As requested in the Notice of Proposed Rulemaking, we are also delivering a copy of the Reply Comments to Deborah Klein of the Cable Services Bureau, and to the Commission's copy contractor, International Transcription Services, Inc.

If you have any questions regarding this filing, please contact me.

Sincerely,

Karen Post

Karen A. Post

Enclosures

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FEB 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	CS Docket No. 97-248
and Competition Act of 1992	)	
	)	RM No. 9097
Petition for Rulemaking of	)	
Ameritech New Media, Inc.	)	
Regarding Development of Competition	)	
and Diversity in Video Programming	)	
Distribution and Carriage	)	

REPLY COMMENTS OF COMCAST CORPORATION

David J. Wittenstein
Karen A. Post
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Counsel for Comcast Corporation

Dated: February 23, 1998

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SUMMARY OF ARGUMENT

In these reply comments, Comcast corrects numerous factual inaccuracies entered into the record by other commenters about a pending program access complaint proceeding in which Comcast is a defendant. Although that case should be litigated in its proper forum, and not in this rulemaking, Comcast is compelled to correct the record in the instant proceeding.

The plain language of the program access statute, supported fully by its legislative history, clearly demonstrates that Congress intentionally limited the scope of the program access law to satellite-delivered programming. The Commission, therefore, has no jurisdiction to extend the program access rules to cover programming that is not satellite-delivered. In addition, the Commission would encounter a dangerous and slippery slope if it tried to regulate terrestrially-delivered programming under an "evasion" theory.

Congress limited the program access law for a very important public policy reason -- to encourage, rather than burden, the development of new local and regional programming services, which are frequently distributed terrestrially. The Commission has regularly supported the development of local and regional services to promote program diversity and serve local needs. Consistent with this important public policy, the Commission should not recommend that Congress amend the program access statute to include terrestrially-delivered programming services.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	CS Docket No. 97-248
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Distribution and Carriage	)	

REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast"), by its counsel, submits these reply comments in connection with the Commission's above-referenced rulemaking proceeding on the program access rules.

1. Comcast Must Correct the Factual Inaccuracies Contained in Several Comments About Comcast's Pending Program Access Complaint Proceeding.

Comcast is a defendant in a program access case currently pending before the Commission.[1/] That dispute should be litigated in its proper forum (in CSR-5112-P), rather than in this rulemaking proceeding. However, a number of commenters in this proceeding have put before the Commission "factual" representations and their own conclusions of facts and law relevant to that pending matter. Comcast is concerned that these comments are prejudicial to its

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[1/] Comcast Corporation, Comcast-Spectacor, L.P. and Philadelphia Sports Media, L.P. (collectively, the "Comcast Defendants") are defendants in DirecTV, Inc. v. Comcast Corporation et al., CSR-5112-P.

interests in the pending program access complaint proceeding.[2] Therefore, rather than leave these matters unrebutted, Comcast is compelled to set the record straight.[3]

On October 1, 1997, Philadelphia Sports Media, L.P. launched a new regional programming service in the Greater Philadelphia area entitled Comcast SportsNet ("CSN").[4] The programming on CSN focuses mainly on Philadelphia area sports and consists primarily of live, locally-produced original programming, such as sports talk shows, call-in sports shows, sports news shows and news update shows.[5] CSN programming includes, on average, approximately 11½ hours per day (including repeat shows) of original, locally-produced programming of local interest.[6] In addition, CSN programming includes coverage of games of the Philadelphia Flyers, 76ers and Phillies,[7] and other local professional and college sports teams.[8] CSN is a brand new service. It is vastly different -- in brand, ownership, management,

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[2] Comcast reminds commenters and the Commission that the program access complaint proceeding is a restricted proceeding under the Commission's ex parte rules, and that no one is permitted to lobby the Commission about that matter.

[3] For more information than Comcast can provide in this brief summary, Comcast refers interested parties to the Comcast Defendants' pleadings in CSR-5112-P.

[4] Affidavit of Sam Schroeder ("Schroeder Affidavit"), attached as Exhibit 4 to the Comcast Defendants' Answer to and Request for Dismissal of Program Access Complaint ("Comcast Defendants' Answer"), filed in DirecTV, Inc. v. Comcast Corporation et al., CSR-5112-P, at ¶¶ 2, 5.

[5] See Schroeder Affidavit at ¶ 3.

[6] Cf. Schroeder Affidavit at ¶ 3 (The amount of original, locally-produced programming on CSN has increased since Mr. Schroeder executed the Schroeder Affidavit).

[7] Additionally, a significant number of Flyers, 76ers and Phillies games are available on broadcast television, including, for the first time in years, 22 games of the Philadelphia 76ers. Schroeder Affidavit at ¶ 13.

[8] Schroeder Affidavit at ¶ 4.

and content -- from both SportsChannel Philadelphia, a now-defunct satellite-delivered regional programming service that provided a limited number of the games of the Flyers, 76ers and Phillies over a generic, national sports-oriented backdrop service, and PRISM, a now-defunct terrestrially-delivered regional programming service that provided almost twice as many games of the Flyers, 76ers and Phillies as SportsChannel Philadelphia, and also provided movies and other entertainment-oriented programs.[9]

CSN launched for the first time in October 1997. The service did not telecast before that date, under the Comcast SportsNet name or any other name.[10] CSN is -- and always has been -- a terrestrially-delivered service.[11] It did not "move" or "switch" or "migrate" from a satellite.[12] It was never on a satellite.[13] It is being delivered terrestrially because, given its limited geographic service area, it is significantly less expensive to distribute the service

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[9] Schroeder Affidavit at ¶¶ 9-12. Consumers Union, Consumer Federation of America and Media Access Project incorrectly assert (at 5) that "[f]or over two years, DIRECTV provided Comcast's Philadelphia-based regional sports programming, obtained via satellite." (first emphasis added; second emphasis in original). As shown, that is clearly wrong because Comcast has never owned a satellite-delivered regional sports network in Philadelphia. DirecTV's claim (at 11) that "Comcast SportsNet replaced SportsChannel Philadelphia" is also wrong for the reasons just stated. See also BellSouth Corporation, BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. Comments at 21 (same).

[10] Schroeder Affidavit at ¶ 2.

[11] Schroeder Affidavit at ¶ 6.

[12] See DirecTV Comments at 5 (wrongly stating that Comcast "migrated" programming from satellite to terrestrial delivery); The Wireless Cable Association International, Inc. ("WCA") Comments at 19, 21, 23 (same); see also WCA Comments at 23 (WCA states that "Comcast SportsNet is now a terrestrially-delivered service" (emphasis added), falsely implying that at one time it was not a terrestrially-delivered service).

[13] Schroeder Affidavit at ¶ 6.

terrestrially than by satellite.[14] In fact, CSN is being distributed, at substantial cost savings, over the same microwave equipment that had been used for the distribution of PRISM.[15]

CSN has been offered to all terrestrial distributors in the Greater Philadelphia area that previously distributed PRISM,[16] and is being carried by the vast majority of them. It has not been offered to any DBS operator, including PRIMESTAR,[17] a company in which Comcast has a financial interest.[18] However, contrary to the assertions of DirecTV (at 11, 12), it is completely within the ability of DBS operators to telecast all the Flyers, 76ers and Phillies games to their subscribers outside the Philadelphia market.[19] The sports leagues -- not the Comcast Defendants -- control all telecasting rights outside the Philadelphia market, and DBS operators can -- and do -- acquire both telecasting rights to games and access to game feeds for out-of-market distribution by contacting the relevant sports leagues.[20]

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[14] Schroeder Affidavit at ¶ 8.

[15] Schroeder Affidavit at ¶¶ 8(c).

[16] Schroeder Affidavit at ¶¶ 5, 8(c).

[17] Of course, if it is finally determined that CSN must be made available to DirecTV, it will also be made available to PRIMESTAR.

[18] Moreover, contrary to DirecTV's assertion (at 10-11), Comcast is far from "the dominant MSO" in the Philadelphia area. Suburban Cable TV, a Lenfest subsidiary, serves approximately three times as many cable subscribers in the Philadelphia area as Comcast.

[19] Supplement to Comcast Defendants' Answer, filed in DirecTV, Inc. v. Comcast Corporation et al., CSR-5112-P, at 3-4 and Exhibit A (demonstrating that, in November and December 1997, DirecTV telecast all 27 76ers games and 17 of the 26 Flyers games played in those months to its out-of-market subscribers, and that DirecTV could have carried all the Flyers games had it so chosen and made arrangements with the NHL).

[20] See Schroeder Affidavit at ¶ 14; Supplement to Comcast Defendants' Answer, at Exhibit B.

Finally, a few commenters quote an article that was published in Vanity Fair regarding an interview with Comcast's President, Brian Roberts.[21] As demonstrated in Comcast's filings in the contested proceeding, this article is irrelevant and mischaracterizes Mr. Robert's remarks.[22]

2. The Plain Language of the Statute Reveals Congressional Intent to Limit the Scope of the Program Access Law to Programming Delivered by Satellite.

It is a well-established principle of statutory construction that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[23] The program access statute could not be any more clear or unambiguous -- it applies only to "satellite cable programming" and "satellite broadcast programming." Congress used these phrases in Section 628 no fewer than eighteen (18) times each. A review of the plain language of the statute, therefore, should be "the end of the matter."

Nonetheless, some commenters urge the Commission to read the word "satellite" out of the statute. They seek, through a variety of routes, to show that Section 628(b), on its face,

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[21] DirecTV Comments at 11-12; WCA Comments at 21; BellSouth Comments at 21; RCN Telecom Services, Inc. Comments at 13.

[22] The article refers to a "loophole" in "the 1996 Telecommunications Act" [sic] referring to the provision in the 1992 Cable Act that subjects only satellite-delivered programming to the program access rules. The word "loophole," which commenters attribute to Mr. Roberts, was the creation of the article's author, and was not used by Mr. Roberts in the interview. See Comcast Defendants' Answer at 10 n.13. Moreover, the phrase "corner the market" was also the reporter's phrase, and Mr. Roberts used the phrase only to react to and dispute the reporter's assertion.

[23] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). See also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

applies to terrestrially-delivered programming, if the programming used to be distributed via satellite.[24] Section 628(b) states:

> It shall be unlawful for a cable, [or] a satellite cable programming vendor in which the cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers.[25]

These commenters ignore the fact that Section 628(b) is limited to "satellite cable programming," which by definition must be programming that "is distributed via satellite . . . ."[26] Programming that is delivered terrestrially -- even if it used to be distributed by satellite -- simply does not satisfy the definition of "satellite cable programming." The statute unambiguously applies only to programming that is distributed by satellite, and no amount of wishful thinking can transform terrestrially-delivered programming into "satellite cable programming" in a manner consistent with the law.[27]

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[24] DirecTV Comments at 13-17; BellSouth Comments at 22-24; WCA Comments at 22-23; CU Comments at 3, 4-5; RCN Comments at 14-15; Bell Atlantic Comments at 9-10.

[25] 47 U.S.C. § 548(b) (emphasis added).

[26] 47 U.S.C. § 605.

[27] DirecTV acknowledges the limitation in the statute to "satellite cable programming," but only in its discussion regarding Section 628(c). In its discussion of subsection (c), DirecTV urges the Commission to "construe the term 'satellite cable programming' as encompassing programming that was once 'satellite cable programming' and would have continued to remain 'satellite cable programming' but for the deliberate shift of the programming to terrestrial delivery modes . . . ." DirecTV Comments at 19 (emphases added). By DirecTV's own admission, even in the scenario provided by DirecTV, something that was delivered by satellite, but is no longer, is not "satellite cable programming." Therefore, the Commission cannot regulate it under Section 628(c), which is limited to "satellite cable programming." See 47 U.S.C. § 548(c).

A few commenters also argue that the Commission can regulate terrestrial programming that used to be "satellite cable programming" under the broad rulemaking powers of Sections 4(i) and 303(r).[28] These sections authorize the Commission to issue rules and regulations "not inconsistent with" the Communications Act.[29] It would clearly be inconsistent for the Commission to regulate terrestrially-delivered programming under the program access provisions of the Communications Act when the statute explicitly limits the Commission's jurisdiction to satellite-delivered programming.

Significantly, a large number of cable's competitors effectively acknowledge that the Commission has no jurisdiction to regulate terrestrially-delivered programming, and request that the Commission recommend to Congress that it change the statute.[30] In Section 4 of these Reply

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[28] DirecTV Comments at 18 n.46; Ameritech New Media, Inc. Comments at 25-26; BellSouth Comments at 26 n.52; CU Comments at 3, 5-6; SNET Personal Vision, Inc. Comments at 5; RCN Comments at 16 (arguing Section 4(i) only); WCA Comments at 23-24 (same); GE American Communications, Inc. Comments at 8-9 (same).

[29] Section 4(i) provides: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act [the Communications Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (emphasis added). Section 303(r) provides: The Commission may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act [the Communications Act]." 47 U.S.C. § 303(r) (emphasis added).

[30] See Ameritech Comments at 26; WCA Comments at 24; SNET Comments at 5, 6; BellSouth Comments at 21-22. One competitor of cable even acknowledges that "the program access statute does not give an alternative MVPD access to a local cable news channel that has never been distributed via satellite delivery of programming." WCA Comments at 24 (emphasis in original). Comcast concurs with that reading, but not with the implied limitation to news programming. There is no rational way to read the enabling statute to deny the Commission jurisdiction over one genre of terrestrially-delivered programming (e.g., news, as in WCA's example) while giving it jurisdiction over another genre of terrestrially-delivered programming (e.g., sports, as in the case of CSN).

Comments, Comcast restates the important public policy reasons why the Commission should not make such a recommendation (and why Congress should not change the law).[31]

3. The Legislative History Confirms Congress's Intent to Limit the Scope of the Program Access Law to Programming Delivered by Satellite.

The legislative history of the program access law supports the plain meaning of the statute -- that Congress intentionally limited the scope of the law to apply only to programming delivered by satellite. The House bill regarding program access (which was ultimately adopted by Congress) applied only to satellite-delivered programming services. The Senate bill, by contrast, would have covered all vertically integrated programming services, regardless of the delivery method.[32] Congress thus specifically considered whether the program access law should apply to terrestrially-delivered programming services, and decided it should not. This only reaffirms that Congress did not -- and did not intend to -- include terrestrially-delivered programming services within the ambit of the program access law.[33]

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[31] DirecTV, on the other hand, argues that the Commission can interpret the program access statute "flexibly," citing the Commission's inclusion of a note in Section 76.1000(h) of the program access rules to include open video system programming within the definition of "satellite cable programming." DirecTV Comments at 22. DirecTV conveniently omits, however, that the Commission was required by Congress to make this change -- in the Telecommunications Act of 1996, Congress amended Section 628 so that "[a]ny provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers." 47 U.S.C. § 628(j). See also In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems, CS Dkt. No. 96-46, Second Report and Order, 11 FCC Rcd 18223, 18317 ¶ 180 (June 3, 1996).

[32] See Report of Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, 102d Cong. 2d Sess. 121 (1991).

[33] See INS v. Cardoza-Fonseca, 480 U.S. 421, 442-443 (1987) (in a case in which, just as in the instant case, Congress enacted the House version, rather than the Senate version of a bill, the Supreme Court noted that this choice is dispositive: "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio

Attempting to dispute both the statute and its intent, a few commenters assert that Congress limited the program access statute to satellite-delivered services only because most programming services were delivered by satellite at the time of enactment.[34] They argue that Congress simply did not consider the possibility of programming services being delivered by terrestrial means. The facts give lie to that assertion. In 1992, there were in fact more terrestrially-distributed local and regional programming services than there are today. In 1992, there were sixteen (16) terrestrially-delivered regional programming services, including five (5) regional sports networks (at least four (4) of which were vertically integrated, including PRISM, which was distributed in the Philadelphia area).[35] Congress thus enacted the program access law with full knowledge that terrestrial delivery of cable programming services (which has been used for decades) was commonly in use and offered benefits for local and regional services, yet Congress still limited the scope of the law to satellite-delivered programming services.[36]

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to enact statutory language that it has earlier discarded in favor of other language.")

[34] GE Americom Comments at 2, 3-4, 5-6, 8, 10; Ameritech Comments at 24; CU Comments at 7 n.3; Bell Atlantic Comments at 11.

[35] See Cable & Station Coverage Atlas -- 1992, "Pay TV & Satellite Services" at 169-182. The terrestrially-delivered regional services in 1992 included these sixteen services, many of which were vertically-integrated: Arizona Sports Programming Network (a sports network owned by Times-Mirror Cable TV); Atlanta Interfaith; Cable TV Network of New Jersey, Inc.; Ecumenical TV Channel; Empire Sports Network (a sports network owned by Adelphia Communications Corp.); Iowa Cable Network; Jewish Television Network; News 12 Long Island; Newschannel 8; Nippon Golden Network; Orange County Newschannel; Pennarama; PRISM (a sports network owned 50% by Cablevision Systems Corp.); RTP-USA; San Diego Cable Sports Network (a sports network owned by Cox Cable Communications); and TSC - The Sports Channel (a sports network of unknown ownership). Today, there are only twelve (12) terrestrially-delivered regional services. See Cable Television Developments -- Fall 1997, published by NCTA, at 98-117; see also Comments of Comcast at 12.

[36] The current situation with respect to CSN is, in fact, precisely the same as the situation was in 1992 with respect to PRISM. From 1976 through September 1997, PRISM was

4. The Commission's Jurisdiction to Regulate Alleged "Evasions" of the Program Access Rules is Unclear, And Attempts to Do So Would Lead the Commission Down a Dangerous and Slippery Slope.

There can be no serious dispute that the program access law, on its face, applies only to satellite-delivered programming and not to terrestrially-delivered programming. But some commenters urge the Commission in effect to find that any use of terrestrial distribution is evasion.[37]

A. The Commission Lacks Jurisdiction to Regulate Activities Falling Outside the Scope of the Program Access Law. Initially, there is no intellectually honest basis for such an expansion of the Commission's jurisdiction. Congress did not authorize the Commission to stop "evasion" (whatever that may consist of) of the program access law, as it did, for instance, with

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a terrestrially-delivered vertically-integrated regional sports programming service serving the Greater Philadelphia area, carrying Flyers, 76ers and Phillies games. See Schroeder Affidavit at ¶ 11. PRISM does not appear ever to have provided service to a DBS operator. Cf. Schroeder Affidavit at ¶ 11. CSN (although a different service than PRISM, with a different owner) is also a terrestrially-delivered vertically-integrated regional sports programming service serving the Greater Philadelphia area, carrying Flyers, 76ers and Phillies games. See Schroeder Affidavit at ¶¶ 4, 5, 6, 9, 12. Moreover, CSN is being distributed over the same terrestrial infrastructure and is being made available to every distributor that used to distribute PRISM. Schroeder Affidavit at ¶ 8(c). Congress enacted the program access law in 1992 in a manner that excluded PRISM from the scope of coverage, and there is no rational reason why the same law should be interpreted now to include CSN.

[37] See especially, DirecTV Comments at 9-23. EchoStar suggests (at 14-15) that the Commission adopt a rebuttable presumption that a programmer is engaging in evasion if it uses terrestrial distribution when terrestrial distribution is more expensive than satellite distribution. By extending this line of reasoning, perhaps there should be a presumption that conduct is not evasive if a programmer uses terrestrial distribution when it is less expensive than satellite distribution. If so, the terrestrial distribution of CSN would be presumptively not evasive. Similarly, GE Americom argues (at 2, 5) that distributors should use the most "efficient" method of distribution. CSN is, in fact, being distributed via the least expensive (and therefore most efficient) method, which is far less expensive than satellite delivery.

rate regulation.[38] Congress could easily have instructed the Commission to regulate "evasion" were this a concern, and chose not to do so with respect to program access. Given Congress's obvious understanding of terrestrial distribution, and its decision not to apply program access to terrestrially-delivered programming, its silence on "evasion" is even more striking.

B. There is No Need to Regulate "Evasion." A number of commenters argue that a Commission decision not to regulate terrestrial delivery of programming would open the floodgates for vertically-integrated programmers to switch their delivery method from satellite to terrestrial in order to evade the program access law and harm their competitors.[39] This fear is

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[38] See 47 U.S.C. § 543(h).

[39] WCA Comments at 21-22; CU Comments at iii, 8; DirecTV Comments at 12-13; BellSouth Comments at 21 n.37; see also Ameritech Comments at 26. In view of the efforts of Ameritech to stifle competition in the local telephone and video markets, there is a strange irony to its complaint that cable operators and vertically-integrated programmers are acting anticompetitively in the MVPD market. Ameritech Comments at 1-5. See, e.g., In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in Michigan, Memorandum Opinion and Order, CC Dkt. No. 97-137, FCC No. 97-298 (Aug. 19, 1997) (denying application for authority to provide long distance service because Ameritech has not satisfied the competitive checklist requirements of the Communications Act); In the Matter of the Complaint of The Michigan Cable Telecommunications Association et al. against Ameritech Michigan, Opinion and Order, Case No. U-11412, Michigan Public Service Comm'n (Dec. 19, 1997) (ruling that Ameritech violated the Michigan Telecommunications Act when it promoted its new venture into the cable television market by convincing consumers to switch their cable service based on a promise Ameritech cannot legally keep); In the Matter of the Complaint of the Michigan Cable Telecommunications Association et al. against Ameritech Michigan for Violation of the Michigan Telecommunications Act and an Application for Investigation Under the Michigan Telecommunications Act, Proposal for Decision of Administrative Law Judge, Theodora M. Mace, Case No. U-11507, Michigan Public Service Comm'n (Feb. 11, 1998) (recommending a $1.7 million fine, as well as costs and attorneys' fees, against Ameritech for anti-competitive behavior consisting of failure to disclose transfer of assets to cable television affiliate in violation of the Michigan Telecommunications Act).

plainly unsupported by five years of experience with the law.[40] Not one satellite-delivered national programming service has even hinted that it is considering changing its delivery method. At least to date, the issue of terrestrial distribution has been relevant only to local and regional programming services. And, as indicated above, see supra p. 9 & n.35, the actual trend appears to be away from terrestrial and toward satellite distribution -- not, as suggested by a number of commenters, the other way around.

C. Congress Meant to Exclude Local and Regional Programming From the Program Access Rules Because Congress and the Commission have Consistently Articulated and Pursued a Public Policy of Encouraging Rather Than Burdening the Development of Local and Regional Programming. Congress had important policy reasons for choosing to exclude terrestrially-distributed local and regional programming services from the program access rules. Congress has consistently recognized the importance of encouraging the development of such programming.[41] The Commission has also been a champion of this important public policy, creating exemptions from Commission rules and even authorizing programming exclusivity on a case-by-case basis in order to promote it.[42] In this context, it is clear why local and regional

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[40] See DirecTV Comments at 4, 9-10 (asserting that national programming services may switch to terrestrial delivery to avoid selling to cable's competitors); BellSouth Comments at 21 n.37 (same). In addition, as explained more fully in the Comcast Defendants' Answer, CSN is not an example of evasion.

[41] For example, Section 2(a)(10) of the 1992 Cable Act states that "[a] primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation."

[42] The Commission created an exemption from the vertical programming cable channel occupancy rules for local and regional services because the exemption could be an important means of:

programming services that transmit their programming terrestrially have been exempted from the program access law.

As Cablevision Systems explains in its comments (at 17-21), Congress exempted terrestrially-delivered programming from the program access law to promote localism. Like Cablevision, Comcast has invested in local and regional programming services. For example, Comcast has created and is distributing a regional, terrestrially-delivered, programming service called CN8 -- The Comcast Network. CN8 is delivered to over 1.5 million Comcast cable customers throughout New Jersey, and the Philadelphia and Baltimore areas. CN8 features local sports programming, including games of the Trenton Thunder minor league baseball team, regional college sports, regional high school sports and local original sports talk shows. CN8 also features unique, interactive public affairs programming of particular interest to residents of New Jersey, Philadelphia and Baltimore, as well as classic motion pictures and other entertainment-related programming. See Exhibit 1. Creating this regional service has been

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> encouraging continued MSO investment in the development of local cable programming, which is responsive to the needs and tastes of local audiences and serves Congress' objectives of promoting localism. Moreover, we recognize that because local and regional programming services are usually costly to produce and appeal only to a limited population of subscribers, such an exception may be necessary to encourage MSOs to continue investing in such local programming.

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 – Horizontal and Vertical Ownership Limits, Second Report and Order, 8 FCC Rcd 8565, 8599, at ¶ 78 (1993) (footnote omitted). When it granted Lenfest the right to offer its regional news service on an exclusive basis, the Commission noted that "exclusivity may promote diversity in the programming market by providing incentives . . . to promote and carry a new and untested programming service." NewsChannel, a Division of Lenfest Programming Svcs., Inc., 10 FCC Rcd 691, 695 (1994). (Of course, CSN is not being offered on an exclusive basis. It is being distributed by cable, SMATV and OVS operators, as well as by wireless cable operators, which constitute cable's single largest competitor in the Philadelphia area.)

expensive, but it has been a valuable programming addition, because it addresses the needs and interests of the people in the local communities in the region served by these Comcast systems. This is yet another example of why Congress appropriately limited the program access provisions to "satellite cable programming."

If Comcast decided to offer its terrestrially-delivered CN8 service to a neighboring MVPD, should the program access rules apply?[43/] And should Comcast then be required to make CN8 available to any competitor that might want it, even a national distributor, such as DBS, that has made no investment, and has taken no risk, in serving the programming needs of these local communities? Congress wanted to encourage investments (like Comcast's) in local and regional programming services, which are typically delivered terrestrially. Subjecting those programming services to the program access law would discourage such investments.

A series of hypotheticals about a service such as CN8 demonstrates the slippery slope of the evasion argument urged on the Commission. What if only a portion of the programming on CN8 -- such as the Trenton Thunder baseball games -- had previously been delivered via satellite by an unrelated operator or distributor? Should the entire terrestrially-delivered service then be deemed "satellite cable programming?" What if CN8 aired only one motion picture that had previously been distributed via satellite (e.g., on HBO)? Or a series of such movies? Does the single movie, or series of movies, "taint" CN8 as satellite cable programming forever, or only for a limited period of time? Finally, suppose Comcast began telecasting some major league sports contests on CN8. Is there any rational reason why this would affect the legal analysis?

[43/] A couple of commenters suggest that the Commission has the authority under current law to regulate a terrestrially-delivered programming service, such as CN8. RCN Comments at 16; GE Americom Comments at 8-10.

As illustrated herein, regulating "evasive" behavior would lead the Commission down a dangerous and slippery slope.[44/] Congress established a careful and clear balance in the program access law. The Commission must respect that balance, and must resist encouragement to stretch the statute or to recommend statutory changes to Congress.

CONCLUSION

The plain language and the legislative history of the program access law demonstrate that Congress very intentionally limited the scope of the program access law to programming delivered by satellite. Programming that is delivered by terrestrial means, even if it was formerly "satellite cable programming," simply is not within the scope of the program access law. Consistent with Congress and the Commission's clearly-stated goal of encouraging the

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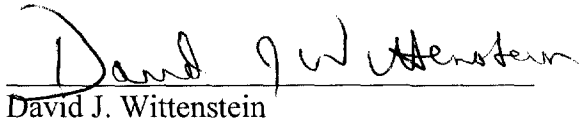
[44/] Nor are the analytical difficulties limited to satellite issues. For example, did Viacom engage in program access "evasion" when, in an enormous transaction, it sold its cable television division and therefore ceased to be a vertically-integrated programmer?

development of local and regional programming, the Commission cannot -- and Congress should not -- extend the law to cover terrestrial programming services.[45]

Respectfully submitted,

COMCAST CORPORATION

By: 

David J. Wittenstein
Karen A. Post
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Its Counsel

Dated: February 23, 1998

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[45] Although Comcast does not discuss in these reply comments any of the other issues raised in this rulemaking proceeding (time limits, discovery, damages, buying groups), Comcast supports its position on those issues as presented in its original comments.

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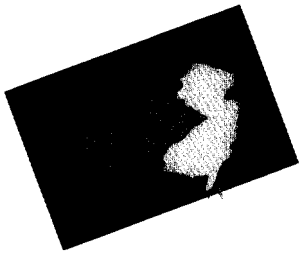
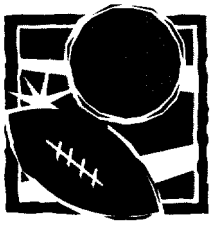
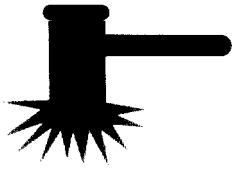
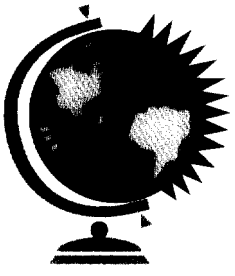


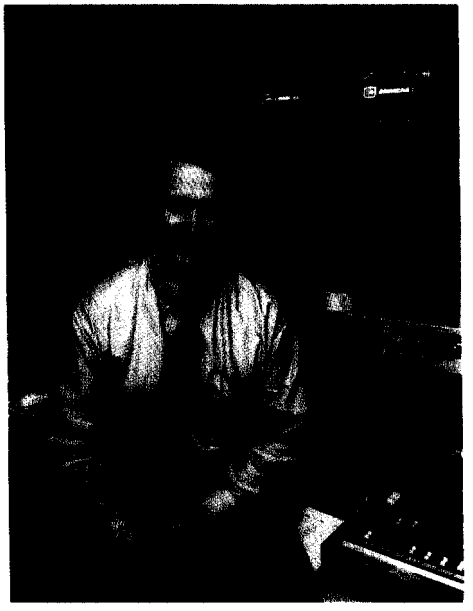






The Comcast Network

THE COMCAST NETWORK



Pat Scanlon, General Manager

Comcast Cablevision is a demonstrated leader and innovator in the cable industry. Over the past few years, Comcast's entrepreneurial management team in the Northeast Region, led by Senior Regional Vice President Michael Doyle, began to develop a vision for a regional programming network that would change the way customers view local cable programming.

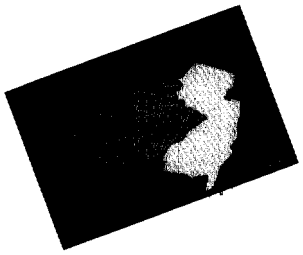
In 1995, company engineers set out to make that vision a reality by building an advanced fiber optic network connecting Comcast's cable television systems in New Jersey and the Philadelphia area. Those systems, combined with Garden State Cable, in which Comcast is a partner, serve approximately 1.2 million television households!

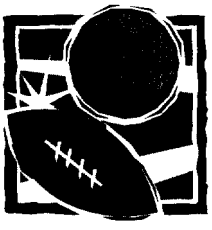
On September 3, 1996, Comcast launched "*The Comcast Network*," a diversified programming network that features local sports (both live and taped), sports talk, entertainment and a heavy dose of unique, interactive public affairs programming.

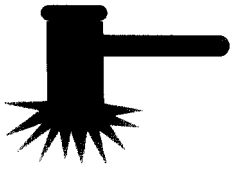
Programming on The Comcast Network also includes classic movies from an extensive film library, narrated movies for the visually-impaired, music videos and unique local programming from Comcast's cable systems in New Jersey and the Philadelphia area.

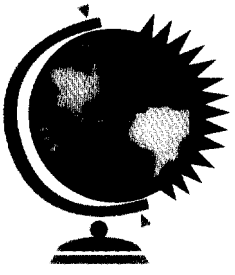
Comcast has re-invented local cable programming with a renewed commitment to strong production values and outstanding content.

Comcast has tapped veteran New Jersey broadcaster Pat Scanlon to lead this exciting new programming venture. Following a 15-year career at New Jersey Network as sports director, Emmy Award-winner Scanlon now oversees the development and day-to-day operations of The Comcast Network.





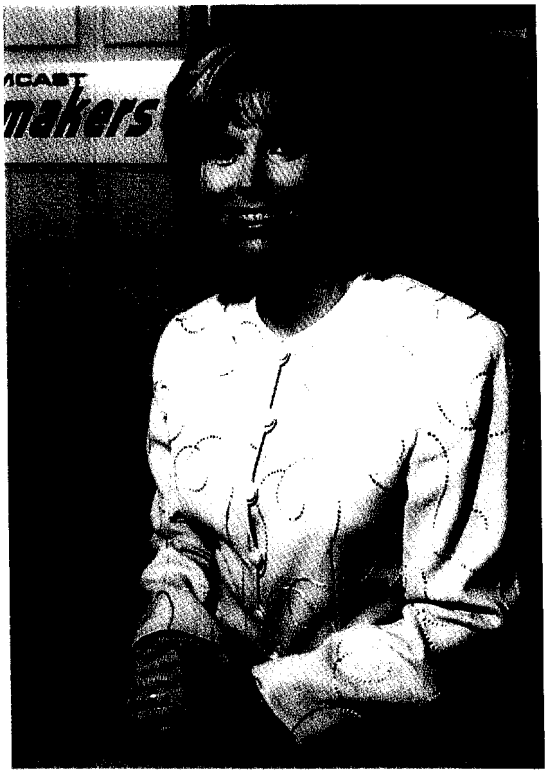




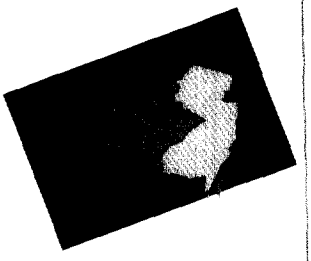
COMCAST

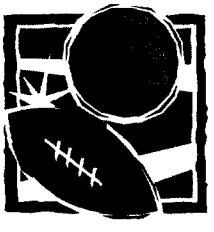
The Comcast Network

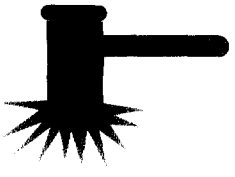
COMCAST NEWSMAKERS

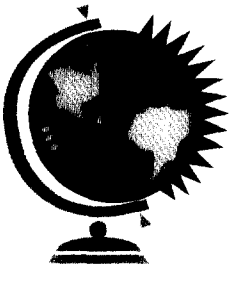


Comcast Newsmakers is a five-minute interview segment seen at the top and bottom of each hour on CNN *HeadlineNews*. Comcast Newsmakers fits seamlessly into Headline News' fast-moving, 30-minute rotation with dynamic music and graphics. Comcast's professional team, led by Senior Anchor Lynn Doyle, gives Comcast customers important information from their local communities and across the state. Regional Newsmakers can be seen at 25 minutes after the hour while local Newsmakers can be seen at 55 minutes after the hour.









COMCAST

The Comcast Network

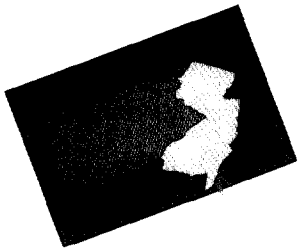
THE COMCAST NETWORK PUBLIC AFFAIRS

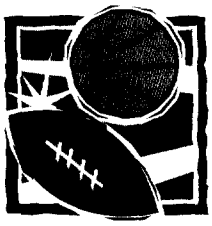
ONE-ON-ONE with Steve Adubato

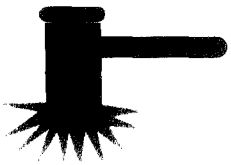
Join Emmy Award-winning anchor Steve Adubato twice weekly as he goes one-on-one with decision makers from the political and public affairs arena. Adubato, a syndicated columnist and former NJ state legislator, was recently named by *New Jersey Monthly* magazine one of "The 50 Most Interesting People in New Jersey."

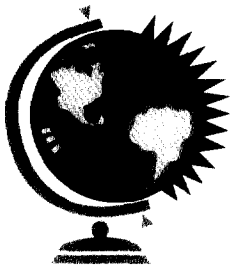
COMCAST NEWSMAKERS: IT'S YOUR CALL with Lynn Doyle

Veteran broadcast journalist and anchor Lynn Doyle hosts an in-depth extension of the *Comcast Newsmakers* forum. This weekly call-in program features timely news and topical guests. Lynn samples viewers' opinions on the topics at hand in an informative hour-long discussion.









COMCAST

The Comcast Network

COMCAST FAMILY TALK

Comcast Family Talk, winner of a prestigious CableACE as the nation's best cable talk show series, is a must see for families coping with life in the nineties. Veteran journalist Mary Amoroso, author of the "Pressured Parent" column in *The Record*, hosts this award-winning program focusing on issues that range from single dads to soccer moms and household economics to family values. Mary brings her insightful and unique thoughts to the show along with years of personal experience and a Rolodex crammed with experts!