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FEDERAL COMMUNICATIONS COMMISSION

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

In the Matter of)
)
Policies and Rules for the) IB Docket No. 98-21
Direct Broadcast Satellite Service)

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA") hereby submits its comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.¹ NCTA is the principal trade association of the cable television industry in the United States, representing cable television operators serving over 90 percent of the Nation's cable television households, over 100 cable programming networks, and manufacturers of cable set-top boxes, cable modems and other cable equipment. For the reasons stated below, the Commission should not adopt the DBS-cable cross-ownership limitations suggested in the Notice.

INTRODUCTION

The Commission has repeatedly and correctly determined that no DBS-cable cross-ownership restrictions are warranted. More significantly, Congress has declined to mandate DBS-cable ownership limitations. The Notice offers no basis to revisit those conclusions. Indeed, developments in the DBS and MVPD markets reinforce the wisdom of those decisions.

¹ In the Matter of Policies and Rules for the Direct Broadcast Satellite Service, IB Docket No. 98-21, FCC 98-26, Notice of Proposed Rulemaking, released February 26, 1998. ("Notice").

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The Notice in this proceeding is primarily addressed to consolidating and streamlining the Commission’s service rules governing the Direct Broadcast Satellite (“DBS”) service. It proposes to “eliminate unnecessary and duplicative regulation of this emerging service” consistent with the agency’s “goals of regulating services subject to [its] jurisdiction in a pro-competitive, common-sense manner.”² Despite this stated objective, the Notice (with two Commissioners dissenting) resurrects a question long since answered with respect to whether limitations on DBS-cable cross-ownership are “necessary in order to prevent anticompetitive conduct in the MVPD market.”³

The discussion in the Notice regarding possible DBS-cable cross-ownership restrictions is apparently premised on the view that, because DBS provides a competitive alternative to cable, the ownership of DBS facilities by cable companies may raise competitive concerns.⁴ While the Notice acknowledges that such concerns may be handled on a case-by-case basis, it suggests that “a formal [cross-ownership] rule may provide greater predictability and consistency and avoid the need to address specific ownership questions on an individual basis in licensing proceedings.”⁵ That seems to be the sole ground advanced for adopting a cross-ownership ban

² Notice at ¶ 1.

³ Id. at ¶ 3.

⁴ In fact, the Notice never once explicitly discusses why cable ownership of DBS would -- or could -- result in anticompetitive consequences. It merely suggests (without any explanation) that a cross-ownership rule might be necessary “to prevent anticompetitive conduct in the MVPD market.” Id. at ¶1. See also id. at ¶57 (“Thus, an important issue is whether DBS can act as a sufficient competitive alternative to cable systems to have a restraining effect on cable rates”).

⁵ Id. at ¶ 58.

and it clearly is insufficient to justify such an action. For the reasons stated below, the Commission should not adopt any DBS-cable cross-ownership rules.

I. THE NOTICE OFFERS NO SOUND REASONS, AND THERE ARE NONE, TO ABANDON THE CASE-BY-CASE APPROACH TO DBS-CABLE CROSS-OWNERSHIP ISSUES

At the outset it must be noted that it is ironic the Commission is proposing adding to its rules and regulations in the context of a proceeding addressing efforts to streamline its DBS rules in a “common-sense manner.”⁶ As we discuss below, there are simply no sound reasons calling for a DBS-cable cross-ownership rule. As a result, we agree with Commissioner Furchtgott-Roth that the Commission “simply should not consider adopting rules that easily could impose significant burdens on consumers and industry in the context of a rulemaking proceeding that ‘seeks to streamline and simplify the Commission’s rules.’”⁷

This is especially the case when it is recognized that the choice is not between either adopting a DBS-cable cross-ownership rule or granting carte blanche to any and all DBS-cable ownership combinations in the future. Rather, the choice is between imposing a flat, inflexible ban on DBS-cable cross-ownership or maintaining the current case-by-case approach anchored in the public interest standard. As the Notice concedes: “a continued case-by-case approach would maintain our long-standing commitment to a flexible regulatory structure for DBS service, and would not prejudice our ability to address specific cases based on the facts in existence at any

⁶ Id. at ¶1.

⁷ Id. Separate Statement of Commissioner Harold W. Furchtgott-Roth, Dissenting in Part.

particular time. It would also take into account any changes in the structure of the MVPD market.”⁸

If “common sense” is to prevail, then merely to pose the choice between a rule or a case-by-case approach answers the question.

As has been evident from the course of the pending FCC proceedings arising out of the applications from Primestar Partners,⁹ in any particular case, there is ample opportunity for the Commission to review whether the public interest warrants any proposed level of DBS-cable cross-ownership in the absence of a rule banning such combinations. In addition, the scrutiny of such combinations by other government offices will ensure that the competitive consequences of such transactions are fully vetted before they are permitted to be consummated.¹⁰ As

Commissioner Powell has said:

We are not without authority to examine such horizontal combinations when they are proposed. We can conduct classic antitrust analysis to consider possible anticompetitive effects and we have the public interest standard which we can apply on a case-by-case basis. Additionally, we are not the only agency with power and expertise to act in this area. The Department of Justice has adequate authority and an admirable record in evaluating and blocking anticompetitive combinations.¹¹

⁸ Id. at ¶58.

⁹ See id. at notes 10 and 132.

¹⁰ See e.g., “U.S. May Fight Murdoch-MCI Satellite Plan,” The Washington Post, March 27, 1998, at E-1 (reporting that the Justice department may challenge Primestar Partners acquisition of DBS licenses and facilities from MCI).

¹¹ Notice, Statement of Commissioner Michael K. Powell, Approving in Part, Dissenting in Part. Commissioner Powell went on to note that “we will have the chance to evaluate competitive issues in the context of the Primestar merger, where we will have the benefit of real facts and a real record on which to think through these issues and to test the adequacy of our existing authority.”

Under these circumstances, rejection of a DBS-cable cross-ownership rule will not leave the FCC nor other branches of the government bereft of tools to deal with competitive concerns arising out of any future DBS-cable combinations.

And, in fact, the number of such combinations (if any) are guaranteed to be few and far between. There are only eight orbital locations for the provision of DBS service assigned to the United States, with each location capable of providing 32 analog channels.¹² The limited number of DBS orbital slots and available transponders provides further grounds for rejecting adoption of a rule of general applicability dealing with DBS-cable cross-ownership. As Commissioner Furchtgott-Roth observed: “There is no need for a general rule that has such limited and distant applicability. We will not be presented DBS cross-ownership issues thousands, hundreds, or even tens of times. By virtue of the limited number of DBS orbital slots, such rules could be applied only a handful of times.”¹³

Proposals to impose DBS-cable cross-ownership bans have been rejected by both Congress and the FCC in the past and there are no new circumstances which warrant revisiting those conclusions. Indeed, since Congress and the FCC refused to adopt such cross-ownership provisions when DBS was in its infancy but its potential to compete with cable was evident, it would make no sense now, in light of the phenomenal recent growth of DBS, to adopt such rules.

When DBS service was first authorized in 1982, the issue of cable/DBS cross-ownership was examined in detail. At that time, the Commission decided against adopting cross-ownership

¹² Notice at ¶ 6.

¹³ Separate Statement of Commissioner Harold Furchtgott-Roth, Dissenting in Part.

rules, finding that competition in the video distribution market would prevent competitors' ability to engage in anticompetitive behavior.¹⁴

Seven years later, the Commission reaffirmed this view in the context of examining Tempo's fitness to be a DBS licensee.¹⁵ It there found that, contrary to claims that TCI's acquisition of a DBS system through its ownership of Tempo would increase concentration of control, "Tempo's participation could well accelerate the initiation of DBS service by bringing valuable marketplace experience and presence and possibly enhancing access to programming."¹⁶

Congress also has examined the issue of DBS/cable cross-ownership, and it too did not adopt such a ban. Rather, in the course of enacting the 1992 Cable Act, Congress stripped from the Senate bill a provision that would have required the FCC to adopt such a restriction when direct-to-home satellite services obtained ten percent of television households. Instead, the Conference Report found that "[i]t would be premature to require the adoption of limitations now...."¹⁷

Finally, the Commission recently considered, but declined to adopt, cable/DBS cross-ownership restrictions in the context of its DBS auction proceeding. It found that its structural rule restricting ownership of multiple full-CONUS orbital locations was satisfactory to spur

¹⁴ In the Matter of Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Conference, Report and Order, 90 FCC 2d 676, 711-13 (1982).

¹⁵ Continental Satellite Corp., 4 FCC Rcd. 6292 (1989).

¹⁶ Id. at 6299.

¹⁷ Conference Report on S.12, 102d Cong., 2d Sess., 138 Cong. Rec. H8329 (daily ed. Sept. 14, 1992).

adequate competition within the DBS marketplace and among MVPDs overall.¹⁸ What the Commission said then is equally -- if not more -- applicable now:

Even if a cable-affiliated MVPD with market power were to acquire the permit for the full CONUS channels available at 110°, two other full-CONUS locations -- largely occupied by independent DBS providers -- would remain. The presence of these other providers severely constrains the strategic activities of an MVPD-DBS combination, since even if it chooses not to make full use of its DBS channels, consumers will have at least two other competitive sources for DBS service from which to choose.¹⁹

In that same order, the Commission reiterated its view that “cable-affiliated MVPDs bring certain positive attributes as DBS permittees,” citing its statement in the Continental decision that “Tempo’s participation could well accelerate the initiation of DBS service by bringing valuable marketplace experience and presence and possibly enhancing access to programming.”²⁰

II. THE STATE OF DBS COMPETITION AND MVPD COMPETITION ELIMINATES CONCERN ABOUT CABLE OWNERSHIP OF DBS

When DBS was in its infancy an argument could have been made that restrictions on cable ownership of DBS might be warranted so that DBS might obtain a secure foothold in the MVPD marketplace. Yet, even in those circumstances, both the FCC and Congress rejected such ownership limitations. Now, in the midst of extraordinary growth of DBS in particular and non-cable MVPDs in general, DBS-cable ownership limitations would have no rational basis.

¹⁸ In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, PP Docket No. 93-253, Report and Order, 11 FCC Rcd 9712, 9740-41(1995).

¹⁹ Id. at 9740.

²⁰ Id. citing Continental Satellite Corp., 4 FCC Rcd. at 6299.

Indeed, in relying solely on speculation as the premise for its inquiry, the Notice ignores the actual robust state of the DBS market in particular and the broader video marketplace in general. The Notice also fails to acknowledge existing constraints on cable operators that guard against pursuit of any alleged anticompetitive strategies. The suggestions to further restrict the extent to which cable operators may hold DBS permits or make use of DBS facilities, therefore, go well beyond the minimum necessary to protect that market. Instead, they cross the line into unnecessary government interference in a dynamic communications arena. The Notice demonstrates no need for such a heavy handed approach.

If anything, the DBS marketplace is even more vibrant now than when the Congress and the Commission made their previous determinations. DBS services that deliver up to 150 channels of traditional cable networks and pay-per-view are now available to every home in the continental United States. DBS providers deliver virtually every program network offered on cable, including movies, sports, and dozens of channels of pay-per-view movies, plus DBS-exclusive programming as well.

DirecTV, Echostar and USSB all provide high-power DBS service. As of March 1, 1998 they provided service to approximately 4.6 million subscribers.²¹ In fact, DBS subscribership grew at a rate of 46% in 1997 while cable subscribership increased at a rate of only 2%.²² Given this dynamic and growing market, there is simply no reason to revisit the FCC's earlier conclusions that cable ownership of DBS service is permissible.

²¹ Media Business Group, SkyREPORT, March 19, 1998; Nielson Media Research.

²² Media Business Group, SkyREPORT, March 19, 1998.

Just as the DBS market has grown, so too has competition for the provision of video programming to subscribers from other service providers. That video marketplace does not just comprise cable and DBS. Rather, the FCC, in assessing competition for the delivery of video services, has made clear that the entire MVPD market is the appropriate starting point for assessing the status of competition in the market for delivery of video programming.²³ That market includes not only cable and DBS, but also MMDS (and, soon, Local Multipoint Distribution Service), SMATV, and TVROs.²⁴ And the telephone companies also have not abandoned their efforts to compete in the video marketplace, both as wireline providers and in wireless, starting with MMDS. All told, over 11 million subscribers obtain multichannel video service from one of cable's competitors today.

Given this dynamic and rapidly changing competitive landscape, any concerns about cable pursuing anticompetitive DBS strategies are unfounded. A cable-affiliated provider of DBS services would not be able to price above competitive levels because most consumers have other ways to receive multiple channels of video programming. Failing to competitively price DBS service would lead to loss of large markets to DirecTV/USSB or to EchoStar which are available in cable and noncable markets throughout the country.

²³ See, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Fourth Annual Report), CS Dkt. No. 97-141, FCC 97-423, released January 13, 1998 at ¶123; Notice at ¶60.

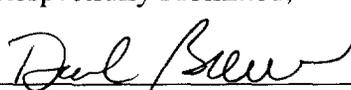
²⁴ See *id.* See also Comments of the National Cable Television Association, Inc., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 97-141 (filed July 23, 1997) at 6 -16 (describing competition in the video marketplace).

Moreover, such behavior would be completely at odds with the substantial real dollar investments necessary to launch DBS service. The loss of a DBS customer by a cable-affiliated DBS provider is not somehow cable's gain, as the Notice seems to assume. It is likely DirecTV's or USSB's, or EchoStar's gain. In short, there is no basis in fact for the concern implicit in the Notice that cable ownership of DBS will result in anticompetitive consequences and therefore there is no reason to single out cable operators to impose "structural" solutions to guard against anticompetitive behavior.

CONCLUSION

For the reasons stated above, the Commission should not adopt a DBS/cable cross-ownership prohibition.

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