

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 11 (c))
Of the Cable Television Consumer Protection)
And Competition Act of 1992)
)
)
Horizontal Ownership Limits)

MM Docket No. 92-264

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA"), by its attorneys, submits the following Reply Comments in response to comments submitted in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

As NCTA explained in our Comments, this proceeding on horizontal ownership limits must be decided in the context of sweeping changes in the telecommunications marketplace. Cable companies are important agents for change in the way that Americans buy and use a host of communications services. The neat lines that separate telephone companies from video providers are disappearing, and with their disappearance, regulators must adjust rules addressed to a bygone era whose markets could be more narrowly defined.

Many of the commercial parties opposing any upward increase to the horizontal limits recognize these market realities in their day-to-day businesses. But their rhetoric in this proceeding would have the Commission do a regulatory about-face. They have failed to make their case. NCTA believes that changes in the marketplace since the Commission adopted the

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original limit and the record in this proceeding strongly support raising the horizontal limit significantly above the current limit. In this light, TCI's proposal in this proceeding certainly is reasonable.¹ The horizontal limit should be raised and a new measure of ownership should be adopted, as proposed in the Notice.

In particular, the Commission should conclude, as it did in the Notice, that direct broadcast satellite (DBS) competition is real and should be included when measuring the degree of horizontal concentration in video. Second, the benefits of clustering are real; clustering should be allowed to continue and not be locked into a static number that eliminates the possibility of greater efficiencies through internal growth.

Third, we believe that the benefits of convergence, as demonstrated by a wide range of media companies, including cable companies, should be recognized and factored into the horizontal ownership limits that are adopted. On this last point, it would be a mistake to focus simply on potential and unproved harms of greater size and ignore the obvious benefits that size brings to a video enterprise in a converging communications marketplace.

I. THE COMMISSION SHOULD ADOPT ITS POSITION THAT HORIZONTAL LIMITS SHOULD BE BASED UPON NUMBER OF SUBSCRIBERS TO ALL MVPDs

As we stated in our Comments, the spectacular growth of DBS is making a real impact in the overall MVPD marketplace.² Indeed, since we filed our comments, reports have emerged that some of the marketplace challenges for DBS services are rapidly being attenuated. For example, DirecTV, the largest DBS operator, believes that the second set problem has been

¹ See Comments of Tele-Communications, Inc., MM Docket No. 92-264, Aug. 14, 1998.

² See also NCTA Comments, CS Docket No. 98-102, filed July 31, 1998 at 8-23.

essentially solved.³ The summer has been a season of great sales and success for DBS.⁴ And with the advent of DBS's exclusive rights to this fall's NFL football package, there is no reason to assume that this heated sales environment will slow anytime soon.

Despite DBS's real marketplace presence, and the reality that subscribers are switching from cable to DBS, some commenters would have the Commission exclude DBS from the denominator of any measurement of the overall market in which an individual cable company operates nationwide.⁵ Excluding DBS and other multichannel video programming distributors in the denominator would have the Commission depart from a true measure of horizontal concentration. It would essentially ignore one out of every eight MVPD subscribers in the country for no rational reason, inasmuch as 13% of the country now subscribes to a multichannel video provider other than cable TV. And it would ignore the data reported in the Commission's Competition Inquiry and in this docket indicating continued growth by MVPDs other than incumbent cable operators.

Opponents of the Commission's proposed approach have provided no evidence that the MVPD marketplace is not as the Commission sees it, *i.e.*, "that a true measure of horizontal concentration ought to take into account all MVPD and MVPD subscribers, rather than cable operators and cable subscribers alone."⁶ Accordingly, all MVPD subscribers should form the denominator of any calculation of horizontal ownership interests.

³ See DLJ Report, Donaldson Lufkin & Jenrette DBS Panel Transcript at 6, Attached to NCTA Reply Comments, CS Docket No. 98-102, Aug. 31, 1998.

⁴ Comments of the Satellite Broadcasting and Communications Association, CS Docket No. 98-102, July 31, 1998 at 7 (reporting DBS new subscribers increased an average of 6,047 per day between June 30, 1997 and June 30, 1998).

⁵ Comments of RCN Telecommunications Services, Inc. at 17; Comments of Consumers Union, *et al.* at 7.

⁶ Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 98-138 rel. June 26, 1998, at ¶80 ("Further Notice").

II. CLUSTERING HAS PROVIDED GREAT BENEFITS TO CABLE SUBSCRIBERS AND SHOULD BE ENCOURAGED UNDER ANY OWNERSHIP RULE

As we observed in our Comments, when systems cluster the result is greater efficiency. By consolidating headends and by regionalizing cable ownership, MSOs can provide realistic advertising alternatives in the video marketplace to existing broadcasters. Marketing is also benefited by allowing for regional pricing and advertising buys by the cable operator. And by amassing a critical number of potential subscribers, cable systems can make the transition from being merely a video provider to offering voice and data services as well. Cable's potential as the most likely facilities-based competitive local exchange carrier (CLEC) is dependent on the industry's ability to do just the sort of consolidation that clustering comprises.

Some who oppose more flexible horizontal rules notably include those who are incumbents in markets where cable is a CLEC. They oppose any further clustering. Ameritech's New Media for example argues that the horizontal limit does not need to be increased in order to realize the benefits of clustering.⁷

The Commission – and even those who oppose relaxation of the horizontal ownership limits – recognize the benefits of clustering. Cable clusters operate in a world of increasing telephone consolidation, in which a single incumbent phone company provides service from Maine to Virginia and another covers the Southwest and Far West of the United States (and seeks to cover the Midwest as well). It is hard to understand exactly why current levels of clustering or the anticipated increases that would be due to internal growth in the future could

⁷ Comments of Ameritech New Media, Inc. at 27 n. 66. Ameritech's comments at this point seem to tie any relaxation of horizontal ownership limits to program access relief. Inasmuch as the Commission has provided significant gains for Ameritech on the program access question, it would seem that this condition precedent has been satisfied. Implementation of the Cable Television Consumer Protection and Competition Act of 1992, CS Docket No. 97-248, FCC 98-189, rel. Aug. 10, 1998. See also, "FCC Sets Timetable, Remedies, for Program Access Complaints, *Communications Daily* Aug. 7, 1998, p.3 (quoting Ameritech Press Statement praising FCC decision).

conceivably be viewed with concern, except by those who would seek to keep competitors out of their markets. It is for this reason that we sought in our comments to allow MSOs to grow internally beyond the limit, as the Commission itself proposed.⁸ To declare such growth as evidence of a company being “too successful” would play into the competitive plan of incumbents in markets that the cable operator wishes to enter. It should be rejected.

III. ANY NEW HORIZONTAL OWNERSHIP LIMITS SHOULD REFLECT CABLE’S ABILITY TO PROVIDE VOICE AND DATA COMPETITION THROUGH ITS EVOLVING PLATFORM

As noted in the previous section, systems are clustering for a number of efficiency-related reasons. Greater ad competition, reduced headend costs, the ability to market a common set of program offerings over a wide geographic area – all these are the benefits of a clustered cable environment offering video.

But, as also noted above, a clustered system can transform itself into more than just a provider of quality video offerings. By growing through clusters and, separately, through growth nationally, cable systems are becoming effective CLECs, helping to fulfill the promise of the 1996 Telecommunications Act. The AT&T-Tele-Communications, Inc. transaction is one powerful endorsement of the strategy to provide voice and data services by using the cable platform. But other cable companies, including Cablevision, Cox, Adelphia, Time Warner, MediaOne, TCI, Jones Intercable, and others, are providing CLEC competition in markets in which they operate. And through @HOME and Roadrunner, cable systems around the country are quickly becoming an important choice for high-speed data connection.

Not surprisingly, competitors like Ameritech and RCN Telecommunications Services would prefer the Commission limit the ability of cable companies to grow internally and through

⁸ NCTA Comments at 23-24.

acquisition to limit their effectiveness as competitors to their voice and data services.⁹ Thus, for example, RCN, with no support, suggests that the FCC reduce the horizontal ownership limit to 20%.¹⁰

The Commission should see these “suggestions” for what they are: efforts to ward off competition in the incumbent businesses of telcos. It is worth noting that NCTA has not pursued a course of dogging the legal authority of competitors in its territory to grow – for example, the Bell Atlantic/NYNEX merger or RCN’s linkage to energy giants like PEPCO. Cable welcomes video competition, even from utility giants. With their comments in this record, the same cannot be said for some incumbents in the telecommunications business. If there are specific anticompetitive issues arising in the video market out of increased horizontal ownership, those can be addressed through the antitrust laws. This proceeding should not be a forum for those who wish to reduce competition in their own fields.

Moreover, to the extent that there are specific issues related to programming access, which seems to be the nonrhetorical focus of Ameritech and RCN, the Commission’s recently revised rules in this area should answer their objections – as press reports of reaction to the FCC’s decision suggests.¹¹ Further, as our Comments reviewed, several statutes and FCC rules address specific competitive issues that arise with respect to access to a cable operator’s programming lineup and to vertical foreclosure by operators.¹² The ability of cable companies to provide competitive services in voice and video through the cable platform should not artificially

⁹ See, e.g., Comments of RCN Telecommunications Services, Inc. at 12-13.

¹⁰ Id. at 14.

¹¹ See supra n. 7.

¹² See NCTA Comments at 13-16.

be restrained in this proceeding by acceding to horizontal ownership limits demanded by those who sit in incumbent positions in their fields.

CONCLUSION

As we argued in our Comments, the Commission should adopt its proposal to base horizontal limits on the number of subscribers divided by the total number of MVPD customers. Clustering is a distinct benefit that should not be discouraged where operators grow internally. And finally, the Commission's evaluation of horizontal limits should not be distorted by the anticompetitive urgings of incumbents in voice and data, but should be predicated on antitrust analysis, aided by existing companion FCC rules relating to program access and vertical ownership.

Respectfully submitted,



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