

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 the Cable Television)

Consumer Protection and Competition)

Act of 1992)

CS Docket No. 98-82

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Review of the Commission's Cable)

Attribution Rules)

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FEDERAL COMMUNICATIONS COMMISSION
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REPLY COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV") hereby offers the following brief reply comments in the above-captioned proceeding.

It is ironic in the extreme that the cable industry cites "competition from DBS and other multichannel providers"¹ and the existence of "behavioral restrictions,"² such as "program carriage [and] program access rules,"³ as purportedly constraining influences on cable multiple system operator ("MSO") behavior that justify relaxation of the attribution rules at issue in this proceeding. If the cable industry had had its way in 1992 and 1993 -- the years when program access legislation was passed by Congress and program access rules were implemented by the Commission -- there would be little emerging alternative multichannel video programming

¹ Comments of the National Cable Television Association at 6.

² Comments of TCI at 40.

³ Comments of Time Warner, Inc. at 17.

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distributor (“MVPD”) competition to cable television operators, and no program access protections.

In any event, none of the cable commenters in this proceeding have explained adequately or persuasively why the market conditions today warrant the various forms of relaxed regulation that they request. The program access law, for example, was intended to prevent cable operators from using their market power to improperly influence cable-affiliated programmers to withhold programming from their MVPD competitors or to engage in such conduct directly,⁴ and to correct an inherent imbalance of bargaining power between incumbent MSOs vis-à-vis emerging MVPDs.⁵ Until the cable industry can make a compelling case that this imbalance of power has been eliminated, that MVPD market conditions have significantly changed, and that effective competition has been realized in most local MVPD markets, there is no justification for relaxing any regulatory safeguards, including the current 5% program access attribution rule.

In this regard, the evidence to date cannot remotely support the relief requested. As the National Cable Television Association concedes, cable operators continue to dominate

⁴ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, RM No. 9097, FCC 98-189 (August 10, 1998) (“*Program Access Enforcement Order*”), at ¶ 2.

⁵ See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359 (1993), at ¶ 21 (“The 1992 Cable Act and its legislative history reflect congressional findings that horizontal concentration in the cable television industry, combined with extensive vertical integration . . . has created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors. This imbalance has limited the development of competition and restricted consumer choice.”).

more than 84% of the MVPD audience.⁶ And the plethora of recent pending and decided program access cases,⁷ and the Commission's recent strengthening of its program access rules,⁸ demonstrate that certain vertically integrated programmers are continuing to actively restrict the supply of programming to, or discriminate against, non-cable MVPDs despite the existence of the Commission's rules.

Furthermore, although cable operators dwell upon the purported efficiencies that they realize through system "clustering,"⁹ they downplay or ignore altogether the potentially severe negative consequences for MVPD competition of the resultant increased concentration. The study commissioned by Ameritech, "Programming Access and Effective Competition in Cable Television,"¹⁰ offers a strong rebuttal to the cable arguments that clustering is simply

⁶ According to the National Cable Television Association, cable's share of the MVPD market continues to be a tremendous 84.49%, only approximately a 2% reduction from last year. See Comments of the National Cable Television Association, CS Docket No. 98-102 (July 31, 1998), at 6.

⁷ See, e.g., *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. FX Networks, L.L.C.*, DA 98-1295 (June 30, 1998); *Echostar Communications Corporation v. Fox/Liberty Networks, L.L.C.*, DA 98-730 (April 17, 1998); *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, 12 FCC Rcd 15209 (1997); *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc., and Cablevision Systems Corporation*, 12 FCC Rcd 9892 (1997); see also *Echostar Corp. v. Comcast Corp., et. al* (filed May 19, 1998) (pending); *DIRECTV, Inc. v. Comcast Corp., et. al* (filed Sept. 23, 1997) (pending).

⁸ See *Program Access Enforcement Order*.

⁹ See, e.g., Comments of Cablevision at 3-4; Comments of Time Warner at 10; Comments of TCI at 15.

¹⁰ J. Dertouzos & S. Wildman, "Programming Access and Effective Competition in Cable Television" (Aug. 14, 1998) ("Dertouzos & Wildman"), at 37, attached to Comments of Ameritech New Media, Inc.

motivated by efficiencies. The authors of the study, Dr. James Dertouzos of the RAND Corporation and Professor Steven Wildman of Northwestern, observe that:

- “Under current cable competition policies . . . the largest multiple system operators (MSOs) are able to exploit their control over access to millions of cable subscribers to obtain programming on more favorable terms than smaller MSOs, including new entrants. Because this advantage is not grounded in superior efficiency, it is a barrier to effective competition in the multichannel video services industry.”¹¹
- “Large size, rather than incumbent efficiencies, also explains the ability of incumbent MSOs to outbid competitive entrants for exclusive rights to popular networks.”¹²
- “The programming access problems examined in this report stem from the current combination of inadequate policy protections and significant horizontal concentration among MSOs. Because the horizontal ownership restrictions and the cable attribution rules were both implemented as protection against the problems posed by high concentration of MVPD subscribers among a few large MSOs, it would be unwise to relax either of these policies without first addressing the shortcomings of the current program access regulations.”¹³

In short, although the cable industry would have the Commission believe that “changed circumstances”¹⁴ justify the relaxation of attribution regulation, it appears that little, if anything, has changed in terms of the incentives and abilities of cable operators and vertically integrated programmers to behave anticompetitively. Although TCI attempts to show that “there is no longer a need to focus on the potential” of cable operators to exert anticompetitive

¹¹ *Id.* at i.

¹² *Id.* at 2.

¹³ *Id.* at 3.

¹⁴ Comments of TCI at 17.

“influence,”¹⁵ the reality of the MVPD marketplace again is more accurately reflected by the conclusion of Dertouzos and Wildman:

One thing that is clear from this analysis of current programming access regulations is that issues relating to the horizontal concentration and what is considered to be an attributable interest in a programming service cannot be addressed independently of the regulations governing access. Allowing MSOs to control access to an even larger fraction of MVPD subscribers would only exacerbate the problems attributable to the inadequacies of current programming access regulations that were just discussed. *Relaxing the attribution threshold simply increases the number of programming services over which the major MSOs might be able to exert direct rather than indirect influence and expands the scope of that influence. Again, without stronger protections against discrimination in access to programming than currently exist, it is hard to justify the risks such a change in policy entails.*¹⁶

In the MVPD marketplace as of September 1998, the cable industry retains the incentive and ability to stifle MVPD competition by directly controlling or indirectly manipulating the supply of programming to its emerging competitors. DIRECTV thus reiterates that vigorous enforcement of the program access rules and retention of the existing strict program access attribution standard are more vital now than ever before. Because the rationale for a restrictive attribution standard remains valid, revisiting the cable attribution threshold for the

¹⁵ *Id.* TCI asserts that “ownership of programming has little bearing on carriage.” TCI Comments at 39. There is ample evidence that this is untrue. *See supra* note 7. The thousands of DIRECTV subscribers who desire to see Philadelphia regional sports programming, but are unable to do so because of Comcast’s actions in refusing to sell its Comcast SportsNet regional sports network to DBS providers, are the innocent victims of the influence that ownership of programming has on carriage. *See Echostar Corp. v. Comcast Corp., et. al* (filed May 19, 1998) (pending); *DIRECTV, Inc. v. Comcast Corp., et. al* (filed Sept. 23, 1997) (pending).

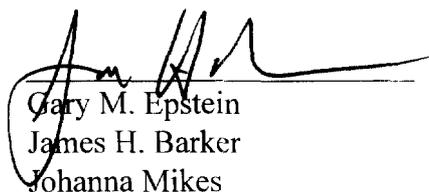
¹⁶ *Dertouzos & Wildman* at 37.

program access rules is unnecessary and unwarranted at this juncture, and, if relaxed, would threaten developing MVPD competition.

Respectfully submitted,

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