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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Carriage of the Transmissions of)
Digital Television Broadcast Stations)
)
Amendment to Part 76)
of the Commission's Rules)

CS Docket No. 98-120

COMMENTS

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. ("WCA") has an immediate and substantial interest in the Commission's resolution of the retransmission consent issues raised in the *Notice of Proposed Rulemaking* ("NPRM") in this proceeding. Access to local broadcast programming is the lifeblood of wireless cable operators, and the Commission's rule prohibiting exclusive retransmission consent agreements between broadcasters and cable system operators ensures that such programming continues to be available to cable's competitors. Thus, the possibility that the Commission might eliminate the rule is of grave concern to WCA.

Above all else, the Commission must remember that its decision to ban exclusive retransmission consent agreements was tied to Congress's concern that cable's competitors would be denied access to programming absent regulatory constraints on the market power of incumbent cable operators. As the Commission is well aware, Congress's concern continues to be justified: cable's competitors still do not have full and fair access to cable programming services, largely due to exclusive distribution contracts between incumbent cable operators and cable programmers. The Commission itself has acknowledged that those exclusive contracts arise from cable's stranglehold over distribution of programming in local markets, and that as a result of regional consolidation, cable's control over local distribution has *increased* since passage of the Cable Consumer Protection and Competition Act of 1992. Given these facts, it certainly would be anomalous for the Commission to now *worsen* the problem by permitting incumbent cable operators to extract exclusive distribution rights for local broadcast programming.

WCA's fear that elimination of the rule would allow cable to leverage its market power into exclusive arrangements is hardly speculative. Broadcasters already are surrendering exclusivity to incumbent cable operators as a *quid pro quo* for carriage of broadcast signals. NBC, Fox and CBS have surrendered exclusivity with respect to the MSNBC, FX and Eye on People cable networks in exchange for carriage of their local broadcast affiliates. All that stops cable from demanding and broadcasters from giving exclusivity with respect to *broadcast* programming is the Commission's ban on exclusive retransmission consent agreements. Against this backdrop, the need to preserve the ban becomes even more pronounced.

Finally, the Commission has asked for comment on what, if any, effect its ban on exclusive retransmission agreements will have on the broadcast industry's transition to digital television ("DTV"). The answer is simple — retention of the ban will promote the most rapid introduction of DTV. As the Commission has recognized in other contexts, competition spurs innovation and introduction of new services, and this will be equally true of DTV. Incumbent cable operators will have little incentive to introduce DTV to their subscribers as quickly as possible if they can secure exclusivity and eliminate the threat that their competitors will retransmit DTV signals. Permitting exclusive retransmission consent agreements invites delay, which is precisely the *opposite* of what the Commission is trying to achieve in this proceeding.

The DTV transition thus militates even further in favor of retaining the Commission's prohibition of exclusive retransmission consent agreements.

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COMMENTS

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.^{1/}

I. INTRODUCTION.

At paragraph 38 of the *NPRM*, the Commission asks for comment on whether it should eliminate Section 76.64(m) of its Rules, which prohibits exclusive retransmission consent agreements between incumbent cable operators and local broadcasters. Most emphatically, WCA submits that the answer is no.

^{1/} WCA, formerly known as The Wireless Cable Association International, Inc., is the principal trade association of the fixed wireless broadband industry. Its membership includes virtually every terrestrial wireless video provider in the United States; the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators; Local Multipoint Distribution Service ("LMDS") licensees; producers of video programming; and manufacturers of wireless broadband transmission and reception equipment.

Over the past year the Commission has left little doubt that promoting competition to cable is, in the words of the Chief of the Cable Services Bureau, "job one."^{2/} The Commission thus has put program access at the top of its regulatory agenda, recognizing that "new entrants seeking to compete against incumbents must have a fair opportunity to obtain and market programming, and the Commission's program access rules must be enforced swiftly and effectively."^{3/} The Commission's ban on exclusive retransmission consent agreements is a cornerstone of that policy, since it assures that cable's competitors will have full and fair access to local broadcast programming that is critical to their survival.^{4/}

Elimination of the ban would, to put a twist on the Bureau Chief's phrase, bring the Commission's pro-competitive efforts back to *square* one, since it is abundantly clear that

^{2/} "AT&T-TCI Merger Handed to Cable Bureau and New Chief Lathen," *Communications Daily*, at 3 (Sept. 28, 1998) (quoting Deborah Lathen, Chief, Cable Services Bureau).

^{3/} Separate Statement of Chairman William E. Kennard re: *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1239 (1998) [the "Fourth Annual Report"].

^{4/} Wireless cable operators retransmit local broadcast signals over microwave frequencies to assure that the subscriber can enjoy the same high quality picture he or she sees on nonbroadcast channels. This enables wireless cable operators to install a single compact and unobtrusive microwave receive antenna at each subscriber's residence, thereby enhancing the marketability of wireless cable service. However, were the Commission to allow incumbent cable operators to extract exclusive retransmission consent agreements from local broadcasters, a wireless cable operator that is denied consent would have no choice but to install obtrusive dual receive antenna systems at each subscriber home to provide for reception of local broadcast signals (*i.e.*, a traditional off-air "rooftop" antenna for receipt of off-air broadcast stations and a smaller microwave antenna for receipt of nonbroadcast services). Since consumers generally are reluctant to allow such cumbersome antenna installations on their property, and since off-air antennas cannot facilitate delivery of local broadcast signals in areas with poor reception, the elimination of the Commission's ban on exclusive retransmission consent agreements could greatly diminish the marketability of wireless cable service in many areas.

(1) incumbent cable operators have more than enough leverage to extract exclusivity from broadcasters, and (2) broadcasters are prepared to surrender exclusivity in order to secure cable carriage of their broadcast programming. As a result, the Commission's ban on exclusive retransmission consent agreements is all that prevents obliteration of the ability of wireless cable operators and their subscribers to obtain access to essential local broadcast programming. The public interest therefore demands that the ban be preserved.

II. DISCUSSION.

A. *The Market Power of Local Cable Operators Which Necessitated the Commission's Ban on Exclusive Retransmission Consent Agreements Not Only Still Exists, But Has Increased Vis-a-Vis Local Broadcasters.*

As reflected in the Commission's 1993 *Report and Order* implementing the must-carry and retransmission consent provisions of the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), the Commission's ban on exclusive retransmission consent agreements is inextricably tied to the concerns that led Congress to adopt that statute's program access provisions.^{5/} More recently, Chairman Kennard, in response to a written inquiry from Rep. Billy Tauzin, reaffirmed that cable's control over distribution of multichannel video programming in local markets is the true source of the program access problem.^{6/} Moreover,

^{5/} *Implementation of the Cable Television Consumer Protection and Competition Act - Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 3006 (1993) ("[I]n view of the concerns that led Congress to regulate program access and cable signal carriage agreements, we believe that it is appropriate to extend the same nonexclusivity safeguards to non-cable multichannel distributors with respect to television broadcast signals . . .") [the "*Must-Carry R&O*"].

^{6/} See Letter from Chairman William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions at 3 (Jan. 23, 1998) ("It is probably fair to say that the general conclusion is that any analysis should focus on the source of any market power involved (the absence of competition at the

over the past two years regional consolidation among cable operators has accelerated to a near-frenetic pace, further tightening the major cable MSOs' long-standing stranglehold over distribution of video programming in local markets. As the Commission noted in its *Fourth Annual Report* to Congress on the status of competition in markets for delivery of video programming:

- cable operators hold an 87.1% share of local markets *vis-a-vis* the distribution of multichannel video programming to the home;^{7/}
- by virtue of regional consolidation and system clustering, a smaller number of cable operators now retain control of distribution of multichannel video programming (including retransmitted local broadcast programming) in local markets. For instance, the Commission found that system clusters controlled by a single cable operator serve more than half of the cable subscribers in the United States; that the number of clusters having 300,000 to 399,000 subscribers increased by 38% between 1996 and 1997; and that the number of clusters having at least 500,000 subscribers increased by 20%;^{8/} and,

local distribution level) . . .) (emphasis added) (the "Kennard Letter"); *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996) ("As already recognized by the Commission, concentration of ownership among cable operators is significant in the program access context because it demonstrates an increase in the buying power of the major MSOs and because it facilitates the ability of MSOs to coordinate their conduct."); Separate Statement of Chairman Robert Pitofsky, and Commissioners Steiger and Varney, *In the Matter of Time Warner, Inc.*, FTC File No. 961-0004, at 7-8 (Sept. 12, 1996) ("The launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers.").

^{7/} *Fourth Annual Report*, 13 FCC Rcd at 1109.

^{8/} *Id.* at 1116.

- the trend toward increased regional consolidation and system clustering is likely to continue, and will extend to systems located in communities outside of the major urban regions, including rural areas.^{2/}

Thus, while programmers once had opportunities to sell their programming to multiple cable operators in a region, they are now increasingly being forced to deal with a single cable operator who controls the lion's share of the market's subscribers. As a result, programmers (and particularly purveyors of local programming like television broadcasters) are even more beholden to incumbent cable operators now than they were in 1992, and it therefore is no surprise that incumbent cable operators repeatedly demand and receive exclusivity from broadcasters where the Commission's rules allow them to do so.^{10/} For instance, it is well known that NBC surrendered exclusivity for its fledgling MSNBC cable service to incumbent cable operators in exchange for cable carriage of NBC broadcast stations.^{11/} At least one major wireless cable operator has already advised the Commission of the unique and tangible anticompetitive effects of NBC's refusal to sell MSNBC to cable's competitors:

^{2/} *Id.* at 1117.

^{10/} "Raising the Exclusivity Ante," *Cable World*, at 1, 103 (July 15, 1996). As identified by the Commission, cable-exclusive services currently include Game Show Network, Home & Garden Television, TV Land, and, as discussed *infra*, MSNBC and Fox News. Kennard Letter, Responses to Questions at 1.

^{11/} *See, e.g.*, "Continental, Comcast to Pick Up Fox News," *Media Daily* (Sept. 25, 1996); "NBC's Wright Says Fox-Time Warner News Deal Imminent," *Media Daily* (July 15, 1996); Kennard Letter, Responses to Questions at 1. As WCA argued in its comments on the Commission's recent *Notice of Proposed Rulemaking* on its cable ownership attribution rules, NBC is able to do this by virtue of a loophole in Section 76.1000(b) of its Rules, which suggests that MSNBC is not a "vertically integrated" cable network even though Microsoft has a \$1 billion, 11.5% non-voting interest in Comcast Cable. Comments of The Wireless Communications Association International, Inc., CS Docket No. 98-82, at 7-15 (filed Aug. 14, 1998).

Channels such as MSNBC . . . were created as a way for broadcasters to get something other than money for carriage of their free TV channels on cable. The cable industry demanded these channels be exclusive. Thus, today, companies like [wireless cable operator People's Choice TV Corp.], Ameritech, Wireless One and others are faced with NBC using its *free* television franchise to undermine cable competition. Celebrities like Tom Brokaw, Katie Couric, and Jane Pauley exhort viewers to tune to MSNBC as soon as they're done watching NBC, even though cable's competitors on the ground can't get MSNBC. The situation will grow worse as Microsoft introduces Windows 98, and places an MSNBC icon on each [personal computer]. The ability of new desktop PC's to process video can then be used by the monopoly software provider to push viewers to the monopoly video provider.^{12/}

NBC is not the only broadcaster to succumb to the market power of cable. During retransmission consent negotiations for Fox broadcast stations, Fox was forced to surrender to cable exclusivity with respect to the FX cable network, whose programming includes Major League Baseball and popular reruns of "The X-Files" and "NYPD Blue".^{13/} Similarly, in order to secure retransmission carriage of CBS stations, CBS has been forced to provide incumbent cable operators exclusivity with respect to CBS's own news-oriented cable channel, Eye on

^{12/} Testimony of Matthew Oristano, Chairman, People's Choice TV Corp., before the Federal Communications Commission re: Status of Competition in the Multichannel Video Industry, at 7 (Dec. 18, 1997).

^{13/} Flint, "Fox Unveils FX Schedule," *Broadcasting & Cable*, at 20 (Dec. 6, 1993); "Oct. 6 Retransmission Consent Disruptions Minimized by Agreements," *Communications Daily*, at 1 (Oct. 6, 1993). Fox also has given incumbent cable operators exclusivity against competing non-DBS MVPDs with respect to Fox News Channel for a period of five years after launch. See Consolidated Opposition and Reply Comments filed by The News Corporation Limited, FCC File No. 106-SAT-AL-97, at 8-9 (filed Oct. 13, 1997) [the "News Corp. Opposition"]. As in the case of NBC, Fox's ability to give exclusivity arises from a loophole in the program access law: since Fox itself does not hold ownership interests in cable systems, it is not "vertically integrated" under the Commission's program access rules. See 47 C.F.R. § 76.1000(b).

People.^{14/} In other words, the broadcasters' willingness to accede to the exclusivity demands of incumbent cable operators is by no means isolated, and testifies to the ability of local cable operators to leverage their stronghold over local distribution into exclusive contracts that threaten the competitive viability of alternative MVPDs.

In sum, (1) incumbent cable operators now exert even greater control over distribution of broadcast programming in local markets than they did in 1992; (2) by virtue of their control over local distribution, incumbent cable operators have enormous leverage over local broadcasters during the retransmission consent process, and thus are able to demand exclusivity in exchange for carriage of local broadcast programming; and (3) the broadcasters are willing to surrender exclusivity where necessary to ensure carriage of their broadcast signals. But for the Commission's ban on exclusive retransmission consent agreements, the broadcasters would have little choice but to surrender exclusivity for their local broadcast programming upon demand by incumbent cable operators. This obviously would undermine the very essence of the Commission's pro-competitive agenda, since it would deny cable's competitors full and fair access to local broadcast programming that is necessary for their survival. WCA thus urges that the Commission reaffirm its commitment to that agenda and, at a minimum, retain Section 76.64(m) of its rules as is.^{15/}

^{14/} See "TCI Defends Exclusive Carriage Deals to Senate," *Media Daily* (October 13, 1997); Leibowitz, "The New Cable Economics," *Cable TV Media Law & Finance*, at 6 (March 1997); Kennard Letter, Response To Questions at 1.

^{15/} The Commission must also take cognizance of the fact that incumbent cable operators are able to circumvent the rule's prohibition of *de jure* exclusivity by forcing broadcasters into consent agreements with discriminatory provisions. For example, WCA is concerned that an incumbent

B. Elimination of the Ban on Exclusive Retransmission Agreements Will Slow the Transition to DTV.

The Commission also has asked commenters to address whether elimination of the ban on exclusive retransmission consent agreements will hasten or slow down the broadcast industry's transition to DTV.^{16/} For the reasons set forth below, WCA submits that elimination of the ban will delay the transition to DTV, and thus will not serve the Commission's broader objectives for DTV in this proceeding.

The Commission has recognized that competition spurs incumbents to introduce new services or improve existing ones:

[I]n providing communications services, the public interest is better served by competition. A competitive industry framework promotes lower prices for services, provides incentives for operators to improve those services and stimulates economic growth.^{17/}

For instance, in its *Fourth Annual Report*, the Commission cited a number of instances where cable overbuild service prompted an incumbent cable operator to improve its service offerings

cable operator will achieve *de facto* exclusivity by requiring broadcasters to grant alternative MVPDs retransmission consent on unreasonable terms and conditions *not required of the cable operator itself*. WCA therefore asks the Commission to clarify that its enforcement of Section 76.64(m) will encompass such situations.

^{16/} *NPRM* at ¶ 38.

^{17/} *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 9 FCC Rcd 7665, 7666 (1994).

or protect its customer base in the face of competitive entry.^{18/} In addition, the idea that competition drives the introduction of new or improved services lies at the heart of the Commission's recent issuance of comprehensive rules allowing MDS and ITFS licensees to provide two-way services,^{19/} and its decision to temporarily limit the in-region eligibility of LECs and incumbent cable operators for in-region "A-Block" LMDS licenses.^{20/}

Indeed, by virtue of its 1996 decision allowing wireless cable operators to operate in the digital mode, wireless cable systems will be especially well-equipped to compete directly with incumbent cable operators in the retransmission of DTV broadcast signals to MVPD subscribers.^{21/} Were, however, the Commission to eliminate its ban on exclusive retransmission

^{18/} *Fourth Annual Report*, 13 FCC Rcd at 1130-40.

^{19/} *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, MM Docket No. 97-217, FCC 98-231, ¶ 9 (rel. Sept. 25, 1998) ("The rules we adopt today will also provide significant benefits to consumers. A new, competitive group of players will now enter the market for high speed two-way communications service. Both individual and business consumers will be able to use the high-speed and high-capacity data transmission and Internet service that will be available through the new systems. . . Most importantly, from a consumer perspective, there will be another choice of provider for these services, helping to drive down the costs in a more competitive market.").

^{20/} *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30 GHz Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Service*, 12 FCC Rcd 12545, 12621-2 (1997) ("[W]hereas a new entrant lacking a share in any local market can be expected to use the LMDS license to compete in a range of possible markets, it is reasonable for us to conclude that a local incumbent would likely attempt to foreclose the possibility of such competitive entry by obtaining the LMDS license and using it only to complement its current operations, not to compete with them. We believe that this incentive will skew its decisions regarding the uses to which LMDS spectrum is put, resulting in inefficient use of the spectrum, and will not promote competition . . .").

^{21/} *Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, 11 FCC Rcd 18839 (1996). Wireless

consent agreements, it in effect would be giving incumbent cable operators *carte blanche* to become the *only* MVPDs in local markets that retransmit digital broadcast signals. The simple fact is that incumbent cable operators have little incentive to retransmit DTV to their subscribers as quickly as possible if there is no threat that a wireless cable operator or any other competitor will be permitted to offer the same service. The fastest possible introduction of DTV to the consumer is guaranteed only where there is head-to-head competition between multiple MVPDs who have the same rights and economic incentives to retransmit DTV service to their subscribers. Absent that competition, time to market becomes irrelevant, thus raising the possibility that DTV will languish indefinitely. Since this is precisely the *opposite* of what the Commission is trying to achieve in this proceeding, WCA submits that the DTV transition militates even further in favor of retaining the Commission's ban on exclusive retransmission consent agreements.

III. CONCLUSION.

WCA wishes to emphasize that wireless cable operators are more than willing to negotiate with local broadcasters for retransmission consent rights on nondiscriminatory terms and conditions. The issue here, however, is whether wireless cable operators will continue to have the opportunity to do so in the face of cable's market power over the local distribution of

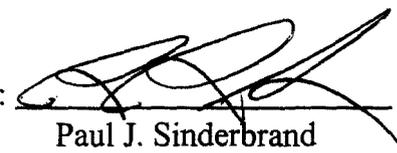
cable operators recently completed several successful launches of digital wireless cable systems in major markets, and are expanding aggressively into two-way services such as Internet access and data transmission. See, e.g., Hogan, "GTE Steps Up Its Marketing Efforts in Hawaii," *Multichannel News*, at 34 (July 20, 1998); Barthold, "Wireless Crossroads: Digital, Data and Telephony," *Cable World*, at 93 (June 29, 1998) (noting, *inter alia*, that BellSouth has launched digital wireless cable systems in New Orleans and Atlanta, and is scheduled to launch additional systems in Orlando, Jacksonville and Daytona Beach).

broadcast signals. For the reasons set forth above, the public interest considerations that prompted the Commission to adopt its ban on exclusive retransmission consent agreements apply with even greater force today. WCA thus urges the Commission to retain its ban on exclusive retransmission consent agreements.

Respectfully submitted,

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