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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Annual Assessment of the) CS Docket No. 99-230
Status of Competition in the)
Market for the Delivery of)
Video Programming)

REPLY COMMENTS OF LIFETIME ENTERTAINMENT SERVICES

Lifetime Entertainment Services ("Lifetime") hereby replies to comments submitted in response to the Commission's *Notice of Inquiry* into the status of competition in the market for the delivery of video programming.¹ As a regular participant in the Commission's previous competition inquiries,² Lifetime, with other independent programmers, consistently has supported competition and diversity in the programming market, while at the same time opposing unsubstantiated calls for expansion of the program access rules. Although this year's *Notice of Inquiry* once again has generated some requests for expansion of program access beyond what Congress originally intended,³ advocates of this position do not present any new or compelling arguments. Simply put, the Commission still lacks the requisite statutory authority to extend the program access rules to cover non-vertically integrated programming services; there

¹ Annual Assessment of the Status of Competition in the Markets for Delivery of Video Programming, CS Docket No. 99-230, *Notice of Inquiry*, FCC 99-148 (released June 23, 1999).

² Most recently, Lifetime commented in response to the Commission's *Fifth Inquiry*, CS Docket 98-102.

³ See, e.g., comments of Ameritech New Media, Inc., at 16; BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. at 18; and The Wireless Communications

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still is no demonstrated need for such an expansion and, most important, expansion still would adversely affect the ability of Lifetime and other independent programmers to contribute to the diversity and competitiveness of the video program market.

I. Independent Programmers Are Important Contributors to Innovation, Diversity and Competition in the Video Programming Market

Over the years, independent programming networks have been responsible for much of the innovation and investment that has enriched the choices of the viewing audience. Lifetime's highly regarded "Television for Women" network ("Lifetime Television") has been honored for its strong commitment to women, not just through a brand of programming uniquely oriented toward women, but also through a variety of public service initiatives. Lifetime's strong commitment to original programming is reflected in its line-up of original movies, intimate portraits, information series and specials,⁴ as well as in its newly-launched season which includes two new series, reality-based "Beyond Chance," hosted by Melissa Etheridge, and "Ruby," featuring comedian Ruby Wax.⁵ Lifetime also has begun its third season as telecaster and sponsor of the WNBA and continues its commitment to women's sports through its sponsorships such as the Women's World Cup and the U.S. women's ice hockey team.

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Association International, Inc., at 7.

⁴ Launched in 1984, Lifetime currently serves over 73 million TV households and is ranked fifth among advertiser-supported satellite-delivered program networks in prime time ratings and total day household ratings according to A.C. Nielsen Cable Network Audience Composition Reports (2nd Quarter 1999).

⁵ Lifetime Television ranked #1 among all cable networks in 1999 in total day delivery with women 18+, 18-34, 18-49 and 25-54 according to Nielsen Media Research.

Lifetime's new digital network, Lifetime Movie Network ("LMN"), which airs contemporary made-for-television movies, select theatrical films and mini-series targeted to women, is generating an unprecedented response from existing and potential viewers in the 14 months since its launch in June 1998.⁶ A recent A.C. Nielsen Custom Survey conducted in July 1999 found LMN to be women's top choice on PrimeStar by DirecTV.

On the public interest front, Lifetime continues its initiatives in the fight against breast cancer. More recently, Lifetime launched "Caring for Kids: Our Lifetime Commitment," an effort undertaken in cooperation with the Congressional Bi-partisan Coalition on Women's Issues and a number of national children's advocacy groups, to inform, educate and encourage viewers to raise their voices in support of better child care. Thousands of cable systems as well as alternative distribution systems participate annually in these critical public affairs campaigns.

As explained below, these efforts by Lifetime, as well as the contributions of other independent programmers, will be jeopardized by inappropriate expansion of regulatory restrictions and unnecessary regulatory interference with the marketplace.

II. Expansion of Program Access Remains Unjustified and Ill-advised.

A. The Commission Lacks Authority to Expand the Scope of Program Access to Cover Independent Programmers.

Based on the express language, purpose and legislative history of the 1992 Cable Act's program access provisions, there can be no doubt that the Commission lacks statutory authority

⁶ Since its launch, LMN has generated over 300,000 telephone calls from people interested in receiving LMN. In a variety of recent studies, LMN was consistently the #1 choice among women to be added to their channel line-up (Beta Research Cable Subscriber Study November 1998; Horowitz Associates, Inc., November 1998).

to impose program access rules on programmers in which cable operators have no attributable interest.⁷ Even some of the proponents of expansion effectively concede that it is for the Congress, not the Commission, to change the current applicability of the law.⁸ Program access was mandated because of the belief that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies. Congress thus sought to check the perceived ability of vertically integrated cable operators to leverage their ownership of popular program services to impede the development of competing distributors. Notwithstanding repeated efforts to persuade the Commission or Congress that the program access measures should apply to independent as well as vertically-integrated programmers, neither body has found it necessary to do so, and the marketplace has only grown more competitive and robust over the last five years.

B. Advocates of Expanding Program Access Have Failed to Demonstrate Any Need for This Change.

As in the past, there still is no sound policy rationale for the Commission to seek authority to expand program access beyond its logical and equitable limits. Neither the Congress, in its on-going legislative involvement in the communications field, nor the FCC, as a result of its Congressionally mandated annual assessments of the status of competition in the market for the delivery of video programming, has found sufficient basis to conclude that the

⁷ See 47 U.S.C. § 628(b).

⁸ See, e.g. Ameritech New Media, Inc. comments, at 17.

distribution practices and arrangements of non-vertically integrated programmers have warranted expansion of the coverage of the program access provisions. Rather, the continued proliferation of other video distribution media such as DBS⁹ demonstrates that the current marketplace is functioning well and that further regulatory interference with natural economic forces is unnecessary. The success of advertiser-supported networks like Lifetime (for which advertising revenues account for approximately 75% of annual revenues) and LMN depends on maximizing distribution. Indeed, economic incentives remain strong for independent, advertiser-supported networks to engage in distribution practices and relationships that promote widespread deployment of their programming product using every available means. Moreover, the current rules contain adequate measures for dealing with anti-competitive behavior.

C. Expansion of Program Access Has the Potential of Adversely Affecting Independent Programmers and Their Valuable Contributions to the Programming Marketplace.

As Lifetime consistently has pointed out in the past, independent programmers lack the degree of access to distribution outlets typically enjoyed by their vertically-integrated counterparts. Lifetime's experience in attempting to grow the recently-launched Lifetime Movie Network, underscores the fact that "shelf space" on cable systems and alternative distribution platforms such as DBS continues to be limited and that other regulatory provisions such as must-carry and leased access continue to add to the high demand that already exists for channel space. Notwithstanding the fact that LMN has been offered on technology neutral terms and conditions to all distributors, Lifetime has found it extremely difficult to gain carriage for a newly-launched

⁹ See Comments of the National Cable Television Association, at 11.

service. Thus, the competitive disadvantage that independent programmers already face would only be exacerbated by the imposition of greater regulatory restrictions on their freedom to conduct their relationships with affiliates in response to the reasonable economic dictates of the marketplace. Regulatory constraints on the ability to respond to market forces and economic incentives would reduce resources that independent programmers like Lifetime should be devoting to new original programming and valuable public service initiatives.

D. Special Protection Sought by Buying Groups Is Unwarranted and also Potentially Harmful.

One final point raised in the comments deserves mention. As in past competition proceedings, certain parties are urging the Commission to establish special ground rules for buying groups. Specifically, it has been requested that the Commission revise the program access rules to provide that a reserve equal to the cost of one month's programming of all buying group members should be a viable alternative to joint and several liability for all group members acquiring program rights under the buying group's auspices.¹⁰ The assumption by distributors of liability for the payment of programming license fees is a standard feature of program distribution agreements. Presumably the cable companies that are members of program buying consortia routinely assume liability for contractual obligations they undertake outside the programming area. They simply have not shown why they should not assume the same liabilities for payment of license fees as other distributors do.

¹⁰ See American Cable Association comments, at 9.

IV. Conclusion

As the Commission undertakes this year's assessment of competition in the video programming market, Lifetime urges it to consider carefully the lack of need for additional regulatory interference in the marketplace. The comments in this proceeding simply do not make a compelling case for expansion of the program access rules to encompass the distribution practices of non-vertically integrated programming services or for special treatment of the members of buying groups. Absent a compelling need for the imposition for such regulatory constraints, there is no justification for the detrimental impact such requirements would have on independent programmers and their ability to continue their valuable and diverse contributions to the viewing audience and the public interest.

Respectfully submitted,

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