Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED
SEP 01 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 99-230
Competition in Markets for the	)	
Delivery of Video Programming	)	

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Gregory L. Klein
Sr. Director, Economic & Policy Analysis

Daniel L. Brenner
Michael S. Schooler
Loretta P. Polk

Counsel for the National Cable
Television Association
1724 Massachusetts Avenue, NW
Washington, DC 20036
(202) 775-3664

September 1, 1999

No. of Copies rec'd 0+10
List ABCDE

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

I. THE COMMENTS CONFIRM THAT COMPETITION IN THE VIDEO MARKETPLACE IS THRIVING 3

II. THE PROGRAM ACCESS RULES HAVE ACCOMPLISHED WHAT CONGRESS INTENDED AND SHOULD NOT BE EXPANDED 9

CONCLUSION 13

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 99-230
Competition in Markets for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

From all quarters of the video marketplace, the message in this year's comments is clear: Competition is flourishing as never before.

NCTA's initial comments set forth the numbers, which show a continuing, dramatic growth in subscribers to multichannel video programming distributors ("MVPDs") that compete with cable. In the past year, seven out of 10 new subscribers chose DBS or another MVPD over cable. Analysts now project that, spurred by industry consolidation, joint marketing with telephone and high speed Internet services, and the likelihood of legislation allowing the retransmission of local broadcast stations, DBS will add 2.7 million subscribers this year.[1]

[1] Cable television competes in a broad video and entertainment marketplace, including MVPDs, broadcast television, video rental stores, movie theaters and other distribution media.

The comments of DBS providers confirm that DBS and cable are targeting the same potential customers nationwide, with products that are viewed as substitutable. They also confirm that DBS is a sturdy competitor, in for the long haul. At the same time, wireless cable operators, private cable operators, wireline overbuilders and telephone companies tout their own vitality and growth in the video marketplace. At least with respect to the provision of multichannel video programming services, the competition envisioned by Congress in 1996 is becoming a reality.

While adding subscribers in leaps and bounds, cable's competitors nevertheless persist in asking the government to put a heavier thumb on their side of the scale in order to reduce cable's share of subscribers even more rapidly. Specifically, they urge once again that the Commission seek authority from Congress to extend the program access rules to terrestrially-delivered and non-vertically-integrated programming – even though the Commission only last year determined that such mandatory access was not necessary to promote competition. And they seek more extensive access to cable-owned wiring in multiple dwelling units – even though the Commission last year significantly broadened access to cable's MDU wiring.

As shown by Economists Incorporated, in a paper submitted with NCTA's initial comments, the fact that cable's share of MVPD subscribers remains relatively high hardly indicates that cable now possesses significant market power. Even if one were to assume that the market were limited to MVPDs, a high relative number shows only that cable operators must continue to enhance the value of their product vis-à-vis their competitors. This is precisely what they are doing by investing in more channels and digital tiers of new programming, as well as new technology to provide Internet services and improved technical quality of video programming.

Forcing cable's penetration share downward by giving regulatory advantages to cable's competitors in these circumstances would not promote competition and would not serve consumers. Although the comments of cable's competitors attest to the vitality of competition in the video marketplace, those competitors will never concede the obvious so long as there is a possibility of obtaining a further regulatory boost. But their attempt to use this proceeding to gain such a boost is a diversion. The unmistakable message from the evidence in this year's inquiry is that competition has taken hold in the video marketplace, and it is here to stay.

I. THE COMMENTS CONFIRM THAT COMPETITION IN THE VIDEO MARKETPLACE IS THRIVING.

The initial comments in this proceeding confirm that competition in the distribution of video programming is flourishing. Cable operators are competing with satellite, wireless, and wireline distribution media, most of which are led by large, entrenched and well-financed telecommunications companies and public utilities.[2] Through a combination of advanced technology, aggressive marketing, and regulatory tools, they have gained substantial headway in the provision of competitive video services, as well as data and telephony. As NCTA reported, consumers now have a clear choice: today, 7 out of every 10 new customers choose another multichannel video competitor over cable.

DBS, in particular, has shown its mettle in the marketplace this past year, jumping from 7 million to 10 million subscribers between June 1998 and June 1999.[3] DirecTV reports in its comments that at the end of July 1999, it "had more than 7.4 million subscribers",[4] and it reported in June that the company's subscriber growth was 48 percent higher than it was the first

---

[2] See e.g. Comments of DirecTV, EchoStar, RCN Corporation, Ameritech, BellSouth, Wireless Cable Association, MediaOne, AT&T Corporation.

[3] Comments of NCTA at 12.

[4] Comments of DirecTV at 1.

six months of last year.[5] DirecTV augmented its subscriber base and expanded its program offerings by acquiring United States Satellite Broadcasting Co. (USSB), Tempo Satellite Inc. and Primestar.[6] EchoStar, too, reported significant subscriber growth over the last year and noted that it plans to launch additional satellites.[7]

The overall numbers in the record -- with DirecTV and EchoStar regularly adding over 100,000 net new customers per month -- show that the DBS industry is achieving its goal of "providing consumers with a multichannel video programming distributor ("MVPD") alternative to incumbent cable television operators."[8] And analysts appear to agree that DBS subscriber growth will continue to outpace cable's growth. Donaldson, Lufkin and Jenrette ("DLJ") reports that in July, 1999 alone, the DBS sector saw an 18% increase in customer additions to 202,500 ...prompting DLJ to predict higher subscribership than it had previously projected:

> As a result of consistent increases in additions in DBS subscriber growth, again exceeding our estimates, we are raising our forecasts to project the industry will add 2.7 million subscribers this year instead of 2.3 million...In addition to better than expected results, we believe a number of factors – including industry consolidation, bundling with telephone and high-speed data offerings and legislation allowing local station retransmission – will prompt better gains than we thought before. The bottom line is that we are raising our long-term forecast to show nearly 25 million subscribers by 2005, up from our previous estimate of 20 million customers.[9]

---

5 "Hot June Nudges DBS Above 10M", Multichannel News, July 19, 1999 at 18.

6 Id. at 2; see also Comments of NCTA at 11-13.

7 Comments of EchoStar at 1; see also Comments of NCTA at 13.

8 Comments of DirecTV at 1.

9 Donaldson, Lufkin and Jenrette, Media and Communications Statistics, August 16, 1999, p.11.

That DBS and cable are competing for the same customers is now clear. Recent studies confirm that DirecTV and EchoStar are "increasingly luring the very same urban and suburban, middle-class families that have always signed up for cable."[10] Indeed, the evidence shows that DBS and cable customers are "rapidly mirroring each other" demographically.[11] Thus, a DirecTV official recently remarked that the company is seeing more and more of its customers coming from "the mainstream, mainline cable audience."[12] And EchoStar officials "contend that about 80% of their subscribers" are former cable customers.[13]

DBS cannot be viewed as a "high end" product with limited mass appeal. As a DirecTV official recently acknowledged, "we've virtually dropped the economic barrier" to satellite television, noting that "DBS equipment is now cheaper than buying a TV set or a VCR."[14] An EchoStar executive noted "we've eliminated the real cost...it (DBS) now becomes more of a choice like cable."[15]

The comments of telephone companies confirm that they, too, are bringing meaningful competition to the MVPD business.[16] Their wireline and wireless systems provide services that are also fully substitutable for cable in the markets they serve. Ameritech, for example, now holds franchises to serve 108 communities in the midwest, and it has "increased the number of

---

[10] "Do Lower DBS Demos mean Higher Churn Rates?", Cable World, Aug. 16, 1999.

[11] Id.

[12] Id. According to the Yankee Group, 60 percent of new DBS subscribers are coming from cable-passed areas. DirecTV puts it much higher, estimating that 75 percent of its new subscribers are from cabled areas. Another DBS industry analyst says, "we've gone way beyond the early adopters" and notes the industry is "seeing less and less rural and more and more urban and suburban" DBS customers. Id.

[13] Id.

[14] Id. (quoting Terry Ferguson, Vice President, Business Development and Strategic Planning, DirecTV).

[15] Id. (quoting Scott Landers, Director-Acquisition Marketing, EchoStar.)

[16] Comments of Ameritech at 1.

communities in which it operates from 61 to 90, representing an increase of almost 50 percent" since last year.[17]

Similarly, BellSouth, in its own words, "continues to make steady progress toward Chairman Kennard's goal of creating bona fide competition in markets for delivery of video programming."[18] It currently holds 21 franchises, and is "negotiating to obtain cable franchises to serve additional communities in and around major metropolitan areas throughout the Southeast."[19] BellSouth also operates digital wireless cable service in New Orleans, Atlanta and Orlando in competition with systems operated by MediaOne Group, Time Warner, Cox and Comcast. It soon will launch in Jacksonville and Daytona Beach, Florida.[20]

In addition, SBC Communications, Inc. recently announced that its Pacific Bell subsidiary "will offer discounted packages that include Internet, entertainment and local-telephone services to consumers in Fremont, CA and Dallas – two areas AT&T has targeted for its own bundled offerings."[21] Pac Bell will offer "combinations of services – including DirecTV satellite-TV service… -- for 6% to 35% less than customers would pay if they purchased the services a la carte."[22]

The Wireless Communications Association ("WCA") points out that while wireless MMDS licensees increasingly offer bundles of telecommunications services, "it remains the case that many wireless cable operators continue to offer video services, using both traditional analog

---

[17] Id. at 1.

[18] Comments of BellSouth at 1.

[19] Id. at 1-2.

[20] Id. at 2.

[21] "SBC Communications to Launch Service 'Bundles' in Two Markets," Wall Street Journal, Aug. 24, 1999.

[22] Id.

and advanced digital technologies, in competition with wired cable operators."[23] And those wireless video services have been reinvigorated by the very same regulatory and technological advances that have made it possible for MMDS licensees to offer telecommunications services. As WCA notes, "with its recent adoption of innovative new rules and policies that permit Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees to make more flexible use of their spectrum, the Commission has blazed the way for the rapid deployment of broadband wireless services utilizing MDS and ITFS."[24]

The comments confirm that new wireline companies, such as RCN and Knology, have also emerged in the past year as vibrant and highly competitive entrants in the bundled video, voice, telephony and data business. RCN, which has partnered with electric utilities to build fiber optic facilities, describes itself as "the largest investor in, and implementer of, the OVS [Open Video System] concept."[25] It reports that it "is building a competitive presence in numerous MVPD markets" and "its MVPD subscribership is growing constantly."[26] RCN has chosen to concentrate "primarily on densely populated and demographically desirable areas of the country" and repeatedly states that it is "making significant progress in providing high quality alternative MVPD services in numerous urban and suburban markets."[27]

---

[23] Comments of Wireless Communications Association at 2-3 (discussing successful launches of BellSouth and GTE's digital wireless video systems and digital video roll-outs by People's Choice ("PCTV").

[24] Id. at 1.

[25] Comments of RCN Corporation at 9.

[26] Id. at 4.

[27] Id. at i, vii, ii ("making good progress in developing the markets it wishes to serve"; "developing a significant competitive role in the MVPD marketplace"). In addition to the cities described in its comments, RCN recently announced another long-term agreement to provide cable, telephony and Internet services in Hoboken, New Jersey and expects to reach similar agreements in other New Jersey communities. It also applied for an OVS license to serve communities in the Seattle area. Communications Daily, August 26, 1999 at 4.

As Ameritech points out, wireline cable "overbuilders" are proliferating, and, like DBS, they are viewed by consumers as substitutes for cable service:

> RCN and Seren are only two examples of a long list of new entrant competitors to incumbent cable that includes BellSouth, GTE, U.S. West, Southern New England Telephone, electric utility companies and municipalities.
>
> These examples demonstrate that cable overbuilders are providing real competition in communities in which they serve.[28]

In sum, six years after the passage of the 1992 Cable Act, cable faces an array of competitors that have already established themselves as viable choices for consumers. Cable's competitors are growing and proliferating in urban, suburban and rural communities across the country. While DBS has an immediate nationwide reach, other MVPDs in local markets are taking full advantage of regulatory, technological, and marketing approaches to win customers over to their video business.

Nevertheless, many of cable's competitors, not surprisingly, attempt to use this proceeding once again to pursue further regulatory advantages that will further their ability to take customers from cable. But, as we now show, there is no evidence in the record that Ameritech, BellSouth, DirecTV or EchoStar cannot continue to flourish and compete effectively against cable unless they are given unwarranted regulatory advantages such as expanded program access regulation.

---

[28] Comments of Ameritech at 4-5. Seren Innovations, Inc. has been authorized to overbuild in the San Francisco East Bay community. See also Comments of MediaOne at 2-7.

II. THE PROGRAM ACCESS RULES HAVE ACCOMPLISHED WHAT CONGRESS INTENDED AND SHOULD NOT BE EXPANDED.

Although cable's MVPD competitors have access to virtually all of the programming that has significant viewership among cable subscribers, they continue to be dissatisfied with the reach of the Commission's program access rules.[29] As in previous years, they urge the Commission to assert jurisdiction over terrestrially-delivered programming and non-vertically integrated programming.[30] And they seek to prohibit exclusive programming agreements and certain programming pricing practices based on their assertion that cable MSOs have undue leverage in the marketplace.[31]

Scrambling for any kind of rationale, the satellite and telephone company competitors now argue that consolidation and clustering in the cable industry, which supposedly gives incumbents "increased buying power"[32] and allows them to engage in "discriminatory pricing behavior"[33] and other anti-competitive tactics, requires expanded program access rules. BellSouth asserts, for example, that it is being denied "full and fair access to cable programming" and speculates that "in the wake of increased cable MSO consolidation" it is "now at even greater risk of losing access to regional sports and other popular cable" programming.[34]

Since the inception of program access regulation in 1992, the Commission has closely scrutinized this area to ensure that the rules are accomplishing Congress' objectives. Just last

---

[29] See Comments of Ameritech, BellSouth, EchoStar, DirecTV and Hiawatha Broadband Communications.

[30] See e.g. Comments of Ameritech at 7-10; Comments of BellSouth at 10-14; Comments of Wireless Cable Association at 5-11.

[31] See e.g. Comments of EchoStar at 7; Comments of BellSouth at 9-13.

[32] Comments of EchoStar at 6.

[33] Comments of Ameritech at iv.

[34] Comments of BellSouth at 3.

year, at the urging of cable's competitors, the Commission strengthened the rules in three key respects. Specifically, the Commission decided to: (1) use its forfeiture authority as an enforcement mechanism where appropriate; (2) impose damages for violations of the rules; and (3) apply time limits for the expeditious resolution of cases.[35]

In that proceeding, the Commission also considered whether application of the rules only to satellite-delivered, vertically-integrated program networks was impeding competition in the video marketplace. The Commission found no significant evidence of any such problem.[36]

A year later, there is still no such evidence. At the same time that it strengthened the program access rules, the Commission noted that it would exercise its authority to prevent evasions of the rules, where a network "switched" from satellite to terrestrial delivery for no other, legitimate reason. In the relatively few cases where the facts show that certain programming once delivered by satellite is now delivered terrestrially, there has been no evidence that such action has been undertaken to achieve an anticompetitive purpose. In fact, in the seven years that the program access rules have been in effect, there have been a grand total of four complaints of "evasion" -- barely a trickle and by no means a trend.[37]

Nor is there evidence of any anticompetitive effect from the unavailability of any terrestrial or non-vertically integrated networks. The runaway rapid growth of DBS service belies any supposed adverse effect from the level of program availability for these competitors.

---

[35] Petition for Reconsideration of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, CS Docket No. 97-248, Report and Order, 13 FCC Rcd 15822, 15825-6 (1998).

[36] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report, 13 FCC Rcd 24284 (1998) at ¶ 194; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, 13 FCC Rcd at 15856, ¶ 71.

[37] See Fifth Annual Report at ¶ 193, noting only two complaints filed related to this issue.

As noted above, cable's competitors carry the overwhelming majority of cable program networks, including virtually all the largest and most-watched networks.

Product differentiation and exclusivity with respect to new and additional services beyond those core vertically networks that must be made available to all MVPDs is generally a legitimate, procompetitive strategy that increases the choices and the amount of programming available to consumers. Certainly, the DBS industry sees its exclusive programming packages as such a strategy. As DirecTV's President Eddy Hartenstein stated in June:

> DirecTV subscribers were provided with entertainment choices they couldn't get anywhere else . . . . It's clear that consumers are selecting DirecTV for our exclusive and differentiated programming.[38]

Just as DBS invests in unique product offerings to differentiate itself in the burgeoning video programming market, cable companies may differentiate themselves to attract and retain customers. This is the hallmark of a competitive marketplace, not a cause for governmental concern, much less intervention.

Some commenters complain that even though they have access to programming, they sometimes have to pay more than certain cable operators.[39] There is, first of all, no reason why cable operators and their subscribers should not share with programmers the cost savings and efficiencies that are resulting from cable industry consolidation and clustering. This is how markets work to promote efficiency and competition. And there certainly is no reason why programmers should be forced to give every buyer the same price as the most efficient buyer. Were the government to require this outcome, one of two possibilities would result: either

---

[38] "Sitting on Top of the World," Multichannel News Advertising Supplement, June 1999; Comments of MediaOne at 11; Comments of AT&T at 10-11.

[39] See e.g. Comments of Ameritech at 10-13; Comments of BellSouth at 12-13; Comments of EchoStar at 6-7.

programmers' revenues (and expenditures) would be artificially suppressed, or the rates paid by more efficient operators and their subscribers will be artificially high. In the first case, program quality suffers. In the latter, consumers pay more. Either way, consumers are made worse off.

In any event, there is no evidence that alleged price differentials are inhibiting the ability of alternative MVPDs to compete. Many of these competitors constitute large companies themselves. Ameritech and BellSouth, for example, are multi-billion dollar telecommunications companies with plenty of competitive muscle. And DirecTV is backed by Hughes Electronics and has joined forces with Bell Atlantic, SBC and America On-line. Even EchoStar has seen a huge gain in its market cap of nearly 200% this year alone. Consolidation is not just a phenomenon of the cable industry. The telephone and satellite industries have coalesced around this strategy in order to compete more efficiently in the provision of telephony, data, Internet and video services.

Where differential prices offered by a vertically integrated satellite program network are not cost-justified under the criteria of the program access provisions of the Act, competitors can file complaints at the Commission. In any event, there is no evidence that a problem is occurring to any significant extent or that the current rules and laws would provide insufficient remedies.

In sum, the Commission should report to Congress that there is no need for further government regulation of the programming market. NCTA urges the Commission to recommend in its Sixth Annual Report that the marketplace, not the government, should dictate the terms of video competition.[40]

---

[40] Several commenting parties also complain that competing MVPDs need further government intervention to facilitate their access to multiple dwelling unit buildings (MDUs) and to the wiring installed by cable operators in MDUs. The Commission has already taken significant steps to facilitate competitive access to MDU subscribers, which even the Wireless Cable Association has "applaud[ed]" as a "critical first step toward achievement of full and fair competition in the MDU environment." WCA Comments at 18. The complaints raised by the commenting parties have been raised in petitions for reconsideration of the Commission's rules, which are currently pending. In addition, related issues regarding access to MDU buildings, conduit ***(continued)***

CONCLUSION

Every year, the evidence shows that more and more consumers have a choice among video programming providers. Already, DBS from two strong facilities-based competitors is available to consumers nationwide as a substitute for cable service, and DBS keeps gaining more and more subscribers every year. Telephone companies are competing vigorously in the video marketplace, providing DBS, MMDS and wireline video programming services in conjunction with their voice and data offerings. And other wireless providers, private cable operators, and wireline overbuilders are expanding the range of available options.

It is no surprise that cable's competitors continue to seek additional regulatory boosts at cable's expense. But such governmental intervention would be at the expense of consumers as well. Marketplace competition – and not regulatory favoritism – will provide consumers with the array of choices that best meet their needs, interests and demands. And, as the record makes more clear every year, that competition is now a reality.

Respectfully submitted,

Daniel L. Brenner
Michael S. Schooler
Loretta P. Polk
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-775-3664

Counsel for the National Cable
Television Association, Inc.

September 1, 1999

---

and wiring by telecommunications providers are the subject of the Commission's "Competitive Networks" rulemaking proceeding. In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry, released July 7, 1999.