

November 23, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Ex Parte Notice

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 04-227

Dear Ms. Dortch:

On November 22, 2003, representatives of Comcast Corporation ("Comcast") met with representatives of the Commission's Media Bureau to discuss the above-captioned proceeding. Comcast was represented by James R. Coltharp, Chief Policy Advisor, FCC and Regulatory Policy, and by James L. Casserly and the undersigned, both of Willkie Farr & Gallagher LLP. The Media Bureau was represented by Danny A. Bring, Jane Frenette, Marcia Glauberman, Judith Herman, William Johnson, Anne Levine, Timothy May, and Royce Sherlock.

The discussion centered on points covered at length in Comcast's comments and reply comments filed on July 23, 2004 and August 25, 2004, respectively, and summarized in a two-page handout distributed at the meeting (attached to this letter as Attachment 1). Comcast also distributed a two-page handout (attached to this letter as Attachment 2) highlighting significant developments since August 2004, which underscore the dynamism of the video marketplace. In addition, Comcast sought to clarify the record on the following matters:

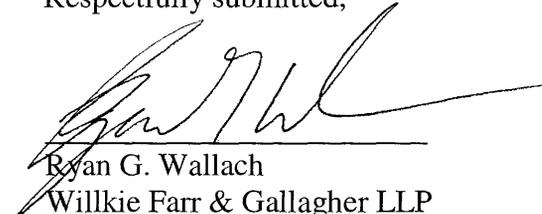
- **Video Competition Is Pervasive:** Contrary to persistent assertions by certain consumer advocates, DBS providers do not only compete for "high-end" cable customers. Comcast submitted an October 7, 2004 Multichannel News article (attached to this letter as Attachment 3) that describes how DIRECTV and EchoStar are attracting a wide variety of cable customers, including "Bottom-End" subscribers. Moreover, contrary to the assertions of the Broadband Service Providers Association ("BSPA"), consumers throughout America enjoy the benefits of competition. As BSPA acknowledges in its comments, competition from

wireline providers/overbuilders is limited to select areas; tellingly, however, Comcast's responses to competition (e.g., system upgrades and rebuilds; rollout of HDTV, VOD, and DVR services; improved customer service; etc.) are occurring in *every* market that we serve. With or without overbuilders, every community served by cable enjoys the "increased choice, better services, higher quality, and greater technological innovation" the BSPA says it is the purpose of this report to assess.

- **DBS Providers' Extraordinary Success Is Relevant to an Analysis of the Status of Video Competition:** Contrary to the mischaracterization on the part of DIRECTV, Comcast's effort to demonstrate the existence of MVPD competition does not depend solely, or even mainly, on how many subscribers DIRECTV and EchoStar have attracted nationally. Comcast is well aware that a market power analysis requires a focus on the competitive choices available in a particular geographic market. The fact is that consumers in every local community that we serve have a choice of at least three MVPDs as well as many other sources from which to obtain their video programming. However, DBS providers' national success *is* relevant to the status of video competition because it shows how formidable they have become and instills confidence that consumers will continue to have at least three MVPD options for many years to come. Moreover, DBS providers could not have attracted 24 million customers nationwide without having achieved significant success in thousands of *local* communities.
- **In Such a Dynamic Marketplace, Any Analysis of Video Competition Must Account for the Impact of New Services and Technologies:** Contrary to the claim of EchoStar, the evidence of video competition does not rely on "future services that may -- at some point but not currently -- offer significant competition." The evidence of *actual* competition in this record -- and in the marketplace -- is compelling. That does not mean the Commission's report should ignore how the video marketplace is constantly evolving as new technologies and services, such as USDTV, video streaming, and online movie rental companies, provide consumers with more sources of video programming. These technologies and services are real and are available now. More importantly, these technologies and services impact existing competitors and compel a competitive response. The prospects for still more video competition from established telephone companies may as yet be somewhat uncertain, but the Commission's report would be incomplete if it did not acknowledge the potential seismic impact of the multibillion dollar fiber builds announced by SBC and Verizon.

Pursuant to 47 C.F.R. § 1.1204(b)(1), the Commission has determined that no *ex parte* or disclosure requirements apply to this proceeding. *See Notice of Inquiry*, FCC 04-136 ¶ 82 (June 17, 2004). Nonetheless, we wanted to place the attached handouts on the public record to summarize and, to some extent update, the information presented in Comcast's previously filed comments and reply comments.

Respectfully submitted,



Ryan G. Wallach
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006
(202) 303-1159

Attachments

cc: Danny A. Bring
Jane Frenette
Marcia Glauberman
Judith Herman
William Johnson
Anne Levine
Timothy May
Royce Sherlock

ATTACHMENT 1

VIDEO COMPETITION IS INTENSE. REGULATIONS DESIGNED FOR A VASTLY DIFFERENT ERA SHOULD BE REASSESSED.

I. THERE IS MORE VIDEO COMPETITION, FROM MORE COMPETITORS, USING MORE TECHNOLOGIES, THAN AT ANY TIME IN HISTORY.

- DBS providers, cable operators, and other video programming distributors compete head-to-head for customers in every city, town, and hamlet. And competition gets even more intense as DBS providers strengthen their competitive positions, broadcasters explore multichannel offerings to reach consumers, telephone companies invest in new distribution technologies, and numerous other retail distribution models develop and mature.
- **DBS.** DIRECTV and EchoStar are now the second and fourth largest MVPDs in the country. Together they serve about 24 million customers (27% of MVPD subscribers). SBCA recently reported that 56% of DBS subscribers are former cable customers. Both DIRECTV and EchoStar expect to offer local channels to more than 90% of U.S. television households by year's end, further intensifying competition. In addition, all four RBOCs have entered into joint marketing arrangements with DIRECTV, EchoStar, or both. In the first six months of SBC's joint marketing campaign, it signed up 226,000 DBS customers, and DIRECTV is adding approximately 10,000 new subscribers per month from its joint marketing campaigns with the RBOCs. VOOOM -- a third DBS provider -- now offers programming catering to HDTV aficionados, including substantial amounts of exclusive programming. Like VOOOM, DIRECTV and EchoStar continue to lure customers by obtaining important programming not available to their cable competitors. For example, DIRECTV recently paid \$3.5 billion to lock in the exclusive right to distribute NFL SUNDAY TICKET through 2010.
- **Broadcasters.** DTV allows broadcasters to become multichannel competitors. USDTV, a low-cost MVPD using broadcast frequencies to offer 20 to 30 popular program networks for \$19.95, was launched in March in three cities and plans to expand to 30 markets by year's end. Emmis Communications is urging traditional broadcasters to band together to provide an encrypted package of local broadcast stations plus 20 to 30 cable networks for approximately \$25 per month. Thirty-five broadcasters, representing 370 broadcast stations, have already signed on.
- **BSPs and RBOCs.** BSPs continue to provide competitive options. For instance, Grande Communications has expanded its deep-fiber network and doubled its subscribership in the past year. RCN has shed hundreds of millions of dollars worth of debt. Municipal and electric utility BSPs offer a growing array of services. RBOCs Verizon and SBC each are spending billions on new fiber architectures in order to provide wire-to-wire competition with MVPDs.
- **Video Streaming, Download Services, and Other Distributors.** Video streaming and download services increasingly deliver video content to consumers. Starz Encore and Liberty Media introduced an online service from which consumers can download unlimited movies for a flat monthly fee. AOL also offers full-feature film downloads through Movielink for only 99 cents each, and RealPlayer users are accessing a variety of streaming video. Akimbo has introduced the first Internet-to-TV VOD service that streams movie and music downloads to DVRs. TiVo has announced plans to introduce a similar service in partnership with Netflix. Sales of DVDs continue to skyrocket. The rental market for DVDs and tapes continues to grow thanks to innovative distributors such as NetFlix, the largest online movie rental service, which ended the third quarter with a 73% increase in subscribers over last year. Other online-based competitors include CinemaNow, MovieFlix.com, and GreenCine.

II. COMPETITION HAS SPURRED COMCAST TO INNOVATE.

- The growth of video competition is also reflected in the competitive responses by cable operators. Multi-billion dollar investments to upgrade cable systems nationwide, offer new services and technologies, and improve customer service and satisfaction are all driven by the inescapable competitive realities of the multichannel video marketplace.
- **Upgrades.** In 2003 alone, Comcast invested approximately \$4.1 billion in capital improvements and constructed a record 53,000 miles of fiber. As of the end of the third quarter of 2004, we had upgraded nearly 98% of our cable network to improve service quality and reliability and enable the delivery of new services.
- **HDTV.** Comcast has launched HDTV in 55 markets, including all of our top 100, and HDTV is now available to a stunning 92% of Comcast basic subscribers. Comcast typically offers 10-14 HDTV channels, including 4-6 local broadcast channels.
- **VOD.** Comcast continues to roll out VOD service. Our VOD offering is available in 29 markets, and we expect to extend it to 80% of our footprint by year-end. We also plan to expand our VOD library to 20,000 hours of programming, much of it for no additional charge. Customers are now using VOD over 50 million times each month, and the average VOD customer uses it 22 times per month.
- **DVR.** Comcast is deploying DVRs even more rapidly. DVR availability reached 50% in June 2004 and will be ubiquitous by year's end.
- **Innovative Programming.** Comcast continues to develop and support innovative cable programming. We recently launched Comcast SportsNet Chicago and Comcast SportsNet West, two regional sports networks. We also have assisted iN DEMAND in developing iNHD and iNHD2, and recently helped create and launch TV One, a new channel serving African Americans. In addition, we offer expansive Hispanic tiers as well as many international specialty channels.

III. THESE COMPETITIVE REALITIES WARRANT EASING EXISTING REGULATORY REQUIREMENTS.

- Congress has been clear: Competition trumps regulation. Regulation for the sake of helping competition to take root or to curtail the exercise of "market power" is no longer needed or justified. Thus, *all* rules grounded in the marketplace circumstances of 1992 are candidates for elimination. And any new regulatory proposals should bear a heavy burden of proof.
- For example, the FCC should adopt a presumption that effective competition exists statewide in any state where DBS penetration exceeds 15%. LFAs should continue to be permitted to rebut such a presumption where appropriate based on the status of competition in their respective franchise areas, but if no oppositions to such a petition are timely filed, the petition should be granted automatically.
- The FCC should also initiate a review of its program exclusivity prohibition in light of the dramatic shift in the competitive landscape. Significant and accelerating growth in DBS, its substantial market share, News Corp.'s control of DIRECTV, and DBS's successful use of exclusive programming as a competitive tool have restructured the MVPD marketplace. The prohibition on exclusive contracts for satellite cable or broadcast programming between a cable operator and a "vertically integrated" programming vendor should be eliminated. At a minimum, the prohibition should be modified to preclude complaints by MVPDs that are more than large enough to negotiate for themselves (e.g., those with over 10 million subscribers) or that themselves distribute exclusive programming.

ATTACHMENT 2

RECENT VIDEO COMPETITION DEVELOPMENTS

(since comment cycle closed in August 2004)

DBS Providers

- DIRECTV added 484,000 net subscribers between July and September and now serves 13.5 million subscribers (an 18% increase in one year), more than all but one cable company.
- EchoStar added 350,000 new subscribers between July and September and now serves 10.5 million subscribers (a 15% increase in one year), more than all but two cable companies.
- DIRECTV has pledged to spend over \$1 billion to launch four satellites capable of carrying approximately 1500 local HD channels and additional national HD networks. Similarly EchoStar received FCC authorization for additional capacity to expand its services with three new satellites.
- DIRECTV extended its exclusive agreement to distribute NFL SUNDAY TICKET until 2010, and expanded the agreement to include new content and interactive features. In addition, DIRECTV announced the exclusive U.S. launch of Ecuador's Ecuavisa Internacional. EchoStar also added exclusive Chinese-language programming.
- EchoStar and DIRECTV expanded the availability of local channels to more markets.
- DIRECTV and EchoStar continued to enter into new agreements to bundle their services with services provided by telephone companies such as Cincinnati Bell and CenturyTel. SBC announced that it signed up 226,000 DBS subscribers in the first six months of its joint marketing campaign with EchoStar.

Broadcasters

- USDTV announced that it will introduce a next-generation set-top box that will enable it to offer new advanced services such as VOD and DVR. USDTV's CEO projected that USDTV could sign up 5 million subscribers in the next four years.

RBOCs

- Qwest strengthened its alliance with DIRECTV to provide consumers with an integrated package of video, voice, and broadband access.
- Chairman Powell recently noted that almost every major phone company is working to develop a service that would transmit video over phone lines via Internet protocol ("IPTV").
- Verizon, SBC, BellSouth, and other ILECs have announced plans to accelerate and expand major investments in building fiber networks in order to offer customers bundles of video, data, and voice communications. SBC has committed \$4 billion to Project Lightspeed (plus another billion in customer activation capital expenditures) to deliver video, voice, and data to 18 million households within three years. SBC has committed \$400 million to an alliance with Microsoft to provide next-generation television services using Microsoft's software platform. Verizon has tripled the number of states where it is deploying fiber-to-the-premises, which will pass 1 million homes in 2004 and 2-4 million more in 2005. Verizon, which has already begun to obtain cable TV franchises in several markets, is investing \$1 billion this year, growing to \$2.5 billion in 2005 and \$20-30 billion over the next 15 years.
- SBC and Verizon each hired cable veterans to lead their respective video content strategies and acquisitions.

Video Streaming/IPTV, Download Services, and Other Distributors

- TiVo and Netflix announced a partnership to develop and launch an online service that will permit customers to download movies to their TiVo DVRs for a low monthly fee. Netflix is already negotiating with movie companies such as Warner Brothers to permit the movies to be streamed to consumers.
- Netflix, Blockbuster, and Wal-Mart all cut prices for their DVD rental subscription services.
- StarzEncore beefed up its online movie service by offering unlimited access to 150 recently-released movies at any given time for \$12.95 per month and a progressive download function that allows customers to begin watching a movie after 15 minutes.
- Akimbo rolled out its IPTV VOD service nationwide. For \$9.99 per month, consumers can download movies and other content to DVRs they purchase at Amazon.com.
- Movielink, the online VOD service owned by major movie studios, announced that it delivered its 1 millionth movie download on November 8th.
- CinemaNow added Sony Picture's movies and HD movie downloads to its service, and now offers consumers the opportunity to download over 5,000 films, shorts, music concerts, and TV programs.

Comcast's Response

- Comcast has upgraded 98% of its cable infrastructure to improve service quality and reliability and offer new advanced services. Upgrades and rebuilds are ongoing. For example, Comcast has spent \$350 million improving its system in Chicago over the past two years, a job that was estimated to take five years.
- HDTV is now offered in 55 Comcast markets representing 92% of Comcast's customers. Comcast continues to rollout DVR service and expects to offer all its customers DVR service by the end of the year. Comcast is rolling out new set-top software and interactive program guides from Microsoft and from Comcast's joint venture with Gemstar.
- Comcast announced the carriage of the NFL Network. Comcast launched two new regional sports networks (CSN Chicago and CSN West) and three local sports channels (Comcast Local (Detroit), Cowboys TV, and Falconvision), and announced the creation of a new regional sports network featuring the New York Mets. Comcast also entered into a joint venture with Sony to create new cable channels from the content libraries of Sony and MGM.
- Comcast launched the first broadband Internet channel built for kids and featuring premier content from Disney Online, and we announced a partnership with HIT Entertainment, PBS, and Sesame Workshop to develop and launch a 24-hour children's cable network and companion VOD service.
- Comcast continues to add additional programming to its VOD offering and recently signed major agreements with ABC Networks, ESPN, NFL Network, Sony Pictures, and MGM, among others. For example, Sony has agreed to license 200 of its own movies and 200 MGM movies to Comcast for VOD.
- Comcast has placed significant emphasis on meeting the needs of the Hispanic community by announcing the carriage of three new services in its Hispanic packages and rolling out ON DEMAND en Español (with more than 100 hours of programming).

ATTACHMENT 3

Multichannel^{NEWS}™

Cable Losing 'Bottom-End' Subs to DBS

By Steve Donohue

10/7/2004 7:00:00 PM

New York -- DirecTV Inc. and EchoStar Communications Corp. pounded cable operators in the second quarter, with subscriber losses dropping basic-cable penetration to a measly 54.9% nationwide.

But some industry executives said most of the customers who are abandoning cable for satellite these days are older ones who spent little on cable, often subscribing to basic-only packages.

"The subscribers who are leaving us tend to be on the bottom end of the spectrum," Cox Communications Inc. senior vice president of marketing Joe Rooney told attendees at a collaborative marketing seminar here Thursday that was sponsored by the Cable & Telecommunications Association for Marketing.

Leichtman noted that DirecTV and EchoStar picked up 749,000 net new customers combined during the second quarter, while cable operators lost about 350,000 in the same period.

"The net adds are beginning to wane a little bit. The impact of DBS [direct-broadcast satellite] has been very strong," said Leichtman, founder of Leichtman Research Group Inc., who moderated the panel, which also featured Scripps Networks executive VP John Lansing.

Cox and Cablevision Systems Corp. remain the only MSOs with basic-cable-penetration rates above 60%, with Cablevision at 66% and Cox at 60%, Leichtman said.

Charter Communications Inc. leads the industry in digital-cable penetration with a 43% rate, followed by Mediacom Communications Corp. at 25%, he added.

Rooney said Cox -- which continues to grow its basic-subscriber base, albeit at a lower rate of 0.63% annually -- has found that many Cox subscribers who left cable for satellite in recent months were basic-cable-only customers.

Some of those were DBS subscribers who also bought basic-cable packages in order to receive local broadcast networks, but who decided to drop cable after DirecTV and EchoStar expanded the number of markets where they offer packages of local-broadcast signals, Rooney added.

Most subscriber churn occurs when customers move to new cities. The panelists spent much of their time discussing CTAM's new Cable Movers Hotline, in which MSOs direct customers who call to disconnect cable service to operators near their new homes.

Rooney said the program has been effective in markets like San Diego. When a consumer moves to the city, their first phone call is typically to order electricity service, followed by local phone service, then cable.

With SBC Communications Inc. offering local telephone customers a bundle that includes high-speed data and video, many of those customers will order a triple-play bundle from SBC without ever hearing of the Cox brand, Rooney said.

Scripps has also chipped in at the Cable Movers program, supplying MSOs with cross-channel promos that tout both the hotline and *Design to Sell*, a program on Scripps' Home & Garden Television, Lansing noted.

Cox has also reduced churn by offering a \$10 discount to subscribers who buy video, voice and high-speed-data packages from the MSO, with some Cox systems allowing customers to use the \$10 to get a free premium service, free digital cable or \$10 off their bill, Rooney said.

Also at the seminar:

- Rooney brushed aside the recent joint venture announced by TiVo Inc. and Netflix Inc. to eventually offer TiVo users movies that could be downloaded to digital-video recorders, calling it "a lot of hot air" since TiVo and Netflix won't be able to distribute movies to viewers in better windows than cable operators.

"The RBOCs [regional Bell operating companies] have mastered the press release, and now, TiVo/Netflix have mastered the press release," Rooney added.

- Lansing -- who will succeed Ed Spray as Scripps Networks' president in January, and who previously ran Scripps' TV-station group -- criticized dual must-carry proposals. While the National Association of Broadcasters has been pushing for regulations that would force cable operators to carry both analog and digital networks from local broadcasters, Lansing called dual must-carry "a waste of precious spectrum."

- Rooney called for more local affiliate promotions that involve cable programmers and local systems' ad-sales, public-affairs and marketing departments. "If there's a four-way win, that's the best," he added.

- Scripps -- which has provided content from its 15,000-hour library geared toward subscribers who get Comcast Corp.'s free-on-demand platform in Philadelphia -- is looking to provide unique local video-on-demand content to other operators, Lansing said.

<<< Back | Print

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