

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
)	
Annual Assessment of the Status of)	MB Docket No. 05-255
Competition in the Market for the)	
Delivery of Video Programming)	
)	

**REPLY COMMENTS
OF ECHOSTAR SATELLITE L.L.C.**

EchoStar Satellite L.L.C. (“EchoStar”) hereby files its reply comments in the above-referenced proceeding. The Commission would be well-advised to draw some sanguine inference from any incremental decline in the market share of cable operators over the last year. Not only does cable’s dominance of the MVPD market persist; it is liable to be further cemented, and its manifestations are as troublesome as ever. First of all, cable rate increases continue to outpace inflation. Second, cable MSOs have taken new initiatives in the programming area, such as the hockey rights recently acquired by the cable-controlled Outdoor Life Network and the In Demand High Definition venture, that threaten to erode further what should be the cornerstone of MVPD competition -- fair and nondiscriminatory access to programming. And finally, EchoStar believes that cable operators continue to exercise their purchasing power to extract preferential terms from unaffiliated programmers too. The conduct of large programming conglomerates may also raise public interest concerns, if it results in the consumer bearing the cost of excessive copy protection measures. For all these reasons, the Commission should remain as vigilant as ever in exercising oversight over continuing developments in the MVPD market.

I. THE MVPD MARKET IS NOT FULLY COMPETITIVE

Despite what the cable interests argue in their comments, the multichannel video programming distribution (“MVPD”) market is not fully competitive. As the National Cable and Telecommunications Association (“NCTA”) concedes, cable companies continue to control 69% of the MVPD market in the United States.¹

The cable interests attempt to conjure a competitive market from technologies that are either too nascent to pose any competitive threat or do not provide a sufficiently comparable service to cable television. For example, the cable interests portray local exchange carriers’ plans to provide a pay television service as increasing competition in the MVPD market.² However, only one major LEC has launched service,³ and the remaining LECs identified are rural providers that do not have the strength to compete with an incumbent cable operator, assuming one exists in their respective

¹ Comments of the National Cable & Telecommunications Association, *filed in* MB Docket No. 05-255, at 2 (Sept. 19, 2005) (“NCTA Comments”) (“Cable made significant gains in digital cable and high speed Internet customers this year, but its share of multichannel video customers continued to decline to 69 percent.”). It should be noted that NCTA also recognizes the degree of concentration in the provision of cable service: “the six largest [multiple system operators (“MSOs”)] . . . serve over 80% of the cable customers in the country. . .”). *Id.* at 29 n.82.

² *See* NCTA Comments at 2 (“This already vibrant competitive marketplace is gaining another strong competitor. . . . the regional Bell operating companies are preparing to enter the video marketplace.”); *see also* Comments of Comcast Corp., *filed in* MB Docket No. 05-255, at 12 (Sept. 19, 2005) (“Comcast Comments”) (“Today, the prospect for significant LEC competition in the video business is greater than ever.”). Comcast also suggests that marketing relationships between certain LECs, such as the Bell companies, and DBS carriers presents a viable alternative to cable. *Id.* (“each of the Bell companies, as well as many smaller LECs, continues to foster marketing relationships with one of the nation’s two DBS providers, enabling them to offer the coveted triple play of voice, video, and data now . . .”). These relationships, however, already are accounted for in the current DBS penetration rates, which NCTA has recognized are significantly lower than cable. *See* NCTA Comments at 2.

³ Moreover, this LEC - Qwest - has launched service in only four markets: Phoenix, Arizona, Highlands Ranch and Boulder, Colorado, and Omaha, Nebraska. *See* Comcast Comments at 14-15.

markets.⁴ Other major LECs have begun planning for a television service over their newly upgraded fiber networks, but they are not yet significant competitors.

There is no doubt that DBS has emerged as the most promising alternative to cable. But for all of the competitive pressure exerted by EchoStar and DirecTV, the most telling fact about the state of competition in the multichannel video market this year, and one that Comcast and NCTA cannot deny, is that cable price hikes have outstripped inflation.⁵ This would not be the case if the MVPD market was fully competitive as the cable operators claim.

Cable operators also make much of their increasing video on demand (“VOD”) offerings.⁶ The cable MSOs’ VOD forays, however, are yet another illustration of one fundamental problem that still bedevils the MVPD market: access to programming. As EchoStar argued in its Comments, the program access rules are not effective in tackling this problem for two main reasons.⁷ First, they do not apply to unaffiliated programmers. An independent VOD programmer who wants carriage is at the mercy of Comcast and is liable to give Comcast preferential treatment or exclusivity rights. Second, the terrestrial loophole described in EchoStar’s Comments allows cable operators to circumvent the program access rules to the detriment of its competitors.

But the purchasing power of large cable MSOs is not the only anomaly hampering access to programming by MVPDs. Unaffiliated programmers are not only liable to give preferential

⁴ These LECs include Pioneer Telephone Cooperative, Progressive Rural Telephone, and Beyond Communications. *See id.* at 13-14.

⁵ *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, MB Docket No. 05-255, at ¶7 (rel. Aug. 12, 2005) (citing *Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, 20 FCC Rcd 2718, 2737, Attachment 4 (2005)).

⁶ *See* Comcast Comments at 48-49; *see also* NCTA Comments at 29-30.

⁷ *See* Comments of EchoStar Satellite L.L.C., *filed in* MB Docket No. 05-255, at 6-8, 10-13 (Sept. 19, 2005) (“EchoStar Comments”).

terms to cable MSOs. Often they too wield considerable power, which they use to extract unfair and onerous terms from distributors such as EchoStar. EchoStar has repeatedly alerted the Commission to risks for competition arising from the tying demands of large conglomerates,⁸ and, indeed, the Commission has recently acknowledged such risks.⁹ Digital rights management is another example. While the concern with piracy is legitimate, EchoStar has discerned a propensity on the part of large programmers to demand digital rights measures from distributors that are characterized by high cost on the one side of the balance and speculative or limited benefit on the other. To the extent these burdens are excessive compared to the benefits that they promise, it is ultimately the consumer who bears these burdens in the form of higher prices and less competition. EchoStar requests that the Commission consider this troubling trend.

II. SATELLITE CARRIERS SHOULD NOT BE REQUIRED TO CARRY HD AND MULTICAST DIGITAL BROADCAST SIGNALS

The Association of Public Television Stations (“APTS”) requests that satellite carriers be required to carry all digital broadcast signals in local-into-local markets, including high-definition and multicast channels.¹⁰ First of all, the Commission has already ruled that cable operators are not required to carry digital multicast broadcast signals because of the constitutional infirmities of such a

⁸ See Comments of EchoStar Satellite L.L.C., *filed in* MB Docket No. 05-89, at 2-3 (Apr. 25, 2005).

⁹ *In the Matter of Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation*, MB Docket No. 05-89, Report and Order, 20 FCC Rcd 10339, at 15 (2005) (“we clarify that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws”).

¹⁰ Comments of Association of Public Television Stations, *filed in* MB Docket No. 05-255, at 14 (Sept. 19, 2005) (“APTS Comments”) (“public television respectfully requests that satellite companies such as DIRECTV and EchoStar be required to carry all free, over-the-air digital signals where local television stations are being carried pursuant to SHVIA. Carriage should include but not be limited to both high-definition programming and all multicast digital programming.”).

requirement.¹¹ Nothing warrants a different conclusion in the case of satellite carriers. In any event, APTS's argument does not belong in this proceeding, and has been briefed by EchoStar extensively in the appropriate proceedings.¹² Multicast must-carry (let alone HD must-carry) would be unconstitutional for satellite carriers because it fails to satisfy both prongs of the *O'Brien* test.¹³ Under that test, a content-neutral restriction on the free speech rights of MVPDs, such as multicast must-carry, is only constitutional if it (1) furthers an important or substantial government interest unrelated to the suppression of free expression, and (2) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁴ Accordingly, APTS's request should be rejected.

III. SATELLITE CARRIERS SHOULD NOT BE REQUIRED TO PROVIDE SMALL AND MEDIUM-SIZED MVPDS ACCESS TO THEIR SIGNAL

The American Cable Association ("ACA") recommends that the Commission adopt a policy allowing small- and medium-sized cable companies nondiscriminatory access to satellite carriers' local-into-local signals.¹⁵ The Commission has already rejected this position.¹⁶ Not only is

¹¹ *In the Matter of Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Report and First Order on Reconsideration, 20 FCC Rcd 4516, at ¶¶14-25 (2005).

¹² See *In the Matter of Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, Petition for Reconsideration of EchoStar Satellite L.L.C., MB Docket No. 05-181, at 7 (filed Sept. 30, 2005) ("Section 210 Petition for Recon."); *In the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Ex Parte Filing of EchoStar Satellite L.L.C., MB Docket No. 03-15 (filed on Jan. 14, 2005).

¹³ *United States v. O'Brien*, 391 U.S. 367 (1968).

¹⁴ See Section 210 Petition for Recon. at 7 (filed Sept. 30, 2005).

¹⁵ Comments of American Cable Association, filed in MB Docket No. 05-255, at 19-20 (Sept. 19, 2005) ("ACA Comments").

there no legal authority requiring satellite carriers to provide a retransmitted signal to any competitor, the ACA fails to provide any new justification for requiring a satellite carrier to share its infrastructure, in which it has invested substantial capital, with its competitors.¹⁷ As the Commission recognized in its report to Congress, incumbent cable operators have many alternatives to receiving local broadcast stations, “including fiber, microwave or fixed satellite,” and these do not require one party to share its signal or facilities with its competitors.¹⁸ The Commission should reiterate this position and reject the ACA’s request. Rather than regulatory intervention, the Commission should allow market forces to determine the most efficient means of delivering these signals.

¹⁶ *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, MB Docket No. 05-28, at ¶83 (Sept. 8, 2005) (“Retransmission Consent Report”).

¹⁷ *See also* Reply Comments of EchoStar Satellite L.L.C., *filed in* MB Docket No. 05-28, at 2 (March 31, 2005).

¹⁸ Retransmission Consent Report at ¶83.

IV. CONCLUSION

EchoStar urges the Commission to take the foregoing reply comments into account in its next annual report on the status of competition among MVPDs.

Respectfully submitted,

/s/

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