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Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of)
Annual Assessment of the Status of Competition In the Market for the Delivery of Video Programming)

Federal Communications Commission Office of Secretary MB Docket No. 05-255

REPLY COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC"), by its attorneys, respectfully submits the following reply comments in response to comments submitted in the above-captioned proceeding. TWC's reply comments will focus on the assertion by certain commenters that the availability of DBS service does not result in lower prices for cable television consumers and thus does not represent effective competition to cable. We also briefly respond to comments from parties that are seeking to use this proceeding to attack certain transactions involving TWC that currently are under review in a separate proceeding.

DISCUSSION

I. The Assertion that DBS Does Not Impose "Discipline" on Cable Prices Is Based On Flawed Analysis and Incomplete Facts.

A number of cable's competitors have argued in their comments that, despite the fact that virtually all cable subscribers have available the option of subscribing to either of two national DBS services, and despite the fact that, in little more than a decade, those two services have achieved a combined penetration level of over 27 percent of all MVPD subscribers, only "head-

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to-head” wireline competition can “check” cable prices.”¹ In support of this assertion, these commenters generally cite the same source: a report released by the General Accounting Office (“GAO”) in 2004 that purported to find that wireline competition produces lower cable prices than DBS competition.²

In reply comments filed in last year’s annual competition proceeding, NCTA demonstrated that the GAO’s methodology, which relied on information from only a statistically insignificant handful of communities, was fundamentally flawed.³ Moreover, the GAO itself has recognized the common sense proposition that competitiveness cannot be gauged solely on price, acknowledging that the cable industry has responded to DBS competition in a variety of ways, including the provision of additional channels of programming and greater attention to customer service.⁴

¹ See, e.g. Comments of RCN Telecom Services, Inc. at 3-4; Comments of Verizon at 1; Comments of SBC Communications, Inc. at 4-6. See also Comments of EchoStar Satellite L.L.C. at 2 (claiming cable’s competitors do not “discipline” cable prices).

² United States General Accounting Office, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004) (“2004 GAO Report”). See also United States General Accounting Office, Testimony Before the Committee on Commerce, Science and Transportation, U.S. Senate, *Telecommunications: Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T (March 25, 2004) (“2004 GAO Testimony”).

³ Reply Comments of the National Cable & Telecommunications Association in MB Docket No. 04-227 (filed August 25, 2004) at 6-10. See also 2004 GAO Report at 29-30 (acknowledgement by GAO that its analysis is not “generalizable to the universe of cable systems” and that the price differences identified in its report could have been caused by factors other than wireline competition). The tenuousness of the GAO report’s conclusion is indicated by the fact that in one of the six situations it reviewed, cable prices were higher in the community with wireline competition than in the “matched” community without wireline service. *Id.* at 15.

⁴ 2004 GAO Testimony at 7.

The GAO also has acknowledged that cable operators are “providing bundles of services to subscribers, and lowering prices and providing discounts” in response to DBS competition.⁵ Yet, neither the GAO’s specific “conclusions” regarding cable rates nor the comments claiming that competition from DBS does not produce lower prices take into consideration the cable industry’s common practice of offering promotional discounts and other price breaks, both for video-only customers as well as for customers who subscribe to multiple services, such as the video, data, and voice “triple play.” Rather, when the GAO reviewed cable rates for its study, it simply considered the operators’ published rate card rates. The FCC’s annual price survey, also cited by some commenters, suffers from the same deficiency.

The highly competitive environment in which cable systems operate has rendered the “list price” shown on an operator’s rate card increasingly irrelevant as customers are offered, and choose to purchase, services at substantial discounts.⁶ By focusing only on “retail” rate card prices that are not reflective of the amount that a growing number of subscribers actually pay for service, the comments citing the GAO study have failed to present a complete and accurate

⁵ *Id.* In its 2004 report, the GAO expressly noted that the cable operators it interviewed stated that their most important competitors were the two national DBS companies. *2004 GAO Report* at 30.

⁶ One study has found that high-speed Internet customers would switch to a different provider if offered a video/high speed package discount of twenty dollars. “Bundling to Save Money,” CableFax Databriefs (Nov. 8, 2004). *See also* “Cablevision Faces Competition By Discounting Bundled Services,” Red Nova News (Feb. 17, 2005), available at <http://www.rednova.com/news/display?id=128508>; “Cablevision Pursues the Optimum Bundle,” Jupiter Media, Aug. 26, 2005; “Q302 Wrap-Up: Telcos Embrace Bundling,” IOMA, Inc., Oct. 1, 2002 (noting that the cable industry “realized the power of bundled services early on and have launched packages of digital video, voice and data services, extending discounts off the individual services when they are purchased in a group.”).

picture of how competition – from DBS as well as from wireline providers – is having an impact on cable pricing.⁷

II. The Commission Should Reject Efforts By Some Commenters To Use This Proceeding To Attack Transactions Currently Under Review By the Commission.

Several of the commenters seek to use this proceeding as a means of attacking the proposed series of transactions between and among TWC, Comcast and Adelphia that are under review by the Commission in a separate docket.⁸ For example, DirecTV, RCN, BellSouth, and others claim that the geographic rationalization that will result from those transactions will “exacerbate” the so-called “terrestrial exemption” issue by increasing the incentives for shifting programming from satellite to terrestrial distribution.⁹ BellSouth goes so far as to argue that terrestrial migration has become a “real problem” and that “the future” that the Commission ruminated about in the late 1990’s (when it suggested hypothetically that terrestrial delivery might someday impact access to programming) “has arrived.”¹⁰ Of course, neither BellSouth nor

⁷ We also note that, while not necessarily reflecting the views of the Commission, a paper prepared jointly by two staff economists (from the Commission’s Media and International Bureaus) concluded that the results of econometric research into DBS-cable competition were “consistent with the hypothesis that DBS providers are a constraining factor on quality-adjusted price increases for basic cable services.” Wise and Duwadi, “*Competition Between Cable Television and Direct Broadcast Satellite – It’s More Complicated Than You Think*,” Federal Communications Commission, Media Bureau Staff Research No. 2005-1/International Bureau Working No. 3 (January 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-255869A1.pdf.

⁸ Adelphia Communications Corp., Comcast Corp., and Time Warner Inc., *Applications for Consent to the Assignment and/or Transfer of Control of Licenses*, MB Docket No. 05-192.

⁹ Comments of RCN at 14. *See also* Comments of DirecTV at 5-6; Comments of BellSouth at 14.

¹⁰ Comments of BellSouth at 14.

any other commenter can cite to a single example of the migration of programming to terrestrial delivery.¹¹

Another example of a commenter seeking to use this proceeding to attack the proposed transactions is The America Channel (“TAC”), whose real goal is to use the threat of government intervention as a curative for its dissatisfaction with the operations of a very competitive marketplace. The distortions and logical flaws in TAC’s arguments (such as equating programming owned by broadcasters with cable operator affiliated programming) have been fully addressed in other proceedings and TWC need not rehash them in detail here.¹² We do, however, want to make two brief points.

First, TAC contends that “empirical data” establishes that “affiliated” networks charge cable operators higher license fees than independent networks.¹³ This claim is directly

¹¹ The expression of overblown (and totally insincere) concerns about the migration of programming from satellite to terrestrial has become as predictable an autumn event as the changing of the leaves. The Reply filed in MB Docket No. 05-192 by Adelphia Communications Corp., Comcast Corp., and Time Warner Inc. discusses this issue in detail (at pages 43–62) and we hereby incorporate the relevant portions by reference. *See also* Reply Comments of Time Warner Cable, MB Docket No. 92-264 (filed September 23, 2005) at 5-7 (pointing out that there is no logical reason to believe that the geographic rationalization of cable system footprints makes exclusive carriage arrangements more likely).

¹² *See* Reply, Adelphia Communications Corp., Comcast Corp., and Time Warner Inc., MB Docket 05-192 (filed August 5, 2005) at 35-39, 78-83; Reply Comments of Time Warner Cable, MB Docket No. 92-264 (filed September 23, 2005) at 7-8. The relevant portions of these pleadings are hereby incorporated by reference. TAC’s comments in the instant proceeding offer a new distortion: the blatant mischaracterization of a paper prepared by two employees of the United States Government Accountability Office (“GAO”) as the findings of the GAO itself when, in fact, the document on its face states that “the opinions expressed in this paper are solely those of the authors and do not necessarily represent the positions of the [GAO].” Clements and Abramowitz, *Ownership Affiliation and the Programming Decisions of Cable Operators*, at note 1. TAC also ignores the fact that the study on which they rely also found that efficiency considerations play an important role in carriage decisions and that carriage is influenced by a variety of factors, including the age and popularity of the network.

¹³ Comments of TAC at 10-12.

contradicted by a report prepared by the GAO that expressly found that “ownership affiliations – with broadcasters or with cable operators – had no influence on cable networks’ license fees.”¹⁴ Moreover, as the Commission has recognized, there are inherent problems in drawing price and value comparisons between program networks because of the difficulty in ascertaining the comparability of different services.¹⁵ The somewhat sketchy stream of statistics that TAC relies on in its comments offers no way of assessing the validity of the comparisons being drawn.

Second, TAC reiterates its now familiar, but still unsubstantiated, claim that it is not possible to launch a new network without carriage by both TWC and Comcast.¹⁶ In response, TWC directs the Commission’s attention to a recent column authored by C. Michael Cooley, the President and CEO of the Sportsman Channel, an independent network successfully launched in April 2003 without carriage from either TWC or Comcast.¹⁷ As the column describes, the Sportsman Channel began with an agreement with the National Cable Television Cooperative (which represents multichannel video providers with more than 14 million subscribers) and built

¹⁴ United States General Accounting Office, Report to the Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, *Tele-communications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, October 2003, at 29.

¹⁵ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, 9 FCC Rcd 4527 (1994) at ¶ 268 (“Thus, a low-cost production that provides the producer with a high price on the basis of high viewer demand may not be comparable to a similarly low-cost production with little viewer demand.”).

¹⁶ Comments of TAC at 13-16.

¹⁷ Cooley, *How I Started a Network – Without Comcast*, Multichannel News, October 3, 2005 at 20.

from there.¹⁸ The channel did not obtain any carriage with TWC for more than a year and a half after it launched and only recently completed an agreement with Comcast. Describing the channel's approach as "if you can prove yourself, they will come," Mr. Cooley points out that a new network's success hinges on "provid[ing] a superior quality channel.... quality customer service, and first-class marketing tactics."¹⁹

In short, the inability of a particular independent programmer to obtain carriage from a particular cable operator is not proof that the operator discriminates against independent programmers. The number of independent networks carried by TWC dwarfs the number of program networks in which it has an ownership interest.²⁰ The fact that every programmer does not obtain as much carriage as it would like is simply a reflection of the operator's right and duty to exercise its editorial and business judgment in allocating the finite capacity of the cable system to create a mix of services that best meets the needs and interests of its customers.

¹⁸ *Id.* It is noteworthy that the cable systems represented by NCTC tend to be smaller, more rural systems, thus further belying TAC's assertion that it is not possible to launch a new channel without first having a carriage agreement covering New York City and/or Los Angeles.

¹⁹ Mr. Cooley also stresses the importance of "setting the launch date *and* keeping it," even in the absence of any agreements. *Id.* In contrast, TAC has repeatedly pushed back its launch date since first announcing the channel in July 2003. As of October 2005, the channel had yet to commence operations.

²⁰ TAC relies on a self-serving and illogical definition of what constitutes an "affiliated" network, including not only networks in which the particular cable operator has an interest, but also any network in which any other cable operator, or any broadcaster, has an ownership stake. The argument that cable operators will favor certain programmers is premised on the assumption that where a cable operator has an ownership stake in a channel, it has a financial incentive that will invariably result in the channel being carried. In fact, carriage decisions are based on numerous and complex factors. In any event, to the extent that financial interests in a network translate into favoritism in carriage decisions, there can be no such incentive where the particular cable operator has no ownership interest in the channel. In addition, looking at the level of carriage of broadcast-affiliated networks is misleading for another reason as well. Since, as the FCC and GAO have documented, broadcasters often use their statutorily conferred retransmission consent rights to obtain carriage for other services they own, any preference they obtain in carriage by non-affiliated cable operators is due to that right, and not "affiliation."

CONCLUSION

The Commission should make clear that because neither the GAO report on cable rates nor its own annual price survey accounts for the discounts that are now commonly offered to consumers, these sources do not fully reflect the impact of competition, in all of its forms, on cable rates, and that any analysis that focuses solely on published "rate card" prices is fundamentally flawed.

In addition, the Commission should reject efforts by various commenters to use this proceeding as a vehicle for attacks on transactions between and among Adelphia, Comcast and TWC that are the subject of a separate proceeding.

Respectfully submitted,

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