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September 8, 2006

EX PARTE

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

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311

Dear Ms. Dortch:

Last fall, the Commission launched the above-referenced rulemaking proceeding, which, as its caption makes clear, was intended to implement Section 621(a)(1) of the Communications Act. As NCTA noted in its comments and reply comments, the scope of that provision is narrow, and the scope of the Commission's authority to enforce it is even narrower. Section 621(a)(1) prohibits franchising authorities from granting exclusive franchises and from "unreasonably refus[ing] to award an additional franchise." And it provides that any applicant whose request for a second franchise "has been denied by a final decision of the franchising authority" may appeal that denial in federal district court or state court.

Some new entrants into the cable television business – in particular, incumbent telephone companies – have argued, to the contrary, that the Commission has broad jurisdiction not only to enforce Section 621(a)(1)'s prohibition on unreasonable refusals to award additional franchises but also to establish rules prohibiting franchising authorities from imposing "unreasonable" requirements on new entrants. In their view, the Commission may even identify in advance certain franchise requirements that would in all cases be deemed unreasonable and impermissible. We've already explained at length why that is not the case.

But Verizon, in recent ex parte filings, tempts the boundaries of this proceeding even further. It argues that, as part of this rulemaking, "the Commission should act now to bar cable incumbents from entering into new, or enforcing existing, exclusive access arrangements" with owners of multi-dwelling units ("MDUs") and other real estate developments.¹

¹ Ex Parte Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, July 6, 2006, p.1.

This is an issue that does not even arguably have anything to do with the *franchising* process or unreasonable *franchise* requirements imposed by governmental authorities, much less with the specific prohibitions of Section 621(a)(1) that are the subject of this proceeding. Exclusive access to MDUs is purely a contractual matter between cable operators and private property owners, since providing service to MDUs does not implicate cable operators' use of the public rights of way. As such, this contractual process is completely separate and distinct from the normal franchising process. Nothing in Title VI gives franchising authorities the authority to impose restrictions or requirements with respect to these contractual matters, and they do not do so.

Verizon apparently believes that the scope of this proceeding extends to implementing not only Section 621(a)(1) but *all* "Cable Act requirements that facilitate competitive entry."² And in a further stretch, it contends that Section 628 of the Act – the provision that generally mandates competitive access to cable-owned programming – can be construed to prohibit *any* arrangements involving cable operators that arguably hinder competition from new entrants. According to Verizon, "Section 628 grants the Commission broad authority to define the particular conduct that is prohibited under Section 628, as long as the Commission's regulations 'promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies.'"³

None of this is right. Nothing in the Notice of Proposed Rulemaking indicated that the Commission was embarking on an open-ended omnibus proceeding to consider all provisions of the Act – from program access to must carry to retransmission consent to privacy – that might arguably deal with competition in the MVPD marketplace. And, in particular, nothing in the legislative history of Section 628 remotely suggests that it was intended to give the Commission a mandate to promote competition in any way that it sees fit. In explaining Section 628, Rep. Tauzin, a principal sponsor, made clear what everyone has always understood – namely, that Section 628 deals with *access to programming*: "The Tauzin Amendment, very simply put, requires [the cable industry] to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs."⁴

Even if the scope of this proceeding could be stretched beyond the Section 621(a)(1) issues set forth in the Notice to encompass Section 628, and even if Section 628 could itself be stretched beyond program access issues to encompass exclusive access of MVPDs to MDUs, the Commission has only recently conducted a lengthy rulemaking proceeding on that very subject. It received comments from a multitude of interested parties, including incumbent cable operators, "overbuilders" (*i.e.*, franchised cable operators who enter the marketplace that is already being served by a cable operator), operators of unfranchised satellite master antenna

² *Id.*

³ *Id.* at 6.

⁴ Statement of Rep. Tauzin, Cong. Rec. H 6532 (daily ed., July 23, 1992).

(“SMATV”) systems that do not use public rights of way,⁵ and real estate companies and building owners. Some parties from each of these groups (including incumbent cable operators) argued for limiting exclusive access contracts; others argued that exclusivity was a means of enhancing and promoting competition among MVPDs in a community.⁶

The Commission ultimately concluded that the record did “not support a prohibition on exclusive contracts for video services in MDUs. . . .” According to the Commission, “[t]he parties have identified both pro-competitive and anti-competitive aspects of exclusive contracts. We cannot state, based on the record, that exclusive contracts are predominantly anti-competitive.” And therefore it “decline[d] to intervene.”⁷

If Verizon thinks that there is now evidence that tips the balance in a way that *would* justify intervention, it is free to petition the Commission for a new rulemaking proceeding. But the mere assertions in Verizon’s ex parte presentations that incumbent cable operators have exclusive arrangements with MDUs and that these exclusive arrangements are restricting Verizon’s ability to compete for the residents of those MDUs hardly suffice to alter conclusions based on a full rulemaking record. This is the wrong place and time to raise this issue.

Moreover, even Verizon’s sparse anecdotal evidence of the existence of exclusive MDU contracts appears to be of questionable validity. For example, Verizon asserts that it “was informed” that a particular MDU development that it sought to serve in Fairfax County, Virginia was “subject to a *perpetual* exclusive access agreement with the incumbent cable operator,” Cox Communications,⁸ and that an unnamed MDU owner “in the Norfolk, Virginia area has informed Verizon that Cox is actively seeking exclusive access arrangements with some of the MDUs in that area.”⁹ But Cox has asked NCTA to make clear, for the record, that notwithstanding what Verizon has been informed by others, Cox neither seeks nor is aware of having *any* exclusive MDU access agreements in these areas or elsewhere.

Whether and to what extent cable operators, unfranchised SMATV operators, or others – both incumbents and new entrants – seek or have exclusive access contracts, much less whether such contracts have any negative effect on competition, is hardly a question to be resolved by an ex parte skirmish in this proceeding. Verizon’s effort to resolve the question here – and, in particular, its request that the Commission prohibit *incumbent* cable operators from entering into such contracts – is simply another effort to use this proceeding to give themselves regulatory

⁵ The Commission has extensively studied the role of unregulated SMATVs and unfranchised private cable operators in the MVPD marketplace. See, e.g., *Massachusetts Community Antenna Television Commission*, 2 FCC Rcd. 7321 (1987); *Entertainment Connections, Inc.*, 13 FCC Rcd 14,277 (1998).

⁶ See *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd. 1342, 1367-68 (2003).

⁷ *Id.* at 1370.

⁸ Ex Parte Letter of Leora Hochstein, *supra*, at 4 (emphasis in original).

⁹ *Id.*

Ms. Marlene H. Dortch

September 8, 2006

Page 4

advantages that others do not have. In the absence of any evidence of anticompetitive problems, such regulatory gifts would impair, not promote, fair marketplace competition.

If you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ Daniel L. Brenner

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