

April 4, 2007

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
455 12th Street SW
Washington DC 20554

Re: *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, MM Dkt. No. 92-264.

Dear Ms. Dortch:

Comcast Corporation (“Comcast”) hereby responds to a recent ex parte letter submitted by the Media Access Project (“MAP”)¹ and supplements the record by providing an updated list of cable programming networks that have achieved viability with fewer than 15 million subscribers. As Comcast has made clear in its previous comments, under the current record the Commission cannot justify the 30% limit advocated by MAP (or indeed any limit at all),² and nothing in MAP’s latest submission provides any valid justification for such a limit.

First, MAP’s argument regarding the “enhance effective competition” language of Section 533 is misguided. Based on this statutory snippet, MAP contends that the purpose of the statute is “to break the stranglehold of cable operators on the programming market and enhance the diversity of voices available to cable subscribers” and to “introduce and improve competition that would lower cable rates, force cable operators to improve their customer service, protect PEG programming, and encourage the deployment of affordable services to all Americans.”³ MAP’s interpretation of Section 533 is tortured and unsupported.

MAP’s myopic focus on the “enhance effective competition” language is untethered from the rest of the statute and leads to an irrational interpretation of the statutory purpose. Although Section 533 is prefaced by an instruction to the FCC to “enhance effective competition,” the statute explicitly sets forth the means and ways in which the Commission is to do so, as well as

¹ Letter from Harold Feld, Senior Vice President, Media Access Project, to Kevin Martin, Chairman, FCC, MM Dkt. No. 92-264 (March 21, 2007) (“MAP 2007 Ex Parte”).

² *See, e.g.*, Comments of Comcast Corp., MM Dkt. No. 92-264 (Aug. 8, 2005) (“Comcast 2005 Comments”); Reply Comments of Comcast Corp., MM Dkt. No. 92-264 (Sept. 23, 2005) (“Comcast 2005 Reply Comments”); Supplemental Comments of Comcast Corp., MM Dkt. No. 92-264 (Feb. 14, 2007) (“Comcast 2007 Supplemental Comments”).

³ MAP 2007 Ex Parte at 1.

the circumstances and conditions that must be taken into account in that effort. MAP ignores *all* of this critical language, focusing almost exclusively on that brief prefatory clause.

Read in context, the statute provides that “[i]n order to enhance effective competition, the Commission shall . . . prescribe rules and regulations establishing *reasonable limits* on the number of cable subscribers a person is authorized to reach through cable systems owned by such person.”⁴ The statute further instructs that any such “reasonable limits” shall “ensure that no cable operator or group of cable operators can unfairly impede . . . the flow of video programming from the video programmer to the consumer.”⁵

Thus, as Comcast has explained repeatedly, and as the courts have acknowledged, the Congressionally authorized purpose of horizontal ownership limits is to ensure that no cable operator or group of operators can unfairly impede the flow of video programming to the consumer.⁶ The purpose of the section is *not* to guarantee the economic success of any particular video programmer in the marketplace, as MAP suggests.⁷ Nor is the purpose of the section to regulate “effective competition” in the “retail” market for MVPD service (i.e., the relations between MVPDs and subscribers); rather, it is to avoid anticompetitive behavior in the “wholesale” market for video programming (i.e., the relations between programming suppliers and purchasers).⁸ In other words, Section 533 seeks to ensure “effective competition” in the wholesale market for video programming, and the Commission is authorized to adopt “reasonable limits” to ensure “the flow of video programming from the video programmer to the

⁴ 47 U.S.C. § 533(f)(1)(A) (emphasis added).

⁵ *Id.* § 533(f)(2)(A). The statute also directs the Commission to: “(B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of the video programming of such programmers to other video distributors; (C) take particular account of the market structure, ownership patterns, and other relationships of the cable television industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests; (D) account for any efficiencies and other benefits that might be gained through increased ownership or control; (E) make such rules and regulations reflect the dynamic nature of the communications marketplace; (F) not impose limitations which would bar cable operators from serving previously unserved rural areas; and (G) not impose limitations which would impair the development of diverse and high quality video programming.” *Id.* § 533(f)(2)(B-G).

⁶ *See, e.g.*, Comcast 2005 Comments at 6-8.

⁷ MAP 2007 Ex Parte at 2 (“None of these developments . . . has increased the availability of independent programming channels that support new programming networks.”).

⁸ *See* Comcast 2005 Comments at 6-8 (discussing the relevant market to be considered under Section 533 and how a horizontal limit must be limited to implementing the congressional objective of ensuring the flow of programming to consumers).

consumer,” not to regulate price or service competition among MVPDs. Thus, MAP’s suggestion that Section 533 is about competition in retail MVPD services to consumers is flawed.

Second, it is more than clear that there is sufficient competition in the *relevant* market, the wholesale market for video programming. As Comcast has shown, there is an extraordinary amount of competition in that market.⁹ Indeed, the creator of a linear video network can achieve viability absent carriage by *any* cable provider, because the largest DBS provider already reaches the minimum of 15 million subscribers that the FCC has said are needed for network viability, and the second largest DBS provider reaches over 13 million.¹⁰

Also, as Comcast and others have noted in previous comments, access to far fewer MVPD subscribers is necessary for a programming network to be viable than some have alleged.¹¹ For example, Major League Baseball (“MLB”) noted in its recent letter to the Commission that DIRECTV’s commitment to offer the network *exclusively* to its approximately 15 million subscribers would allow MLB to reach “the critical mass necessary for its deployment.”¹² It is clear that The Baseball Channel is not alone in this regard; rather there is evidence that a number of programming networks – aside from regional sports networks which the Commission has viewed as somewhat unique – can be viable with far fewer MVPD subscribers than the Commission has previously assumed.¹³

⁹ See, e.g., Comcast 2007 Supplemental Comments at 1-2 (explaining some of the dramatic developments in the market for video services that have taken place since the 2005 round of comments); Comments of Comcast Corp., MB Dkt. No. 06-189, at 17-29 (Nov. 29, 2006) (Attachment A to Comcast 2007 Supplemental Comments) (detailing the dynamic and vibrant nature of competition in the video programming market) (“2006 Comcast Video Competition Comments”).

¹⁰ Thomas W. Hazlett, *Cable Ownership Limits & the Flow of Video Content: Evidence from U.S. Markets*, at 34 (Mar. 16, 2007) (Attachment to Further Supplemental Comments of Comcast Corp., MM Dkt. No. 92-264 (Mar. 16, 2007) (“Comcast 2007 Further Supplemental Comments”)) (explaining that because of the availability of two DBS rivals, who today serve a combined 29+ million homes, a program network can now achieve nationwide reach without carriage by, or any relationship with, even a single cable operator).

¹¹ See, e.g., Comcast 2007 Further Supplemental Comments at 11 (citing Tülin Erdem, Michael L. Katz & John Morgan, *The Economics of Cable Horizontal Ownership Limits*, at 31-38 (¶¶ 60-64, 67-74) (Mar. 16, 2007) (Attachment to Comcast 2007 Further Supplemental Comments) (“EKM Paper”).

¹² Letter from Robert A. DuPuy, President & COO, Major League Baseball, to Monica Shah Desai, Media Bureau Chief, FCC, at 6 (Mar. 21, 2007).

¹³ *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal Ownership Limits*, Third Report & Order, 14 FCC Rcd 19,098, 19,114-16 (¶¶ 40-42) (1999).

Specifically, as we have noted, the record already reflects that many successful networks in fact reach substantially fewer than 15 million subscribers.¹⁴ To update the record, Comcast attaches (as Appendix A) a table of cable programming networks with fewer than 15 million MVPD subscribers, along with the number of subscribers and the launch date for each.

To the extent that retail competition is relevant to this docket, it shows there is no realistic basis for presuming that cable companies would engage in vertical foreclosure in the wholesale programming market. In reviewing the economic literature, the EKM Paper concluded that there is significant evidence of consumer willingness to substitute DBS for cable service and that cable and DBS service providers compete along both price and quality dimensions. The EKM Paper also explained that, properly interpreted, relevant studies all support a finding that DBS service providers are significant competitors to cable operators and, thus, diminish cable operators' incentives and ability to engage in vertical foreclosure.¹⁵

Third, matters such as cable rates are plainly not what Congress had in mind in authorizing "reasonable [horizontal ownership] limits" under Section 533. Congress took numerous other measures in the 1992 Cable Act to promote competition among MVPDs, including creating an intricate and wholly separate regime to address cable rate regulation¹⁶ – an issue that is not mentioned at all in Section 533. Given the existence of that specific rate regulation regime, it would be absurd to read Section 533 as empowering the Commission to address rate issues by means of a horizontal cap.¹⁷

Fourth, although MAP presses the Commission to adopt *regional* ownership limits, it alludes only vaguely to some need for such regulation and provides no justification whatsoever, statutory or otherwise, for such limits. Although MAP cites the Commission's conclusion in the *Adelphia Order* that "even small increases in Comcast's and Time Warner's market shares may increase incentives to increase price,"¹⁸ that statement (assuming the conclusion is correct) was

¹⁴ Comcast 2007 Supplemental Comments at 11 (citing Comments of AT&T Corp., MM Dkt. No. 92-264, at 59-66 (Jan. 4, 2002)).

¹⁵ EKM Paper at 56-62 (¶¶ 110-23).

¹⁶ 47 C.F.R. §§ 76.901-990.

¹⁷ See *Norwest Bank Minn. Nat'l Ass'n v. F.D.I.C.*, 312 F.3d 447, 451 (D.C. Cir. 2002) ("When both specific and general provisions cover the same subject, the specific provision will control, especially if applying the general provision would render the specific provision superfluous . . .").

¹⁸ MAP 2007 Ex Parte at 4 (quoting *Applications for Consent to the Assignment &/or Transfer of Control of Licenses; Adelphia Commc'ns Corp. (& subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Commc'ns Corp., (& subsidiaries, debtors-in-possession), Assignors & Transferors, to Comcast Corp. (subsidiaries), Assignees & Transferees; Comcast Corp., Transferor, to Time*

limited to *the price that vertically-integrated regional sports networks (“RSNs”) might charge to unaffiliated MVPDs*. Further, the Commission explained that the conditions it imposed in the *Adelphia Order* fully ameliorated its concerns with respect to regional concentration.¹⁹ And, as Comcast explained in its recent comments, vague statements of concern, such as those made by MAP, regarding the effects of *potential*, unidentified harms from regional concentration, do not satisfy the need to show *actual*, non-conjectural harm.²⁰ Finally, neither MAP nor any other party has explained the link between the asserted harm of regional concentration and the proposed remedy of national subscriber caps.²¹

Fifth, all but one of the studies cited by MAP has been fully rebutted in the record before the Commission.²² The only study cited by MAP that has not been directly addressed, the Duvall and Wise study, concludes that competition in the MVPD market between cable and DBS will result in “the addition of more and higher quality video services.”²³ Thus, the central conclusion of the Duvall and Wise study is that DBS *does compete* with cable and that the resulting increases in consumer welfare are better understood in terms of improvements in quality of programming rather than reduced price levels – as the EKM Paper also showed.²⁴

Finally, MAP’s comments grossly distort the record in significant ways. MAP brazenly asserts, without providing any citation for either proposition, that the record shows that “no new

Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee, Mem. Op. & Order, 21 FCC Rcd 8203, 8268 (¶ 141) (2006) (“*Adelphia Order*”).

¹⁹ *Adelphia Order*, 21 FCC Rcd at 8328 (¶ 300) (finding that “on balance, the proposed transactions, as conditioned, would serve the public interest, convenience, and necessity”); *see also id.* at 8326-28 (¶¶ 294-300).

²⁰ Comcast 2007 Further Supplemental Comments at 20-24; *see also Time Warner Ent. Co. v FCC*, 240 F.3d 1126, 1133-34 (D.C. Cir. 2001) (requiring showing of “non-conjectural harm”) (“*Time Warner II*”).

²¹ Comcast 2007 Further Supplemental Comments at 25-26; *see also Time Warner II*, 240 F.3d at 1134 (“Having failed to identify a non-conjectural harm, the Commission could not possibly have addressed the connection between the harm and market power.”).

²² *See, e.g.*, Comcast 2005 Reply Comments at 14-22; *id.* at Exhibit 1 (Decl. of Janusz A. Ordovery & Richard Higgins, *Critique of Economic Submissions Filed in the Federal Communications Commission’s (“FCC”) Second Further Notice in the Cable Horizontal Ownership Proceeding*, at 4-12, 14-16 (Sept. 23, 2005)); EKM Paper at 43-52 (¶¶ 83-87, 90-93, 96-98), 54-55 (¶ 106), 57-58 (¶¶ 111-13), 60-61 (¶¶ 118-22); Comments of Comcast Corp. on OPP Working Paper No. 35, MM Dkt. No. 92-264 (July 18, 2002) (“Comcast OPP Comments”); Decl. of Howard Shelansky on OPP Working Paper, MM Dkt. No. 92-264 (July 16, 2002) (Attachment to Comcast OPP Comments).

²³ Jerry B. Duvall & Andrew Stewart Wise, FCC, *Competing on Quality: Two-Sided Markets, the Sutton Paradigm, and the Multichannel Video Industry: a Graphical Approach*, at 31 (2006).

²⁴ EKM Paper at 56-62 (¶¶ 109-23).

Marlene H. Dortch

April 4, 2007

Page 6

cable programming network has succeeded in the last five years without securing carriage on Comcast and/or Time Warner” and that Comcast can “ensur[e] the success of affiliated networks.”²⁵ The only attempt to provide evidence in the record to support such claims was made by The America Channel (“TAC”),²⁶ but Comcast has already fully rebutted those comments.²⁷ As Comcast pointed out, TAC’s conclusion that “carriage by Comcast and Time Warner is required for a network to reach even 25 million subscribers, despite the availability of other MVPDs in the marketplace” was based solely on the fact that 90 of the 92 networks TAC “studied” were carried by Comcast or Time Warner.²⁸ Clearly, even assuming TAC’s figures to be correct, this does not constitute evidence that carriage by Comcast or Time Warner is necessary for a network to become viable. A better explanation of the TAC finding is that programming networks that have reached 25 million subscribers are producing programming that many MVPDs, including Comcast and/or Time Warner, considered valuable to consumers. Further, as already discussed and as Appendix A shows, networks can achieve success with far fewer subscribers than TAC assumed. As Comcast has also pointed out, the argument that carriage by Comcast and Time Warner is necessary to achieve viability is further weakened by the fact that there are numerous examples of programming services that obtained most of their initial carriage on DBS.²⁹

Neither is it the case, as MAP contends, that “cable programming remains the purview of a handful of vertically integrated media conglomerates” that “have selected a handful of affiliated or otherwise captive channels.”³⁰ Even if this comment could be borne out by the record (which it cannot and which MAP does not attempt to do), it would only be relevant to a discussion of channel occupancy rules (which are meant to limit the amount of vertically-integrated programming a cable operator may carry), not the horizontal ownership limit. In any event, the simple fact is that vertical integration between cable operators and networks has

²⁵ MAP 2007 Ex Parte at 2.

²⁶ Comments of The America Channel on the Second Further Notice of Proposed Rulemaking, MM Dkt. No. 92-264, at 18-28 & Exhibit 2 (Aug. 8, 2005) (“TAC 2005 Comments”).

²⁷ Comcast 2005 Reply Comments at 5-8.

²⁸ *Id.* at 6 (quoting TAC 2005 Comments at 19).

²⁹ Comcast 2005 Comments at 79 (listing BBC America, CNBC World, Bloomberg Television, ESPN U, Classic Sports/ESPN Classic, Go!TV, DIY, Boomerang, The Independent Film Channel, and NFL Network).

³⁰ MAP 2007 Ex Parte at 2.

Marlene H. Dortch
April 4, 2007
Page 7

plummeted from around 57% of all networks being affiliated in 1993³¹ to around 13.5% in 2007.³² For its part, Comcast has well-documented that it offers a phenomenal number of channels from a wide variety of sources, over 90% of which are *unaffiliated* with Comcast.³³ Accordingly, even assuming that vertical integration raises legitimate concerns that could somehow be connected to a horizontal cap, it is clear that vertical integration is greatly reduced.

For all these reasons, MAP's filing does nothing to bolster the record in support of a 30% cap. As we have previously demonstrated, the present record is factually and legally inadequate to warrant the adoption of such a cap, or indeed any cap at all.

Respectfully submitted,

/s/ Helgi C. Walker
Helgi C. Walker
WILEY REIN LLP
1776 K Street, N.W.
Washington, DC 20006

Arthur J. Burke
DAVIS POLK & WARDWELL
1600 El Camino Real
Menlo Park, CA 94025

³¹ H.R. Rep. No. 102-628, at 41 (1992) (noting that there were "68 nationally delivered cable video networks" and that "39 [of the 68], or 57 percent, have some ownership affiliation with the operating side of the cable industry").

³² Based on data as of June 30, 2005, the FCC found that 21.8% of national programming networks were vertically integrated with cable operators, but this finding was based on a computation that counted a single network, iN DEMAND, as if it were 60 separate networks. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2575 (¶ 157) & n.568 (2006). The Commission noted that, "[i]f we count iN DEMAND as one network, 57 satellite-delivered national programming networks are vertically integrated with one or more . . . cable operator[.]" *id.* at 2576 (¶ 159), which would mean 57 out of the total 472 (or approximately 12.1%) national programming networks are vertically integrated with a cable operator. iN DEMAND recently reported that it now operates one HD network, INHD, and eight multiplexed PPV channels. *See* Letter from Michael S. Berman, Senior Vice President, Business Affairs & General Counsel, iN DEMAND Networks, to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189, at 2 (Feb. 2, 2007). Factored in to the Commission's analysis, this would bring the total of national programming networks to 480 and the number of cable-affiliated national programming networks to 65, or 13.5%.

³³ *See, e.g.,* 2006 Comcast Video Competition Comments at 59-62.

Marlene H. Dortch
April 4, 2007
Page 8

Michael H. Hammer
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
Counsel for Comcast Corp.

Marlene H. Dortch

April 4, 2007

Page 9

APPENDIX A

Cable Programming Network	Number of Current MVPD Subscribers	Launch Date
¡Sorpresa!	Less than 1,000,000	Mar. 2003
AmericanLife TV Network	10,500,000	Feb. 1985
Arabic Channel	1,350,000	Apr. 1991
Arizona's News Channel	630,000	Nov. 1996
Asia Television Home Channel	367,000	Nov. 2000
AZN Television	14,000,000	Mar. 2005
Azteca America	1,000,000	Aug. 2004
B Mania	470,000	Nov. 2000
Bandamax	1,215,239	May 2003
Beauty and Fashion Channel	11,000,000	Jan. 2005
BET J	9,000,000	Jan. 1996
Canal 24 Horas	50,000	June 1999
Casa Club TV	3,250,659	July 1997
Chicagoland Television News	1,800,000	Jan. 1993
Cine Mexicano	500,000	Nov. 2004
CNC Columbia	100,000	May 1999
CoLoursTV	11,000,000	Dec. 2001
Concert	8,000,000	Sept. 2003
De Película Clásico	750,000	May 2003
Gospel Music Channel	1,000,000	Oct. 2004
Healthy Living Channel	11,000,000	Jan. 2004
HITN-TV	15,000,000	July 1987
HorseRacing TV	13,100,000	Jan. 2003
INHD	5,000,000	Sept. 2003
Inspirational Life Television	10,000,000	June 1998
International Television Broadcasting	500,000	April 1986
JCTV	440,000	Nov. 2002
Kids Sports News Network	1,500,000	Oct. 2005
La Familia Cosmovision	300,000	May 2002
Liberty Channel	622,500	Sept. 2001
The Locomotion Channel	1,200,000	Nov. 1996
Madison Square Garden Network	9,600,000	Oct. 1969
Mav'rick Entertainment Network	300,000	Oct. 2004

Cable Programming Network	Number of Current MVPD Subscribers	Launch Date
MGM Networks Latin America	4,764,627	July 1997
Mun2	10,600,000	Oct. 2001
National Greek Television	500,000	Dec. 1987
Newsworld International	4,500,000	Sept. 1994
NTV America	9,598	Oct. 2002
Ovation	5,300,000	Apr. 1996
Phoenix InfoNews Channel	367,000	Nov. 2000
Phoenix North America Chinese Channel	367,000	Nov. 2000
PumaTV	2,270,000	1997
Resorts & Residence TV	11,000,000	Not available
RFD TV	6,800,000	Dec. 2000
Ritmoson Latino	1,215,239	May 2003
Short TV	2,500,500	Jan. 1999
Smile of a Child	137,823	Dec. 2005
The Sportsman Channel	14,300,000	Apr. 2003
Starz	14,600,000	Mar. 1994
TBN Enlace	2,031,500	May 2002
Telefutura	7,200,000	Jan. 2002
Telehit	1,215,239	May 2003
Telemundo Internacional	6,500,000	Mar. 2000
Telemundo Puerto Rico	1,300,000	Feb. 2005
The Tennis Channel	3,000,000	May 2003
Tr!o	8,000,000	Sept. 1994
Turner South	7,200,000	Oct. 1999
TV CHILE	7,500,000	Not available
TVE Internacional	50,000	1989
TVG Network	14,000,000	July 1994
Wine Network, Inc.	8,000,000	Sept. 2004
Zee TV USA, Inc.	350,000	July 1998

Source: National Cable and Telecommunications Association, <http://www.ncta.com/Organizations.aspx?type=orgtyp2&contentId=2907> (last visited Apr. 4, 2007).