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VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming; MB Docket No. 06-189;

Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Provision; MB Docket No. 07-29

Dear Ms. Dortch:

On June 12, 2007, Jim Coltharp and Mary McManus of Comcast, and Jim Casserly, Ryan Wallach, and the undersigned, of Willkie Farr & Gallagher LLP, met with Elizabeth Andrion, Dan Bring, Steve Broeckaert, Brian Extein, Marcia Glauberman, Rosemary Harold, David Konczal, Karen Kosar, Anne Levine, and Mary Beth Murphy of the Media Bureau, to discuss developments in the video marketplace and, in particular, to summarize the factual, legal, and policy reasons why the Commission should allow the program access exclusivity prohibition to sunset. The attached handouts were distributed to all meeting participants.

Kindly direct any questions regarding this matter to my attention.

Respectfully submitted,

/s/ Stephanie L. Podey
Stephanie L. Podey
Counsel for Comcast Corporation

Attachments

cc: Elizabeth Andrion
Dan Bring
Steve Broeckaert
Brian Extein
Marcia Glauberman
Rosemary Harold
David Konczal
Karen Kosar
Anne Levine
Mary Beth Murphy

THE EXCLUSIVITY PROHIBITION SHOULD BE PERMITTED TO SUNSET, AS CONGRESS INTENDED. PROPOSALS TO EXPAND PROGRAM ACCESS RULES OR TO MAKE THEM MORE BURDENSOME SHOULD BE REJECTED OUT OF HAND.

I. COMPETITION IN THE VIDEO MARKETPLACE IS VIBRANT AND GROWING.

- Congress intended for the exclusivity prohibition to last 10 years, and, in those 10 years, the video marketplace evolved to a point where competitors to incumbent cable companies grew larger than most cable companies and had access to all the programming they needed to compete, justifying a sunset of the rules. Nevertheless, in 2002, a divided Commission extended the prohibition for an additional 5 years; then-Commissioner Martin said the decision for whether the ban was still "necessary" to be a "very close call." With the continued acceleration of video, it is no longer a close call -- the rule should sunset.
- ***Video Choice.*** As the attached document details, competition in the distribution of video programming is intense and getting more so each day. In every community, virtually every consumer can choose from *a minimum of three MVPDs*, and in many a fourth or fifth MVPD is available or will be soon, to say nothing of the many other ways by which consumers can access video content (broadcasting, DVDs, Internet downloads, video streaming, mobile video devices).
- ***Vertical Integration.*** Vertical integration between programming networks and cable operators -- a key concern when Congress adopted the program access rules -- has plummeted. In 1992, 57% of all national programming networks were vertically-integrated with a cable operator. Since then the Commission has documented the steady decrease in vertical integration and last year reported that, as of June 30, 2005, cable operators had interests in only about 20% of the 531 national programming networks. And, in fact, that number is closer to 13.5%. Assuming a pay-per-view network is counted on equal footing as a 24/7 linear network, Comcast has a financial interest in only 18 national networks. Of the 100 or so regional networks identified by the Commission, Comcast has a financial interest in only twelve.

II. EXCLUSIVITY AND VERTICAL INTEGRATION ARE THE NORM IN COMPETITIVE MARKETS AND ARE RECOGNIZED TO BE PRO-CONSUMER.

- The benefits of exclusivity have been recognized in America since its inception, and Congress specifically acknowledged the benefits of program exclusivity when it deliberately incorporated the sunset provision into Section 628(c)(5).
- The Commission also has recognized the benefits of exclusivity in the programming context. For example, the network nonduplication rule was not statutorily mandated but "arose from the Commission's recognition in the 1970s and 1980s that protection of exclusive contractual rights is necessary . . . to provide appropriate protections and incentives to program producers and distributors to provide the programming desired by viewers."
- Exclusive contracts can foster investment, innovation, and increased competition based on product differentiation. There are myriad examples of exclusive contracts working this way.
  - We see this when Yahoo! cuts exclusive deals with newspapers so that it can better compete against Google, or when XM Radio builds exclusive content around Bob Dylan and certain major sports leagues, and Sirius counters with Howard Stern and other major sports leagues.
  - We see this in the video marketplace when DIRECTV enters into exclusive agreements with the NFL, NASCAR, and the NCAA, while EchoStar licenses a substantial amount of international fare on an exclusive basis, in order to differentiate their services. In the words of DIRECTV's CEO Chase Carey: "[U]nique content is what will separate the company from its pay-TV brethren over the course of the next few years."

III. IF THERE WAS A JUSTIFICATION FOR THE EXCLUSIVITY PROHIBITION IN 1992, THAT JUSTIFICATION IS NOW LONG GONE.

- In light of the intense competition in the marketplace, it is clear that the exclusivity prohibition does not "continue[] to be necessary to preserve and protect competition and diversity in the distribution of video programming."
- As Chairman Martin previously noted, "'necessary' should mean something closer to 'indispensable' or essential . . . . Thus, I believe that a finding that the exclusivity ban is 'beneficial' to or 'promotes' competition and diversity would not be sufficient."
- The exclusivity prohibition in today's competitive marketplace is clearly not "necessary" to preserve and protect competition and diversity. The percentage of vertically integrated programming networks has declined dramatically. The overall number of programming networks has increased just as dramatically. There is an abundance of programming available to fill every MVPD's channel lineup and tailored to every possible niche interest. In fact, there is now so much programming that no single MVPD does or can carry it all.
- It is also important to recognize that, were the exclusivity prohibition allowed to sunset, the other program access rules would remain in place. Thus, a cable-affiliated programming network would still be constrained in its ability to engage in certain conduct that could harm an MVPD competitor. Moreover, the antitrust laws are also well-suited for addressing any anticompetitive conduct.
- Independent of the foregoing, the exclusivity prohibition as currently applied is anomalous in the extreme and the Commission must not perpetuate these anomalies. The prohibition is both too broad and too narrow to address its stated objectives. It is too broad in that it applies to any cable-affiliated programming, whether it is "must-have" or not. It is too narrow in that it does not apply to a lot of programming that the Commission and many consumers consider to be "must-have," including some for which DBS providers have obtained exclusive distribution rights.
- In deciding whether it is "necessary" to further extend the prohibition more than five years beyond the time that Congress originally anticipated it would sunset, it would be arbitrary and capricious for the Commission to perpetuate a rule that operates in such an illogical and discriminatory fashion.

IV. PROPOSALS TO EXPAND THE SCOPE OF THE EXCLUSIVITY PROHIBITION ARE BEYOND THE COMMISSION'S AUTHORITY.

- The Commission repeatedly has concluded that its statutory authority under the program access rules applies only to "satellite cable programming and satellite broadcast programming," and that terrestrially delivered programming is "outside the direct coverage of Section 628(c)." Nothing has changed to alter that conclusion.

V. CHANGES TO THE COMMISSION'S PROGRAM ACCESS COMPLAINT PROCEDURES ARE UNNECESSARY AND WOULD BE COUNTERPRODUCTIVE.

- The existing program access procedures were the product of careful consideration and have worked just as Congress intended -- to spur the marketplace to ensure that distributors have access to the programming their subscribers demand. Proposals to change the rules would impose additional costs and delays in processing complaints. They would also encourage unnecessary litigation.
- Requiring arbitration of program access disputes is unnecessary and would be unlawful. The statute specifically assigns the Commission with responsibility for adjudicating program access disputes, and the law does not empower the Commission to outsource this responsibility. Requiring parties to engage in arbitration would be inconsistent with both the Commission's Alternative Dispute Resolution Policy Statement and with federal law under the Alternative Dispute Resolution Act. Moreover, arbitration would further delay proceedings and burden Commission resources.

"[T]HE MEDIA MARKETPLACE HAS CHANGED DRASTICALLY. . . . COMPETITION IN THIS SPACE HAS NEVER BEEN SO FIERCE AND CHAOTIC."

I. AMERICAN CONSUMERS TODAY ENJOY ABUNDANT CHOICES IN VIDEO PROGRAMMING DISTRIBUTION.

DBS. DIRECTV and EchoStar offer service to virtually every household in the United States and have continued to strengthen their competitive position in the marketplace.

- As of March 31, 2007, DIRECTV and EchoStar served almost 30 million customers (or *over 30%* of the 96.8 million U.S. MVPD subscribers). DIRECTV added almost 1 million gross subscribers (235,000 net) in the first quarter of 2007 and now serves 16.19 million, while EchoStar added almost 900,000 gross subscribers (310,000 net) and now serves 13.42 million. DIRECTV and EchoStar are now the second and third largest MVPDs in the United States.
- DBS providers continue to offer new services while enhancing existing services. In the past year, they have rolled out more HD programming, innovative DVRs, and unique "interactive" TV enhancements. Earlier this year, DIRECTV announced that it intends to carry 100 HD channels in 2007, and that it will eventually deliver more than 1,500 local HD and digital channels and 150 national HD channels. Over the past year, DIRECTV also entered into new exclusive programming deals, for example, NASCAR's programming package. EchoStar too has been beefing up its service by expanding the local and national HD services it offers and offering exclusive services such as DishGAMES.
- Competition between DBS and cable is so fierce that these MVPD competitors are spending millions of dollars on ad campaigns and related litigation disputing who has the better service and quality.

LECs. LECs continue to rapidly deploy their video services to more areas and consumers.

- Verizon is now the 13th largest cable operator in the nation, provides video service to over 348,000 customers, and is adding nearly 2,200 new video customers each day. It offered its service to over 2.4 million households by the end of 2006 and expects its cable service to pass 9 million homes by the end of 2008 and 18 million homes by 2010.
- AT&T has expanded its cable service to over 21 markets and now serves over 30,000 subscribers, an increase of 900% from the 3,000 subscribers it had at the beginning of 2007. As of March 31, 2007, AT&T's U-verse installations had ramped up to approximately 500 per day. AT&T plans to make U-verse available to 19 million homes by the end of 2008. Meanwhile, Qwest continues to offer its ChoiceTV cable service in certain markets and is reportedly upgrading to a fiber-optic infrastructure to provide additional video services.
- LECs continue to roll out HD offerings: Verizon's cable service offers 24-34 HD channels, and AT&T offers 25 HD channels. Verizon also recently introduced to its video customers the latest in advanced interactive programming guide technology.
- The LECs' DBS partnerships also continue to attract significant numbers of subscribers: as of March 31, 2007, Verizon had signed up 618,000 DBS customers for its bundled package of services, AT&T had signed up approximately 1.7 million, and Qwest had signed up over 506,000.

Internet. Technological advances and widespread broadband adoption have made the Internet a significant alternative source for video programming.

- Recent surveys found that over 40% of Americans aged 12-64 watch online videos at least once a week, and one-quarter of online Americans over age 12 (45 million people) have streamed TV shows.
- CBS SportsLine announced that more than 800,000 people registered for its 2007 March Madness on Demand via the Internet and more than 189,000 users waited to view the tip-off of the first game.
- YouTube and other online video businesses, such as Wi-Fi TV, Brightcove, Virtual Digital Cable, Microsoft's "Soapbox on MSN Video," and Akimbo, continue to attract millions of viewers. The

founders of Skype have begun rolling out Joost, an Internet TV service that uses peer-to-peer networking to deliver multichannel content. A similar service, Babelgum, launched its beta offering in May 2007 and already serves content from Reuters and AP.

Broadcasters. The conversion to digital broadcasting is making even more programming available free over-the-air, and broadcasters are finding other innovative ways to distribute their programming.

- As of May 24, 2007, 1,600 stations in 211 markets were broadcasting in digital, all of which are capable of transmitting HD and multicast signals to any consumer in their service area.
- Consumers are turning to the Internet to watch broadcasters' programming. During February 2007 alone, ABC.com attracted 9 million viewers, NBC.com attracted 8 million, CBS.com attracted 5.6 million, and Fox.com attracted 2.9 million. Fox offers full episodes of ten different shows including *24*, *Bones, Are You Smarter Than a Fifth Grader?,* and *Prison Break* on MySpace. News Corp. and NBC Universal have agreed to create an online video site, which will launch this summer.
- Broadcasters are rolling out wireless video offerings. For example, CBS recently announced a new division, CBS Mobile, to expand its wireless offerings and plans to start a dedicated network feed by 2008. NBC Universal partnered with MobiTV to offer VOD full-length episodes of prime-time shows from its top networks and to launch original mobile channels.

BSPs/Overbuilders. BSPs such as Everest, Grande Communications, Knology, WideOpenWest, Optical Entertainment Network (OEN), SureWest, and RCN continue to offer another MVPD option in a growing number of areas. While some of these companies went through difficult financial times, overbuilders such as RCN have fought back to financial stability and are continuing to expand their service areas. For example, just a few weeks ago, RCN announced new financing and said it will expand its service footprint in the Boston area.

Emerging Services. Wireless service providers are becoming an increasingly popular source for video programming. In the past year, Verizon Wireless launched its mobile video service, V-CAST, in 20 markets. It offers made-for-mobile channels from programmers like CBS, NBC, Fox, MTV, Comedy Central, and Nickelodeon. AT&T is rolling out wireless video and has signed an exclusive deal with Apple to deploy the iPhone. The iPhone synthesizes communications, video, music, and computing in one device; Apple predicts that it will sell 10 million video-capable phones by 2008. Telephia Research estimates that there were 6.2 million mobile video subscribers in the United States at the beginning of 2007 (an annual growth rate of 188%) and IMS Research estimates that there will be 30 million mobile TV subscribers by 2011. Broadband over Power Lines (BPL) also continues to develop. For example, Google is supporting efforts to roll out BPL video distribution services to two million homes and businesses in Texas.

II. COMCAST CONTINUES TO INVEST AND INNOVATE TO BE THE FIRST COMPANY CONSUMERS TURN TO FOR AN INCREASING ARRAY OF SERVICES.

Competition has compelled cable operators to differentiate themselves from their competitors.

Cable Services. Comcast continues to improve its video services and increase the availability of HDTV and other advanced video services.

- In the first quarter of 2007, Comcast added 644,000 digital cable customers; approximately 55% of its video customers currently subscribe to digital cable.
- By the third quarter of 2007, Comcast plans to offer up to 35 HD channels per market, up from 20 today.
- Comcast's VOD service has enjoyed exponential growth -- Comcast offers almost 8000 VOD titles in the course of a single month, 95% of which are available free of charge to digital subscribers. In

addition, Comcast launched an unprecedented initiative to offer 100 hours of HD programming on VOD. In the last two years, Comcast subscribers have viewed *over three billion* VOD titles.

Video Programming. Comcast continues to invest in new programming networks.

- In 2006, Comcast partnered with CSTV to launch The mtn., a national network dedicated to sports programming from the Mountain West Conference. Comcast also recently announced that it will help launch a new regional sports network in Portland, Oregon that will feature Portland Trailblazers' games. In addition, Comcast will acquire and manage Fox Sports Net New England and Bay Area, which will allow Comcast to improve those regional sports networks as it did the Comcast SportsNets, adding more HD programming and innovative sports shows.
- Despite these new investments, vertical integration continues to decline. The Commission reported in 2006 that only approximately 20% of the 531 national programming networks were affiliated with a cable operator; the current figure is now actually closer to 13.5%.

Triple- and Quadruple- Play Bundle. Comcast customers have the convenience of obtaining bundles of services such as video, high-speed Internet access, and digital phone at discounted prices. Comcast offers its triple-play bundle in many markets for only $99 per month.

- In 2006, Comcast added almost a million new subscribers for its high-speed Internet service. As of March 31, 2007, Comcast offered its high-speed Internet service to over 47.2 million homes and provided service to over 12 million of those households.
- Comcast began offering Comcast Digital Voice (CDV) service in 2005 and by March 2007 had surpassed two million customers, well ahead of projections. Comcast's voice services are now available to over 40 million homes, and almost 3 million customers have chosen Comcast's service. According to a recent study, residential cable phone customers could save on average $135 or more each year on their phone bills, and residential customers and small businesses combined could save a total of $101.5 billion over the next five years.
- At the end of 2006, Comcast introduced a bundle of four services in limited markets. For an introductory price of $132 per month, Comcast offers consumers video, data, and voice plus Pivot, a new mobile telephone service that allows customers to watch live TV, access TV listings, check home e-mail, and make unlimited calls between their cable VoIP home service and mobile phones. AT&T has responded to Comcast's quad-play bundle by offering its own bundle for $135 per month.

Good Corporate Citizenship. Comcast knows that cable service is a local service, tailored to the individual needs of each community, and addressing the demands of the citizens of those communities. Accordingly, Comcast is deeply engaged in the local communities it serves.

- Comcast provides educational programming and Internet access to thousands of schools and libraries.
- Comcast actively supports programs such as Partnership for a Drug Free America, Emma L. Bowen Foundation Diversity Internship Program, United Way, United States Hispanic Chamber of Commerce Foundation, National Urban League, Comcast Leaders and Achievers scholarship program, numerous local Boys and Girls Clubs, and many others. Each year, tens of thousands of Comcast volunteers donate their time to working on projects to better their communities.
- Comcast has established a comprehensive program to promote diversity and has been recognized as one of the Top 25 Notable Companies for Diversity, one of America's top 50 corporations for multicultural business opportunities, and one of the Top Companies for Hispanics.