Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 4(g) of the	)	
Cable Television Consumer Protection and	)	MM Docket No. 93-8
Competition Act of 1992, Home Shopping	)	
Station Issues	)	

COMMENTS OF

cable

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high speed Internet access after investing $110 billion over ten years to build a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art digital telephone service to millions of American consumers.

DISCUSSION

In this proceeding, the Commission seeks to update the record[1] in response to a Petition for Reconsideration filed by The Media Access Project almost 14 years ago.[2] That Petition urges

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[1] Public Notice, "Commission Seeks to Update the Record for a Petition for Reconsideration Regarding Home Shopping Stations," DA 07-2005 (rel. May 4, 2007).

[2] Petition for Reconsideration filed by the Media Access Project on behalf of the Center for the Study of Commercialism (filed Aug. 23, 1993).

the Commission to reconsider its 1993 ruling that television stations predominantly utilized for the presentation of commercial sales presentations serve the public interest.[3] The Commission's determination that shopping stations were in fact serving the public interest forced cable to make room for home shopping stations on systems across the country and required cable programmers to take a back seat to broadcast channels presenting non-stop sales presentations and infomercials.[4] This proceeding provides a welcome opportunity to reevaluate – and rectify – that erroneous judgment with respect to the forced carriage of these stations.

Congress singled out home shopping stations for special scrutiny by the Commission in connection with implementing the must carry provisions of the 1992 Cable Act.[5] In Section 614(g), Congress directed the FCC to conduct a separate proceeding – prior to granting home shopping stations must carry rights – to determine whether these stations "are serving the public interest, convenience, and necessity…." As part of that determination, the Act specifies that the agency was to consider "the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to non-broadcast services offering similar programming."[6] In 1993, the FCC concluded that "home shopping stations are operating in the public interest" and that as a result, "Section 4(g) of 1992

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[3] Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 5321 (1993).

[4] Shopping programming is valuable to some cable viewers, and cable operators, too, choose to voluntarily carry some of these services. But offering customers this genre of programming voluntarily as part of a mix of program services is a far cry from the government forcing cable operators to do so, against their will, on favorable tier and channel positions. Moreover, to the extent the Commission focused in 1993 on the purported incentives for cable operators to favor affiliated cable shopping services over unaffiliated broadcast shopping service (*see id*. at 5326), to our knowledge, cable operators no longer own any national shopping services.

[5] 47 U.S.C. § 614(g).

[6] *Id.*

Cable Act seems to suggest that such stations are automatically eligible for mandatory cable carriage."[7]

In looking at the second factor – the level of competing demands for the spectrum – the FCC focused solely on the competing demands for use of the television broadcast spectrum. It failed to consider any competing demands on the uses of *cable's* privately constructed spectrum. However, cable systems have defined channel capacity and inevitably there are more potential uses for that capacity than there is room.

Demands on that capacity to provide an ever-increasing array of valuable video and non-video services, like digital telephony and high-speed Internet access, are on the rise. And cable programmers are competing for access to that valuable bandwidth to provide an increasing amount of digital programming, including high definition programming. Thus, bandwidth (*i.e.*, cable's "spectrum") devoted to forced carriage of broadcast home shopping programming inevitably comes at the expense of more valuable cable offerings. The statute and the First Amendment require that the FCC consider these burdens, too, in determining whether to continue to mandate carriage of home shopping stations.

Moreover, the FCC's 1993 decision was reached prior to the Supreme Court's *Turner* decisions upholding analog must carry generally. Viewed in light of *Turner*, there is little fit between the forced carriage of home shopping stations and the rationale upon which must carry rules generally were justified.

In *Turner*, the Court upheld must carry rules based in part on the theory that loss of a cable audience would adversely affect a local commercial station's advertising revenues.[8] But

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[7] 8 FCC Rcd. at 5328.

[8] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 208-209 (1997) (explaining evidence before Congress showing the "'direct correlation [between] size in audience and station [advertising] revenues…").

there is no similar finding by Congress as to the loss of a cable audience on the fortunes of commercial stations that rely on direct viewer solicitations rather than audience share, which translates into rates charged to advertisers.[9] Conversely, there is no empirical evidence that the fourteen years of mandatory carriage has led to these stations investing any "extra dollars that an additional cable audience will generate" in a "rich mix of over-the-air programming…."[10] To the contrary, the evidence suggests that many of these stations provide little programming beyond infomercials and sales pitches; in other words, they remain "predominantly" home shopping outlets.

Dozens of home shopping stations operate in the United States, and in some markets multiple shopping stations broadcast over-the-air. Available evidence shows that these stations continue to offer many hours daily of nationally-distributed shopping programming and infomercials.

For example, ION Network (formerly Paxson) is a nationwide broadcast service with 60 full power television stations across the country. These stations typically provide 14-½ hours of infomercials daily.[11] Other shopping networks deliver even more hours daily of infomercials and shopping fare to their local affiliates. For example, the Boston market contains two shopping stations. One offers Shop NBC,[12] which apparently provides 100 percent shopping

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[9] It is true that a larger audience for home shopping stations potentially increases the number of persons who might watch and purchase. But must carry is justified on specific purposes identified by Congress. Assuring large audiences for home shopping vendors (or subscription broadcast services) is not among them. *See* Cable Television Consumer Protection and Competition Act of 1992, Sec. 2(a) (12) ("Broadcast television programming is supported by revenues generated from advertising broadcast over stations."); *id.*, Sec. 2(a)(14) ("cable television systems and broadcast television stations increasingly compete for television advertising revenue.") Relatedly, Congress recognized that pay services – who would certainly benefit by the widest possible distribution – do not receive must-carry under digital carriage rules. *See* 47 U.S.C. § 336(b)(3).

[10] *Turner*, 520 U.S. at 226 (Breyer, J., concurring).

[11] http://www.ionline.tv/schedule.php.

[12] WWDP, Norwell, MA.

programming.[13] The other station, affiliated with Shop-at-Home,[14] airs infomercials and sales presentations for 98% of its day.[15] The Los Angeles market is another example. Available scheduling information shows multiple stations that primarily air nationally-distributed shopping programming, infomercials or paid programming.[16]

The time is ripe for reevaluating the preferential treatment granted to home shopping stations. Fourteen years after the Commission's home shopping must carry decision, there are multiple ways for viewers to shop from their homes other than through a cable system. One way available to all homes in the stations' markets is viewing home shopping stations over-the-air.[17] Viewers have abundant other ways in which to shop from home – even if catalogues and other non-video methods are excluded from the mix. Home shoppers can view products on broadband connections – in fact, they can see the same national programming over the Internet as they can view over-the-air.[18] And home shopping stations can also reach homes through other multichannel video programming distributors – DBS and telephone company overbuilders.

Under these circumstances, there is no justification for forcing cable operators to continue to carry home shopping stations. The Commission should reconsider its 1993 decision and find that stations "predominantly utilized for the transmission of sales presentations or program length

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[13] http://research.backchannelmedia.com/station/show/WWDP.

[14] WMFP, Lawrence, MA.

[15] http://research.backchannelmedia.com/station/show/WMFP.

[16] KPXN provides ION programming, http://www.ionmedia.tv/stations/list.cfm?id=1&STATE=ALL; KHTV-LP offers programming from the Home Shopping Network, http://www.stationindex.com/tv/markets/Los+Angeles; and KVMD offers 93 hours of paid programming weekly (based on sample week of July 16, 2007) http://www.backchannelmedia.com/.

[17] Technology has now evolved so that cable households can easily switch from cable to over the air viewing through sophisticated electronic switches built in to television sets and ubiquitous remotes that make it easy to switch from cable to broadcast and back again.

[18] http://www.shopathometv.com/home.jsp.

commercials" are no longer entitled to a leg up over all cable program networks. Instead, they should compete on the same grounds for carriage – the quality and attractiveness of their program offerings.

Respectfully submitted,

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