

September 5, 2007

**FILED ELECTRONICALLY**

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

**Re: MB Docket No. 07-29**  
**Notice of *Ex Parte* Presentation**

Dear Ms. Dortch:

On September 4, 2007, on behalf of Cablevision Systems Corporation (“Cablevision”), Michael Olsen of Cablevision, Justin Lilley of TeleMedia Policy Corp., and the undersigned met with Rudy Brioché, Legal Advisor to Commissioner Adelstein, and Amy Blankenship, Legal Advisor to Commissioner Tate, regarding the above-captioned proceeding.

In the meetings, we reiterated the argument in our filings in this proceeding that extending the exclusivity ban in section 628(c)(2)(D) would be inconsistent with the state of technology and the marketplace and that retention of the ban therefore cannot be justified under the standard of section 628(c)(5). We also proffered the proposal described in the attachment hereto and provided copies of the attached materials to the Commission participants in the meetings.

Pursuant to section 1.1206(b) of the Commission’s rules, an electronic copy of this letter and the attachments is being filed electronically with the Office of the Secretary and served electronically on the Commission participants in the meetings.

Should there be any questions regarding this matter, please contact the undersigned.

Sincerely,



Howard J. Symons

Attachments

cc: Rudy Brioché  
Amy Blankenship

## **CURRENT CONDITIONS COMPEL A NARROWING OF THE PROGRAM ACCESS EXCLUSIVITY BAN**

### **THE MARKETPLACE IS MORE COMPETITIVE THAN IN 1992 AND 2002.**

- DBS providers' share of MVPD subscribers jumped 53% between June 2002 and June 2006.
- Five years ago, there were no significant efforts by the ILECs to provide video programming to consumers. Today, AT&T and Verizon are offering service to what is expected to be nearly 14 million households by the end of this year.

### **OPERATORS FACING WELL-FUNDED COMPETITORS SHOULD HAVE ALL COMPETITIVE TOOLS AVAILABLE TO THEM.**

- Both DirecTV and EchoStar have at least double the number of subscribers of every cable MSO in the country, with the exception of Comcast and Time Warner.
- DirecTV and EchoStar are the second and fourth largest MVPDs, serving 15.72% and 12.27% of MVPD subscribers respectively, while Cablevision, which serves 3.22% of MVPD subscribers, is ranked eighth.
- AT&T is spending \$4.6 billion to upgrade its network in order to provide video to an expected 19 million homes by mid-2008. Verizon has stated that it plans to invest \$18 billion in its FiOS network by the year 2010.

### **THE WIDE AVAILABILITY OF PROGRAMMING FROM MULTIPLE SOURCES MEANS THAT THE ABERRATIONAL FORCED SHARING POLICY MUST BE NARROWLY TAILORED.**

In addition to DBS and Telcos, consumers can receive programming from:

- **Broadband service overbuilders**, including RCN, Wide Open West ("WOW"), Knology, and Grande. RCN's network passes 1.6 million homes and serves approximately 406,000 subscribers. In 2006 alone, RCN's subscriber base increased by 6,000 and new product additions increased by 26,000. Knology's network passes 759,000 homes in its service area and through its pending acquisition of PrairieWave Holdings, Inc. in 2007, Knology is poised to increase its customer base by another 157,000 subscribers.
- **Municipal providers.** There are currently well over 100 municipal utility broadband systems providing video services in every region of the country.
- **SMATV.** There are at least 150 SMATV providers offering services throughout the United States. SMATV providers are particularly strong in Cablevision's service area: at least six SMATV operators compete with Cablevision in New York and New Jersey and at least four compete with Cablevision in Connecticut
- **Internet Video.** In July 2006 alone, 107 million Americans, three out of every five Internet users, viewed video online. According to the *Wall Street Journal*, "video Web sites now draw users in numbers that rival those of cable and satellite companies."
- **Mobile Video.** By 2010, more than 250 million people worldwide will be watching mobile video, generating \$27 billion in revenue.
- **Competition from Electric and Gas Utilities.** Electric and gas utilities are well positioned for entry into the MVPD market, through their existing access to public rights-of-way and established customer relationships.

## PROPOSED PROGRAM ACCESS COMPETITION TEST

The exclusivity restriction shall not apply to non-sports programming owned by a cable operator in any Designated Market Area (DMA) not served by that cable operator. The exclusivity restriction shall not apply to such programming in any DMA served by that cable operator if a wireline incumbent local exchange carrier (ILEC) offers multichannel video programming service to at least 20% of the households passed by the operator in that DMA.

- A cable operator has little if any incentive to unlawfully withhold programming from non-cable MVPD in markets where the operator does not provide cable service.
- The Commission has implicitly acknowledged that the likelihood of foreclosure declines as the size of a cable operator's footprint falls. *2002 Extension Order* at ¶ 38 (“The larger the number of subscribers controlled by the vertically integrated cable programmer the larger the benefits of withholding that accrue to that programmer. Other things being equal then, as the number of subscribers rises, so does the likelihood that withholding could be profitable.”). A cable operator that passes only 5 percent of the nation's television households and faces competition from EchoStar, DirecTV (each of which serves more than 10 million subscribers and passes virtually every home in the country) and either AT&T or Verizon has no ability to foreclose competition through exclusivity with an affiliated national programming service.
- Even within an operator's footprint, the Commission recently determined that an MVPD's lack of access to regional non-sports programming could not harm competition or consumers. *See Adelfia Transfer Order* at ¶ 169. DBS providers carry few, if any, of the 59 non-sports regional programming services available on the marketplace, *See Twelfth Annual Report*, at ¶ 166 (identifying 96 regional networks) and ¶ 183 (identifying 37 regional sports networks), even though, as the Commission notes, “many, but not all, regional networks are satellite-delivered.” *Id.* at ¶ 166. The fact that DirecTV and EchoStar have ascended to be the second and fourth largest MVPDs in the country without carrying regional non-sports networks provided by cable operators offers strong evidence that such networks are not “essential” to their competitive viability.
- Verizon provides wireline service to over 40 million homes while AT&T serves over 30 million homes. Verizon and AT&T enjoy a combined market capitalization of approximately \$350 billion, roughly 40 times larger than Cablevision. In its most recent quarter, Verizon earned \$22 billion in revenues while AT&T reaped \$29 billion -- 15 to 20 times larger than Cablevision's \$1.5 billion in revenues in its most recent quarter.
- The LEC test for cable rate deregulation requires only that a LEC “offer video programming . . . in the franchise area.” Unlike the other effective competition tests, Congress expressly did not require the LEC to meet a minimum penetration or passby test as a predicate for rate deregulation of the incumbent cable operator.
- Explicitly requiring an ILEC to pass at least 20% of households as a condition of sunseting the exclusivity ban would go further than the effective competition test by adding a specific

metric and would ensure that the ILEC, already well-positioned to compete, has obtained a solid footing in the market prior to the sunset.

- Adopting this standard will not eliminate ability of competing MVPDs to challenge exclusive arrangements between cable operators and vertically-integrated programmers. Instead, it simply shifts the burden of proof by eliminating the *per se* ban on such arrangements in section 628(c)(D). These agreements could still be challenged under the “unfair competition” prong of the program access rules, 47 U.S.C. § 548(b), but the complainant would be required to show that the challenged arrangement causes competitive harm.