

Leora Hochstein
Executive Director
Federal Regulatory



1300 I Street, NW, Suite 400 West
Washington, DC 20005

Phone 202 515-2535
Fax 202 336-7922
leora.l.hochstein@verizon.com

September 6, 2007

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) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Dkt No. 05-311;

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 Licensees and their Affiliates; and Sunset of Exclusive Contract Prohibition, MB Dkt No. 07-29;

Carriage of Digital Television Broadcast Signals: Amendment of Part 76 of the Commission's Rules, CS Dkt. No. 98-120

Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Dkt No. 07-51

Dear Ms. Dortch:

On September 5, 2007, Will Johnson and I met with Amy Blankenship, legal advisor to Commissioner Tate, to discuss our positions in the above-referenced proceedings.

Regarding program access, we argued that, given the current critical time in the development of video competition, the Commission should extend its existing ban on exclusive contracts between cable operators and their affiliated programmers, although this restriction should sunset after competition firmly takes hold. We also asked the Commission to ensure that vertically integrated programmers not be permitted to artificially carve up programming that is subject to the program access rules into different "feeds," in an effort to circumvent the Commission's program access rules and deny competitors access to increasingly essential HD programming. In addition, we suggested that the Commission adopt a firm deadline of five months for resolving all program access disputes and a standstill requirement for disputes over the renewal of programming contracts.

On cable customer service regulations, we stated that while local franchising authorities (LFAs) have flexibility under the Cable Act to adopt reasonable cable customer service

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requirements, they do not have unfettered discretion to adopt any regulation over video and broadband providers just by characterizing it as a "customer service" regulation. We asked the Commission to make explicit that any state or local customer service regulations, to avoid federal preemption, must be true "customer service" regulations, and not other regulations in disguise. Moreover, such regulations must be limited to cable services, and may not unreasonably burden competitive video entry. Finally, we urged the Commission to reiterate that any local cable customer service regulations that undermine federal policies encouraging broadband deployment and video competition are preempted.

On the issue of carrying must-carry stations after the transition to DTV, we asked the Commission to retain its current degradation standards that ensure picture quality, without inhibiting innovation or preventing compression techniques that allow providers to carry additional programming without degrading picture quality. We also reiterated that providers transitioning to all-digital systems and services need flexibility to address issues concerning their customers' ability to view digital programming on analog television sets. In particular, we emphasized that the suggestions of commenters that all-digital providers should be required to give away converter equipment would be unlawful, as explained in more detail in the attached document.

With respect to exclusive access agreements between video providers and multiple dwelling unit (MDU) owners for the provision of video services, we stressed the importance of prohibiting video providers from enforcing existing exclusive access contracts for a limited period of time so that wireline video competition is given a chance to take hold. Exclusive access agreements are analogous to exclusive franchises that have long been barred, as they completely deny new entrants the ability to offer service to the residents of MDUs or other properties that are subject to such agreements. Similarly, we explained that existing exclusive access contracts may deny consumers living in MDUs the benefits of new competitive entry now emerging in the video marketplace. The record in this proceeding reveals that cable incumbents have used exclusive access agreements – many of which are long term and were entered at a time when no competitive, wireline providers were available – as a tool to “lock up” properties and frustrate competitive entry.

Sincerely,

A handwritten signature in black ink, appearing to read "James H. ...". The signature is written in a cursive, somewhat stylized font.

The Commission Cannot and Should Not Regulate the Terms on Which All-Digital Providers Provide Equipment to Address Viewability Concerns

- The Commission’s Notice proposes that video providers with “all-digital systems” may satisfy post-DTV-transition broadcast carriage obligations, including Section 614(b)(7)’s “viewability” requirement, by “carrying the signal only in digital format, provided that all subscribers have the necessary equipment to view the broadcast content.” *Id.* ¶ 4.
- Verizon has already committed to transitioning to an “all-digital” video service by the February 19, 2009 broadcast DTV transition date. As a competitive provider, Verizon needs flexibility to address subscribers’ viewability concerns, while minimizing the burdens on and disruption to its subscribers.
- As the Commission has noted, “non-speculative public benefits” result when video providers transition to all-digital services. *Consolidated STB Waiver* ¶ 58.
 - Among other things, the transition to an all-digital network frees up spectrum that can be used for “additional HD content, which may facilitate the DTV transition by creating greater incentives for its subscribers to acquire digital television sets.” *BendBroadband Order* ¶ 24. The additional spectrum also may be used to provide more robust broadband services or other services.
 - Consumers who are encouraged to purchase digital television in order to take advantage of additional HD or digital content will avoid any disruption from the cessation of analog broadcasts in 2009.
- Burdensome new regulations that would be triggered by a decision to go all-digital would deter providers from making this transition, thus denying the public of the benefits that flow from the transition to all-digital services.
- In particular, regulations micromanaging the terms on which provider’s meet their customers’ equipment needs would be inappropriate – particularly a rule, as some have suggested, that would require providers to give away digital conversion equipment to subscribers.
 - Requiring providers to give away conversion equipment could place a prohibitively expensive price tag on the decision to go all-digital, thus undercutting the Commission’s objective in encouraging video providers to do just that.
 - Likewise, a converter giveaway rule would lessen consumers’ incentives to transition to digital devices – contrary to the Commission’s longstanding policies – because consumers would be less likely to transition to digital equipment if they were supplied with digital converters for “free.”
 - The costs of such a giveaway necessarily would be reflected in higher costs for video services.

- A rule requiring all-digital providers to give away converter equipment would be inconsistent with the Cable Act and the Constitution.
 - Section 629, and the Commission’s related rules addressing “navigation devices,” likewise would preclude a digital converter giveaway requirement.
 - While seeking to foster a competitive market for navigation devices, Section 629 also provides that the Commission’s navigation device “regulations shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming systems, to consumers, if the system operator’s charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.” 47 U.S.C. § 549(a).
 - Therefore, Section 629 expressly recognizes that video providers have a right to charge subscribers for converter boxes, and a giveaway rule would necessarily entail a subsidy that would violate this prohibition.
 - The Commission previously recognized in the *2001 DTV Order* that “requiring cable operators to make available set top boxes capable of processing digital signals for display on analog sets might be inconsistent with section 629 of the Act.” *Id.* ¶ 80.
 - A converter box giveaway requirement also would undermine the broader goals of Section 629 and the Commission’s navigation device rules. The Commission recognized in the *2001 DTV Order* that to “require cable operators to make such equipment available to subscribers would impede the overarching goal of [Section 629], that is to assure competition in the availability of set-top boxes and other customer premises equipment.” *Id.*
 - The Cable Act’s rate regulation provision, Section 623 would also prohibit any requirement that a competitive provider give away converter equipment.
 - The statute provides that “[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section.” 47 U.S.C. § 543(a)(2).
 - This limitation applies to the regulation of rates charged by a provider for “equipment used by subscribers to receive the basic service tier, including a converter box.” 47 U.S.C. § 543(b)(3).
 - On its face, Section 614(b)(7)’s “viewability” provision does not provide a basis for such a requirement, and, in fact, would preclude it. *See* 47 U.S.C. § 534(b)(7).

- The “viewability” requirement was adopted to address a particular problem – that many television sets at the time could only tune a limited number of channels without the use of a converter box.
 - Section 614(b)(7) expressly provides that any “viewability” obligation would be satisfied when a provider “offers to sell or lease” any conversion equipment necessary for television sets connected to the cable system to view signals. 47 U.S.C. § 534(b)(7).
- Requiring all-digital providers to give away converter equipment would violate the Fifth Amendment.
 - Requiring a provider to give away equipment is the type of direct appropriation of private property that constitutes a “classic taking” requiring the payment of just compensation. *See, e.g., Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005).
- Requiring video providers to give away converter equipment as a condition of transitioning to all-digital services also would raise serious issues under the First Amendment.
 - Programming carried by video providers is a form of protected speech. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”).
 - As the Commission has recognized, a significant benefit of moving to an “all-digital” system is freeing up bandwidth for additional programming, and thus engaging in additional protected speech. *See, e.g., BendBroadband Order* ¶ 24.
 - Regulations that increase the costs of going “all-digital” therefore impose a burden on its ability to engage in protected protected speech and are subject to heightened constitutional scrutiny. *See Turner I*, 512 U.S. at 662 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (internal quotation marks omitted)).