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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street S.W.
Washington, DC 20554

Re: *In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Dkt. No. 07-42

Dear Ms. Dortch,

On November 5, 2007, James R. Coltharp and Mary P. McManus of Comcast Corporation and I met with Cristina Chou Pauzé, Legal Advisor to Commissioner Robert M. McDowell, regarding the above-captioned proceeding. During this meeting, Mr. Coltharp, Ms. McManus, and I summarized the principal arguments that Comcast presented in its comments and reply comments and provided Ms. Pauzé with copies of the two attached handouts.

Please contact me with any questions about this submission.

Respectfully submitted,

/s/ James L. Casserly
James L. Casserly

Attachments

cc: Cristina Chou Pauzé

Program Carriage Arbitration: More FCC Regulation That Is As Unlawful As It Is Unnecessary

Competition Ensures Consumers Have a Wide Array of Programming They Want at Reasonable Prices; Government Regulation Will Reduce Choice and Raise Prices.

- Robust competition among video distributors and platforms ensures that programming networks cannot be unreasonably restrained from competing fairly.
 - Any distributor that does not carry the programming that consumers demand risks losing market share to other competing distributors. MVPDs can, do, and should compete by differentiating their channel line-ups, packages, and prices.
 - No single distributor has make-or-break power over any programming network.
 - In the 15 years since Congress enacted the program carriage provisions, more than 400 networks have launched and are being carried. Meanwhile, vertical integration with cable operators has plummeted from 57% in 1992 to approximately 13.5% today.
 - The vast majority of networks that cable operators carry are *unaffiliated* with any cable operator. *Less than 10%* of the networks Comcast carries are affiliated with Comcast.
- *To keep prices low for consumers and ensure consumers have the programming they demand*, MVPDs must have the discretion to bargain hard when confronted with network demands for large licensing fees or carriage for programming of questionable value.
- There is no credible evidence of a problem that warrants rule changes.
 - *Thousands* of program carriage negotiations have been conducted over the past 15 years, and *only two* program carriage complaints have *ever been* filed.
 - None of the commenters proposing changes in program carriage has ever brought forth credible evidence of statutory violations. None has any practical experience on which to base any claims about whether and how the complaint process should be changed.

The Commission Cannot Lawfully Assert a Greater Role in Program Carriage Negotiations.

- The statute establishes three narrow bases for program carriage complaints, and the FCC may not expand or ignore them. The NFL would have the Commission amend the statute, and Hallmark asks the Commission to ignore it. The Commission can do neither.
- The Commission has no discretion to rewrite or ignore the law. Congress did not create a “must-carry/must-pay” rule for networks. Unless and until a network shows that a distributor has impermissibly demanded equity or exclusive rights in return for carriage, or unreasonably restrained the network from competing fairly by discriminating on the basis of affiliation, there is no statutory basis for FCC intervention.
- Grave constitutional concerns would arise were the FCC to force a distributor to carry certain programming networks (especially in the absence of any evidence of wrongdoing) or dictate how networks are carried or the price that should be paid.
- Mandatory arbitration of program carriage disputes is unnecessary, counterproductive, and unlawful. The Commission is responsible for adjudicating such disputes. Moreover, forcing parties into arbitration is antithetical to the fundamental precept that arbitration is a technique to be used only when parties voluntarily agree to it.

**THE COMMISSION CANNOT SERIOUSLY ENTERTAIN PROPOSALS
TO CREATE PROGRAM CARRIAGE “REMEDIES” IN THE ABSENCE
OF PROVEN VIOLATIONS OF THE STATUTORY STANDARD.**

***The Communications Act Strictly Limits the Scope of Program Carriage Complaints.
Congress Did Not Enact a “Must-Carry, Must-Pay” Rule.***

- Section 616 of the Communications Act spells out three narrow categories of conduct that are impermissible in program carriage negotiations but does not assign the FCC a broad role in overseeing marketplace negotiations or second-guessing carriage decisions.
- The Commission has recognized its duty to “strike a balance that not only prescribes behavior prohibited by the specific language of the statute, *but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations.*” 1993 Program Carriage Order ¶ 14 (emphasis added).
- At least two parties ask the Commission to flout congressional intent by rewriting the law. Ignoring the standards established by statute, and the sound reasoning of the Commission’s implementing rulemaking, they seek to avoid their duty to prove a program carriage violation before invoking a program carriage remedy. Neither Section 616 nor the Due Process Clause of the Constitution allows this.

The NFL and Hallmark Channel Proposals Patently Conflict with the Plain Language of Section 616.

- The NFL “urges the Commission to focus its procedure more on obtaining equitable and objectively fair results, and *less on demonstrating the wrongful motive of the MVPD.*” Hallmark Channel asserts that the “program carriage rules should . . . focus on ensuring fair negotiations . . . , *not on proving an MVPD’s improper motives [or] malfeasance.*”
- Both the NFL and Hallmark Channel want the FCC to directly intervene in the carriage decisions of MVPDs, *without proof of a statutory violation*, and force those distributors to carry programming on terms and conditions set by the government. *The Commission has no discretion to interpret the statute in this way.*

Neither Hallmark Channel Nor the NFL Has Made a Case for (or Offered a Statutory Basis for) Government Intervention in its Carriage Negotiations.

- Launched in August 2001, Hallmark Channel rapidly gained distribution to over 82 million homes, in large part because it enticed MVPDs to carry it by charging low license fees. Now, as it renegotiates its carriage agreements, Hallmark Channel asks the government to put its thumb on the scales so that it can obtain higher fees -- which would inevitably increase consumer prices for cable and satellite services.
- NFL Network launched in November 2003 and rapidly gained distribution to over 40 million subscribers because it came to market offering MVPDs reasonable terms. Three years later, however, the NFL demanded a massive price increase, after it moved eight games a season to the network. Comcast prefers to provide the new high-priced NFL Network to those customers who want it without imposing the additional costs on everyone else, and Comcast has done so -- in accordance with the contract to which the NFL *agreed*. Offering the NFL Network in this manner does not unreasonably restrain the NFL’s ability to compete fairly, nor is it a basis for the FCC to rewrite the contract.