

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

In the Matter of)
)
) MB Docket No. 07-198
Review of the Commission’s Program)
Access Rules and Examination of)
Program Tying Arrangements) MB Docket No. 07-29
)
)

REPLY COMMENTS OF ADVANCE/NEWHOUSE COMMUNICATIONS

Advance/Newhouse Communications (“Advance/Newhouse”) respectfully submits these reply comments in the Federal Communications Commission’s (“FCC’s” or “Commission’s”) above-captioned inquiry.^{1/}

Advance/Newhouse manages Bright House Networks (“BHN”), which is a full-service broadband provider in Florida, Alabama, Indiana, California, and Michigan, with approximately 2.4 million customers. In all of its systems, BHN offers advanced video, including digital programming, and high speed data (“HSD”) services, with approximately 1.3 million HSD subscribers. BHN has also introduced facilities-based competitive voice service in all of its systems and currently has approximately 500,000 voice subscribers.

^{1/} *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 Prohibition, Review of the Commission’s Program Access Rules and Examination of Program Tying Arrangements, Report and Order and Notice of Proposed Rulemaking, MB Docket Nos. 07-29 and 07-198, FCC 07-169 (rel. October 1, 2007) (“NPRM”).*

Advance/Newhouse and BHN have a vested interest in the outcome of this proceeding, as BHN is a leader in the production and distribution of truly local programming, including local news, that is of high value in the communities that it serves. The free market currently encourages BHN and other providers of video programming to develop desirable local programming in order to distinguish themselves from their competitors; forced sharing of that content would eliminate the economic rationale for its development and production.

It is therefore essential that the Commission distinguish in this proceeding between those types of terrestrially-delivered programming that are being debated so heatedly by other commenters and the types of local, community-oriented programming delivered by BHN to its subscribers without need of satellite transmission. Regardless of how the Commission views the larger issue of what some commenters have referred to as “must-have” terrestrially-delivered programming, it should take care not to endanger the continuing viability of local news and community programming produced and distributed by BHN and others, including Verizon.

No one can have a monopoly on the news, and all video programming distributors are perfectly free to turn their cameras on the local community to produce their own local news and community programming. There is no economic justification for forced sharing of such programming even if the Commission had the authority to require it, which it does not.

I. BHN HAS MADE A SIGNIFICANT INVESTMENT TO PRODUCE COMPELLING LOCAL CONTENT, BUT THAT INVESTMENT WOULD BE ECONOMICALLY IRRATIONAL IF IT WERE NOT A MEANS OF PRODUCT DIFFERENTIATION

In all of the markets in which it operates, BHN competes with DirecTV and DISH Network to provide video programming and with either Verizon or AT&T for *all* of its services. In fact, it was in the Tampa, Florida market (served by BHN) that Verizon first rolled out its FiOS video service, with all the financial weight of a company whose 2006 revenues were greater than those of the entire cable industry.

Most if not all of the most popular cable networks, in addition to local broadcast stations, are generally available to subscribers of all of these video programming outlets. In order to compete by differentiating themselves in the marketplace, providers such as BHN have a strong incentive to produce compelling local content for their subscribers.

As a result, BHN has developed a number of local news and information channels specific to the communities that it serves. It is unlikely, however, that BHN or any other provider would make the substantial investment necessary to develop such programming if it was forced to share such programming with its competitors, thereby negating its value as a product differentiation.

BHN produces unique, independent local content that serves the needs of its communities in ways that others often overlook. In the Tampa area alone, BHN has invested nearly \$150 million to provide five channels of original local content, each of which represents not only a channel on the cable system but also a team of individuals dedicated to serving the community on a daily basis:

- **Bay News 9** is the Tampa Bay area's only 24 hour local news network and provides live coverage of news and current events, including county-by-county coverage from newsrooms in Pinellas, Hillsborough, Polk, Manatee,

Pasco, Hernando and Citrus Counties. Bay News 9 supports more than 200 local charitable and community events each year, and has supplied more than 600 weather education kits to sixth-grade teachers throughout the Tampa area in addition to sponsoring the Weather Quest emergency response interactive exhibit at the Tampa Museum of Science and Industry.

- **Bay News 9 Travel Weather Now** allows viewers to check current conditions and forecasts for cities across the U.S., Europe, Canada and the Caribbean, as well as view real-time information on flight delays and other travel-related information.
- **Bay News 9 en español** is the nation's first 24-hour local cable news channel to broadcast entirely in Spanish. Bay News 9 en español sponsors a number of local events, including the annual Conga Caliente festival.
- **Bay News 9 On Demand** offers Bay News 9 special reports, hurricane preparedness information, exclusive political and election coverage, sports news, and other features in both English and Spanish in a video-on-demand format.
- **Tampa Bay On Demand** provides content on local sports, dining, travel, and entertainment in a video-on-demand format, allowing viewers to research destinations for local daytrips, take a virtual tour of a local museum, discover a new restaurant, or watch long-form interviews of celebrities and persons of note. Tampa Bay On Demand sponsors "The Next Big Thing," one of Tampa's largest music events, as well as the Cotee River Seafood Festival in Pasco County.

Likewise, in the Orlando area, BHN has invested over \$80 million to provide five channels of original local content and to foster a similar level of community involvement:

- **Central Florida News 13** is central Florida's only 24-hour local news channel. Central Florida News 13 provides up-to-the-minute coverage of breaking news, weather, traffic, and issues of interest to residents of the central Florida region and is an official media partner of the American Red Cross, the Orlando Regional Chamber of Commerce, and the Central Florida Fair in addition to sponsoring the American Cancer Society's Making Strides Against Breast Cancer walk and the annual Orlando Veterans Day Parade.
- **News 13 en español** provides coverage in Spanish of the same important local news as Central Florida News 13, with an added focus on issues of interest to the local Hispanic community. News 13 en español is a sponsor of the Orlando Hispanic Film Festival and the Central Florida Fair.
- **News 13 Weather NOW** provides local weather 24 hours a day for residents of central Florida.

- **Local News On Demand** provides access to content from both Central Florida News 13 and News 13 en español in a video-on-demand format.
- **Central Florida On Demand** provides local programming from around central Florida, including coverage of concerts, parades, high school football games, and guides to local travel, home maintenance and repair, and hurricane preparedness. Central Florida On Demand is a media partner with Space Coast Mardi Gras, the Manatee Festival, and the annual John Young History Maker Award.

These investments by BHN represent a substantial quantity of dollars and a substantial amount of effort on the part of hundreds of employees for whom community service is a way of life. BHN is pleased to have the opportunity to play this role in the communities it serves, and will continue to do so absent regulatory interference. It would not be able to do so, however, if the Commission were to commoditize its efforts and negate the significant intangible benefits that it derives from this level of community involvement in terms of product differentiation and goodwill.

Although, as recounted above, creating original local programming has costs, incurring those costs is economically rational in a video programming market where three, four, or more providers are competing for the same subscribers. As with any product being sold in a free market, sellers are motivated to offer a better product at a lower price; in the case of video programming, offering a better product than your competitors means offering new and different programming.

Local programming presents an opportunity to offer unique content that is of high value to consumers but is not prohibitively expensive for providers to develop—and is not subject to any technical or contractual limitations, thereby allowing any competitor who wishes to produce similar programming to do so.

II. THERE IS NO ECONOMIC JUSTIFICATION FOR FORCED SHARING OF LOCAL NEWS AND COMMUNITY PROGRAMMING

The Coalition For Competitive Access to Content, which represents many of the proponents of expanding program access to terrestrially delivered content in this proceeding, summarizes the “central policy issue” before the Commission thusly:

The primary issue is whether programming now delivered or expected to be delivered on terrestrial networks has the same “must have” characteristics as satellite delivered content and whether the current and expected use of terrestrially delivered content will be significant enough to warrant the creation of appropriate competitive access protection at this time.^{2/}

Other proponents of expanding program access to terrestrially delivered content specifically refer to regional sports networks (“RSNs”) and, in some cases, high definition (“HD”) content as examples of “must-have” programming.^{3/} The argument in support of calling such programming “must have” is that, due to contractual or technical limitations, there is no substitute programming available to competing providers.^{4/}

Local news and community programming is not “must have” programming. Absent contractual or technical limitations that make it impossible or impractical to produce competing content, programming is not “must have” just because a competitor has chosen not to produce similar content on its own. Local news and community programming is well within the ability of Verizon, AT&T, DirecTV, DISH Network, or

^{2/} Comments of the Coalition For Competitive Access to Content (CA2C), MB Docket No. 07-198, at 5 (filed January 4, 2008) (“Comments of CA2C”).

^{3/} See, e.g., Comments of Verizon, MB Docket No. 07-198, at 5-8 (filed January 4, 2008) (“Comments of Verizon”).

^{4/} See, e.g., *NPRM* ¶ 38 (discussing the “continuum of vertically integrated programming” running from services for which there are substitutes, and therefore little competitive effect for other operators if the programming is unavailable, to services for which there is no substitute, and therefore implicate competitive concerns).

any other provider of video programming to produce and distribute using its own facilities in competition with BHN and other cable operators.

In fact, competition in the video programming distribution market has already motivated Verizon—a head-to-head competitor with BHN for video subscribers—to begin developing its own local news and community programming channels similar to Bay News 9 and others offered by BHN.^{5/} The first of several markets in which Verizon rolled out a local channel (called FiOS1) was the Washington, DC and Northern Virginia area. FiOS1 features around-the-clock local news, weather, and traffic in addition to interactive content and coverage of local sports teams such as Georgetown University, George Mason University, and Northern Virginia high school football and basketball games.^{6/} FiOS1 also has an agreement with MASN to show Major League Baseball games.^{7/} By providing this hyper-local programming and adding unique interactive content, Verizon no doubt hopes to enhance the value of its FiOS product and thereby attract and retain subscribers.

In an environment such as this, where competitive forces have encouraged BHN and other operators such as Verizon to develop new and innovative local news and community programming in order to differentiate themselves from the competition, consumers win because they have more choices and access to more local content—the

^{5/} See, e.g., News Release, Verizon to Provide New Local TV Channels on FiOS TV, January 9, 2007 (“Verizon announced (Tuesday, Jan. 9) that it will launch local television channels in selected markets in 2007, starting with the Washington, D.C., metropolitan area in the first quarter... FiOS1 will include round-the-clock traffic and weather, local news and community sports.”).

^{6/} See, e.g., Sports Video Group, Verizon FiOS1 Debuts in Washington, DC, March 29, 2007, available at http://www.sportsvideo.org/portal/artman/publish/printer_3985.shtml.

^{7/} *Id.*

market is functioning just as it should. Forced sharing of local news and community programming would distort the efficient functioning of the market by removing the product differentiation and goodwill incentives that motivate these offerings, thereby removing the incentive for Verizon, BHN, or any other provider to invest in local programming, with the result being less local content and less choice for consumers.

III. THE COMMISSION HAS NO AUTHORITY TO FORCE CABLE OPERATORS TO SHARE PROGRAMMING THAT IS NOT SATELLITE CABLE PROGRAMMING

As other commenters have made clear,^{8/} and as the Commission itself has repeatedly held,^{9/} Congress did not intend for the program access rules in § 628 to apply to terrestrially-delivered programming. Bedrock tenets of statutory construction prohibit the reading of a general clause in contravention of a specific statutory clause^{10/} (such as § 628), which is precisely what the Commission now asks if it may do.^{11/} It may not, and as a result the Commission may not rewrite or circumvent § 628 in defiance of the clear

^{8/} See, e.g., Comments of Comcast Corporation, MB Docket No. 07-198, at 6 (filed January 4, 2008) (“Comments of Comcast”); Comments of National Cable & Telecommunications Association, MB Docket No. 07-198, at 12-13 (filed January 4, 2008) (“Comments of NCTA”); Comments of Cablevision Systems Corp., MB Docket No. 07-198, at 17 (filed January 4, 2008) (“Comments of Cablevision”).

^{9/} See, e.g., *RCN Telecom Servs. of N.Y., Inc. v. Cablevision Sys. Corp.*, 14 FCC Rcd. 17093 (1999), *aff’d*, Memorandum Opinion & Order, 16 FCC Rcd. 12048 (2001); *DIRECTV, Inc. v. Comcast Corp.*, 13 FCC Rcd. 21822 (1998), *aff’d*, Memorandum Opinion & Order 15 FCC Rcd. 22802 (2000); *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089 (1999), *aff’d*, Memorandum Opinion & Order, 155 FCC Rcd. 22802 (2000), *aff’d*, *EchoStar v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

^{10/} See, e.g., Comments of Comcast at 8 n.23 (compiling cases).

^{11/} See Notice ¶ 116 (“We seek comment regarding whether we have the authority to extend our program access rules to all terrestrially delivered cable-affiliated programming by way of statutory provisions granting general authority to the Commission, in light of the specific authority in Section 628 that limits their scope to satellite programming.”).

expression of Congress that the program access rules apply only to satellite-delivered programming.^{12/}

With regard to the unfair competition provision of § 628(b), the *NPRM* itself states that “the plain language of Section 628(b), like Section 628(c)(2)(B)” limits its application to satellite delivered programming.^{13/} The plain language of the statute therefore prohibits the use of § 628(b) as a lever to force terrestrially-delivered content into the purview of program access.

The various other sources of general authority that the *NPRM* lists as possible justifications for applying the program access rules to non-satellite delivered programming are similarly unviable. The Commission’s exercise of authority under § 4(i), for example, must be ancillary to the “effective performance of its statutorily mandated responsibilities.”^{14/} But Congress expressly limited the scope of § 628 to satellite-delivered programming, and as a result the Commission’s performance of its statutory responsibilities simply cannot require regulation of terrestrial programming.^{15/}

^{12/} See, e.g., *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 Prohibition*, Report and Order, 17 FCC Rcd. 12124, 12158 ¶ 73 (2002) (discussing the legislative history of the program access provisions and holding that, “[g]iven this express decision by Congress to limit the scope of the program access provisions to satellite delivered programming, we continue to believe that the statute is specific in that it applies only to satellite delivered cable and broadcast programming.”); (citing H.R. Conf. Rep. 102-862, 102nd Cong., 2d Sess. 91-93 (1992)).

^{13/} *NPRM* at ¶ 116.

^{14/} See generally Comments of NCTA at 12-13 (citing *American Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) and *Motion Picture Ass’n of America v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002)).

^{15/} *Id.* See also Comments of Comcast at 8-10.

The Supreme Court^{16/} and the D.C. Circuit,^{17/} among other courts,^{18/} have rebuffed past attempts by the Commission to expand its authority beyond what Congress intended by relying upon the same general provisions cited in the *NPRM*. Congress expressly limited the Commission’s authority to regulate program carriage agreements to only those agreements entered into between a cable operator and a vendor of satellite cable programming. This limitation prohibits the application of the program access rules to non-satellite delivered programming, including local news and community programming.

^{16/} See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706-708 (1979) (declining to defer “to the Commission’s judgment regarding the scope of its [ancillary] authority” where evidence existed that Congress intended to limit its discretion).

^{17/} See, e.g., *American Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (because the FCC lacks statutory authority, the Commission’s purported authority is “ancillary to nothing”); *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (holding that “the FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue”).

^{18/} See, e.g., *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) (“Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission’s specific statutory responsibilities.”).

CONCLUSION

Local news and community programming is an attractive means of product differentiation that significantly benefits consumers. Market forces encourage competing providers to develop their own local content, thereby providing more choice and more local content for consumers. Forced sharing of local content would remove the economic justification for producing it in the first place, and the result would be less local content for consumers. There is no basis for the Commission to choose such an outcome.

Respectfully submitted,

_____/s/_____
Bruce D. Sokler
Robert G. Kidwell
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300 (phone)
(202) 434-7400 (facsimile)

February 12, 2008

*Counsel for Advance/Newhouse
Communications*