

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of the Cable Television Consumer)	
Protection and Competition Act of 1992)	
)	
Development of Competition and Diversity)	MB Docket No. 07-29
in Video Programming Distribution:)	
Section 628(c)(5) of the Communications Act)	
)	
Sunset of Exclusive Contract Prohibition)	

**REPLY OF TIME WARNER INC.
IN SUPPORT OF PETITION FOR RECONSIDERATION**

Time Warner Inc. (“TW”) hereby submits its reply in support of the Petition for Reconsideration (“*Petition*”) filed by Fox Entertainment Group, Inc. (“Fox”) in the above-captioned proceeding.¹

In its *Petition*, Fox described numerous ways in which the Commission’s expanded program access discovery rules will harm competition in the video programming business. In particular, the rules will give a complainant access on a broad scale to a programmer’s most highly-confidential business information, and this will provide the complainant with extraordinary bargaining leverage in its negotiations with that programmer. It is naïve to think that negotiations between a programmer and an MVPD could be conducted on anything approaching an equitable basis when the MVPD knows in advance all the intimate details of the

¹ Petition for Reconsideration of Fox Entertainment Group, Inc. in MB Dkt No. 07-29 (filed Nov. 5, 2007) (“*Petition*”).

programmer's contracts with other MVPDs. The harm to programmers -- and the sheer unfairness of the FCC tipping the scales in such a manner -- is obvious.

The Commission has consistently recognized that carriage contracts contain "highly sensitive material."² TW has previously explained that carriage contracts are a programmer's most competitively significant documents, containing highly proprietary information that is maintained in the strictest of confidence.³ The Commission has acknowledged that disclosure of programming contracts between MVPDs and programmers can "result in substantial competitive harm to the information provider."⁴ Under such circumstances, the Commission should be *limiting* discovery to only those documents an MVPD can demonstrate, on a case-by-case basis, are essential to its complaint, not *expanding* discovery to allow MVPDs to engage in open-ended "fishing expeditions" that will increase their bargaining power over programmers.⁵

² See *EchoStar Satellite L.L.C. v. Home Box Office, Inc., Request for Enhanced Confidential Treatment*, Order, 21 FCC Rcd. 14197 ¶ 9 (2006) ("*EchoStar/HBO Protective Order*") (enhanced confidential treatment was necessary to protect the "highly sensitive material" in HBO's programming contracts); *Applications for the Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation and its Subsidiaries to Time Warner, Comcast, et al. - Order Adopting Second Protective Order*, Order, 20 FCC Rcd. 20073 ¶ 7 (2005) ("*Adelphia Second Protective Order*") (granting enhanced confidential treatment to certain RSN programming contracts); *News Corp., General Motors Corp., and Hughes Electronics Corp. - Order Concerning Second Protective Order*, Order, 18 FCC Rcd. 15198 ¶¶ 2-3 (2003) ("*News Corp./DIRECTV Second Protective Order*") (granting "enhanced protection" for "highly sensitive material" contained in documents related to News Corp.'s programming contracts). Programming contracts qualify as automatically exempt from public examination under Section 0.457(d)(1)(iv) of the Commission's rules. See 47 C.F.R. § 0.457(d)(1)(iv).

³ See TW Reply Comments at 12.

⁴ See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816 ¶ 61 (1998).

⁵ Opponents of the *Petition* are wrong in suggesting that such fishing expeditions will not occur. AT&T Opposition to *Petition* at n.6. ("AT&T Opposition"). There is ample evidence that MVPDs have used the program access complaint process for that very purpose. See *EchoStar Communications Corp. v. Comcast Corp. et al.*, Memorandum Opinion and Order, 14 FCC Rcd. 2089 ¶ 31 (1999) (denying discovery request); *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.*, Memorandum Opinion and Order, 14 FCC Rcd. 17093 ¶ 27 (1999) (same), *aff'd*, *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.*, Memorandum Opinion and Order, 16 FCC Rcd. 12048 ¶ 19 (2001); see also *EchoStar Satellite Corp. v. Young Broadcasting et al.*, Memorandum Opinion and Order, 16 FCC Rcd. 15070 ¶ 4 (2001) (denying discovery request in retransmission
(footnote continued...))

Moreover, the Commission needs to understand that the expanded discovery rules will not only give MVPDs access to programmers' sensitive business information, but also to the confidential information of their competitor MVPDs. For example, if an MVPD were to file a complaint against a programmer and, by operation of the new discovery rules, learn the details of competing distributors' contracts with that programmer, the MVPD would have acquired a significant and unfair competitive advantage over such other distributors. Armed with knowledge of the cost and pricing structures of its competitors, the MVPD would be able to act strategically to price and market its own services in a way that could cause significant harm to the other MVPDs' businesses.

In its opposition to the Fox *Petition*, EchoStar argues that no harm will come from forcing a programmer to divulge its confidential programming contracts. However, EchoStar has sung a different tune when its own confidential information is at stake. For example, in the EchoStar-DIRECTV merger proceeding, when EchoStar sought to protect its "most sensitive" information, it argued that "inadvertent or intentional disclosure of these data to . . . competitors would have a devastating effect on [EchoStar's] businesses and place [EchoStar] at a significant competitive disadvantage."⁶ This is exactly the point TW is making here about *its* "most sensitive" information.

(...footnote continued)

consent adjudication) ("*Young Broadcasting*"). The new discovery rules will create far greater opportunities for such abuses.

⁶ Letter from Gary M. Epstein, Counsel for Hughes Electronics Corp. and General Motors Corp., and Pantelis Michalopoulos and Carlos M. Naida, Counsel for EchoStar Communications Corp. to Marlene H. Dortch, Secretary, FCC, in CS Docket No. 01-348 at 1 (filed Apr. 22, 2002).

The competitive harms inherent in the expanded discovery rules are all the more troublesome because there was no reason for the Commission to adopt the new rules in the first place. The prior discovery rules permitted the Commission to allow discovery where the complainant demonstrated that it was necessary. The Commission provided no credible evidence that the prior rules were causing *any* injury in the MVPD marketplace. In fact, most program access complaints have been settled by the parties without any Commission action,⁷ and the Commission has been able to decide other complaints based on the pleadings and, where there is a demonstrated need, supplemental information from the parties.

Nor can protective orders prevent these competitive harms. As the Commission has recognized, breaches of protective orders, whether inadvertent or intentional, are not uncommon in program access complaints and in other Commission proceedings.⁸ It is troubling that EchoStar -- one of the strongest advocates for obtaining expanded discovery of confidential information -- has a history of failing to protect confidential information in these types of proceedings.⁹ Moreover, once the breach has occurred, the damage is irrevocable.¹⁰ There is no way that any Commission rule, including fines, can take the information “out of the

⁷ Such settlements are consistent with the Commission’s oft-stated goal that carriage disputes be resolved via private negotiations. *See, e.g., In re Ameritech New Media, Inc. v. MediaOne, Inc.*, Memorandum Opinion & Order, 13 FCC Rcd. 17748 ¶ 4 (1998) (“The Commission encourages resolution of program access disputes through negotiations between the parties in an effort to avoid time-consuming, complex adjudication.”); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd. 3359 ¶¶ 74, 124 (1993) (“1993 Program Access Order”). *See also* TW Reply Comments at 2.

⁸ *See, e.g., Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control*, Order, 15 FCC Rcd 19668 (2000) (describing the breach of a merger protective order by Disney). AT&T’s claims that such concerns are mere “conjecture,” AT&T Opposition at n.6, are belied by this evidence.

⁹ *Young Broadcasting* ¶ 7 (describing EchoStar’s disclosure of confidential information).

¹⁰ *Implementation of the Cable Television Consumer Protection Act of 1992; Development of Competition and Diversity in Video Programming and Distribution*, Report and Order, 22 FCC Rcd. 17791 ¶ 103 (2007) (“[F]ashion[ing] appropriate sanctions for violations” of protective orders is inadequate.).

complainant's head" to ensure that it is not used in future negotiations with programmers. And, of course, the risks only increase under an expanded discovery regime in which a complainant can obtain access to multiple programming contracts.

Furthermore, as Fox demonstrated, there are serious problems with the protective order the Commission adopted. For example, it does not provide an opportunity for a programmer to object to the individuals seeking access to confidential information. As Fox observes, the protective order appears to "require that access be granted to any party upon the mere signing of a declaration."¹¹ Numerous protective orders adopted by the Commission have allowed the disclosing party to object to disclosure.¹² Given the Commission's prior recognition of the highly confidential nature of programming contracts, disclosure should not be required "until there is a ruling [by the Commission] on the merits of an objection."¹³

The expanded discovery rules are also inconsistent with the Commission's goal of resolving program access complaints expeditiously. As Fox explained, the Commission will "become the arbiter of myriad interlocutory disputes between the parties before it can even hope

¹¹ *Petition* at 8.

¹² *See, e.g., EchoStar/HBO Protective Order*, App. A ¶ 7; *Adelphia Second Protective Order*, App. A ¶ 8 (providing five business days until confidential information must be produced and three business days to object to disclosure); *News Corp./DIRECTV Second Protective Order* ¶ 8 (same).

¹³ *Petition* at 8. The Commission should also revise the protective order to allow a disclosing party to designate confidential materials "Copying Prohibited," a provision that has been a fixture in numerous Commission protective orders. *See, e.g., Applications of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. For Approval to Transfer Control*, Protective Order, 22 FCC Rcd. 12822 ¶ 6 (2007); *Application of News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, Protective Order, 22 FCC Rcd 12797 ¶ 11 (2007); *Applications for the Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation and its Subsidiaries to Time Warner, Comcast, et al.*, Order Adopting Protective Order, 20 FCC Rcd. 10751 ¶ 6 (2005). Restrictions on copying will help to prevent inadvertent disclosures of confidential information to competitive decision-makers or parties who have not agreed to abide by the terms of the protective order.

to address the substantive merits of a program access case.”¹⁴ This is virtually guaranteed to delay resolution of complaints. The Commission has offered no rational basis -- beyond merely summarizing a handful of comments requesting more lenient discovery standards -- for overturning years of precedent finding that “expanded discovery would be more likely to encumber and lengthen resolution times for program access proceedings.”¹⁵

If the Commission nonetheless elects to retain the changes to the discovery rules, there are a number of steps it should take to limit discovery and thereby reduce the potential competitive harms as well as the time frames for resolving complaints. First, the Commission should clarify that discovery requests may only be submitted after the complaint, answer, and reply have been filed. This will enable the Commission to determine whether the information in the filings is adequate to resolve the complaint, as the Commission originally envisioned.¹⁶ If so, there is no need for expanded discovery.

Second, the Commission should clarify that, if a defendant attaches to its answer the contract of the competing MVPD specified by the complainant (or, if appropriate, the contract of a “similarly situated” MVPD), then the burden of proof will be on the complainant to demonstrate why additional discovery is necessary. After all, once a defendant submits the contract with the competing MVPD (or similarly situated MVPD), the only question is whether the prices, terms, and conditions that the defendant offered the complainant are discriminatory as

¹⁴ *Petition* at 4.

¹⁵ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd. 15822 ¶ 48 (1998).

¹⁶ *1993 Program Access Order* ¶ 123 (“Thus, we will adopt a system that promotes resolution of as many cases as possible on the basis of a complaint, answer and reply.”).

compared to those contained in the competing or similarly situated contract.¹⁷ No other contracts are relevant to that question. Since the complainant already has the competing or similarly situated contract, further discovery is unnecessary, and all the potential dangers of expanded discovery can be avoided.

Finally, TW agrees with Fox that parties should not be required to turn over documents or information subject to the attorney-client privilege or attorney work-product privileges, confidential exchanges between programmers and their accountants or experts, or documents created to defend against an actual or anticipated program access complaint or litigation between the parties.¹⁸

* * *

¹⁷ *1993 Program Access Order* ¶¶ 98-99; *see also* 47 C.F.R. § 76.1003(e).

¹⁸ *See Petition* at 10.

For the reasons described herein and in the Fox *Petition*, TW respectfully requests that the Commission revert back to its case-by-case discovery regime, which provided complainants with a full opportunity to demonstrate that disclosure is necessary, while at the same time avoiding indiscriminate disclosure of highly confidential business information and ensuring that programmers are only required to produce information essential to resolution of a complaint.

Respectfully submitted,



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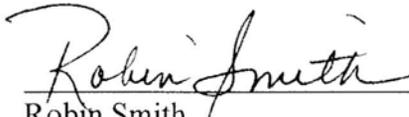
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March 17, 2008

CERTIFICATE OF SERVICE

I, Robin Smith, do hereby certify that on this 17th day of March, 2008, I caused to be served true and correct copies of the foregoing Reply Comments to the following parties:

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