DOCKET FILE COPY ORIGINAL

RECEIVED

AUG 3 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 01-129

COMMENTS

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Inquiry ("NOI")* in the above-captioned proceeding.[1]

I. INTRODUCTION.

Under Section 628(c)(2)(D) of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), the Commission's rules generally must prohibit exclusive contracts between, *inter alia*, vertically integrated satellite cable programming vendors and cable operators.[2] The statute's prohibition on exclusive contracts is scheduled to sunset on October 5, 2002 "unless the Commission finds, . . ., that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[3] Preservation of the statutory ban on exclusivity is a matter of critical importance to fixed wireless providers of multichannel video programming, and thus WCA has a direct and immediate interest in the Commission's resolution of this issue.

[1] FCC 01-191 (rel. June 25, 2001). WCA is the principal trade association of the fixed wireless broadband industry. Its membership includes virtually every terrestrial wireless video provider in the United States; the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators; Local Multipoint Distribution Service ("LMDS") licensees; and manufacturers of wireless broadband transmission and reception equipment.

[2] 47 U.S.C. § 548(c)(2)(D).

[3] *Id.* § 548(c)(5).

While it is true that fixed wireless operators now have unprecedented opportunities to utilize MDS/ITFS spectrum for non-video services, many of those same operators continue to offer packages of multichannel video programming in direct competition with incumbent cable operators, using both traditional analog and more advanced digital technologies. Indeed, MDS/ITFS-based fixed wireless broadband providers remain a vital source of competitive multichannel video service in smaller markets and rural areas where cable overbuilds and/or DBS "local into local" service may not be available for the foreseeable future.[4] MDS operators such as W.A.T.C.H. TV (Lima, Ohio), CNI Wireless (Somerset, Kentucky), CFW Cable (Charlottesville, Virginia and the surrounding area), Teton Wireless (Missoula, MT and Twin Falls/Idaho Falls, ID) and WHTV Broadcasting Corp. (various communities in Puerto Rico) have long been the only *bona fide* competition to incumbent cable operators in their respective markets.[5] Nothing less than the economic survival of these entities (and that of other terrestrial competitors to cable) will be at stake when the Commission reviews the federal program access law later this year.

II. DISCUSSION.

A. *The Marketplace Conditions That Prompted Congress to Adopt the Program Access Law Are Worse Than What Existed in 1992.*

The Commission has recognized that concentration of ownership among cable operators bears directly on program access because it increases the buying power of the cable MSOs and provides them with opportunities to coordinate their conduct.[6] As the Commission observed in imposing divestiture conditions on AT&T's acquisition of MediaOne:

---

[4] Recent evidence suggests that a substantial number of American consumers will continue to have no access to DBS local-into-local service. According to a study published by Equal Airwaves Right Now (EARN), at least two-thirds of the television markets in the United States will not receive the service even after new spot beam satellites are launched. *See* Branch, "Study Says DBS is Planning to Ignore Rural Customers," *Communications Daily*, at 6 (July 25, 2001).

[5] Also, People's Choice TV Corp. (recently acquired by Sprint) is providing digital wireless cable service in the Phoenix market ("DigitalChoice") which allows consumers to customize their video channel line-ups using advanced interactive capabilities. *See, e.g.,* Taylor, "Digital TV Availability Expands in Valley," *Phoenix (AZ) Tribune*, at B1 (June 1999).

[6] *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996).

> In 1999 alone, in addition to the proposed merger between AT&T and MediaOne, other announced mergers and acquisitions include those between Adelphia Communications, Century Communications, and FrontierVision; between Comcast, Jones Intercable, Prime Cable (Maryland), and Lenfest Communications; and between Cox Communications, Media General, Prime Cable (Las Vegas), and TCA Cable. Vulcan Ventures acquired Marcus Cable and Charter Communications (which previously had acquired Falcon) in 1998 and purchased control in numerous MSOs in 1999, including Fanch Communications, Avalon, Greater Media, Heicion, Renaissance, and Rifkin. Concentrated markets are more prone to collusive outcomes than are competitive markets.[7]

The Commission's *Seventh Annual Report* to Congress on the status of competition in markets for the delivery of video programming reaffirms that national and local concentration of ownership in the cable industry has reached extraordinary levels. Indeed, the Commission found that the top ten cable MSOs serve nearly 90% of all U.S. cable subscribers,[8] and that approximately two- thirds of those subscribers are served by cable system "clusters" in local markets.[9] In the largest cluster size category (over 500,000) subscribers, the number of clusters increased by 33.3% between 1998 and 1999, and the number of subscribers served by those clusters increased by 21.4%.[10]

The proof, in other words, is undeniable: whereas cable programmers once had significant opportunities to sell their programming to multiple cable operators in a local market, in many cases they are now forced to deal with a single cable operator who has consolidated previously independent systems into a cluster and thereby acquired the lion's share of the market's subscribers. In turn, this exposes MDS/ITFS providers and other terrestrial competitors to an incalculable risk that vertically integrated programmers will succumb to cable's market power and refuse to sell their programming to alternative MVPDs that do not yet serve a

---

[7] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9843-4 (2000) ("*AT&T/MediaOne*").

[8] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1 at ¶ 15 (rel. Jan. 8, 2001) ("*Seventh Annual Report*").

[9] *Id.* at ¶ 158, Table C-2.

[10] *Id.* at ¶ 158.

comparable "critical mass" of subscribers. This scenario demands retention, not elimination, of the statutory ban on exclusivity.

B. *Cable Programmers Have Already Proven That They Will Withhold Critical Programming From Cable's Competitors Where the Commission's Rules Permit Them to Do So.*

The events of the past several years confirm that vertically integrated cable programmers, and particularly regional sports networks, will withhold programming from cable's competitors where loopholes in the Commission's program access rules permit them to do so. In particular, and in no small part due to the Cable Services Bureau's liberal interpretation of the "terrestrial distribution" loophole in Section 628(b) of the 1992 Cable Act, cable MSOs are deploying fiber to deliver their affiliated programming on an exclusive basis to their subscribers. Indeed, fiber-based networks now deliver local cable programming in a number of markets, including New York City, Chicago, Philadelphia, Boston, Indianapolis, Minneapolis, Orlando, Columbus, Kansas City, and southern New Jersey.[11]

Most alarming, however, is the fact that these ostensibly "local" fiber networks are now being used by regional sports networks as a justification for denying competitors access to local sports programming. For example, cable MSO Cablevision Systems Corp., which controls virtually all professional sports programming in the New York market, has migrated satellite-delivered "overflow" games from MSG Network and Fox Sports Net to Cablevision's fiber-delivered MSG Metro suite of services, and withheld those games from RCN Telecom Services of New York, its primary "overbuild" competitor in the New York market.[12] Similarly, the Tribune company has migrated Chicago Cubs games from WGN to the fiber-delivered ChicagoLand Television Network.[13] And, cable MSO Comcast has migrated its affiliated sports

---

[11] *See* Testimony of Decker Anstrom, President and CEO, National Cable Television Association, before the Senate Antitrust, Business Rights and Competition Subcommittee (Oct. 8, 1997); Umstead, "Ops Eye Low-Cost Local Heroes," *Multichannel News*, at 74 (May 4, 1998).

[12] *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation, et al.*, 14 FCC Rcd 17093 (CSB, 1999).

[13] "Ameritech Pressing FCC and Congress for Program Access Rule Changes," *Communications Daily* (Feb. 3, 1998).

programming in the Philadelphia market to the fiber-delivered Comcast SportsNet, and withheld that programming from DirecTV and EchoStar.[14]

Clearly, then, the consequences of eliminating the statutory ban on exclusivity must be analyzed both in terms of the quantity and the *types* of programming that would be withheld from cable's competitors if the ban were to sunset on October 5, 2002. While it is true that some cable programming services may continue to be available to cable's competitors regardless of whether the sunset goes into effect as scheduled, the cable industry's pattern of conduct thus far strongly suggests that the programming of greatest importance to subscribers will become unavailable to cable's competitors if the ban on exclusivity is eliminated. Again, this militates in favor of retention of the ban, and the Commission's analysis of the problem should proceed under that assumption.

C. *The Commission Has Held That Exclusive Contracts Between Vertically Integrated Programmers and Incumbent Cable Operators Do Not Serve the Public Interest.*

Under Section 628(c)(2)(d) and 628(c)(4) of the 1992 Cable Act, the Commission is authorized to waive the statutory ban on exclusivity on a case-by-case basis where it determines that such a waiver is in the public interest.[15] The Commission, however, has found that such waivers do *not* serve the public interest.[16] In so doing, the Commission has rejected many of the pro-exclusivity arguments that vertically integrated programmers are likely to offer during the Commission's evaluation of whether to permit the statutory ban on exclusivity to sunset as of October 5, 2002. For example, vertically integrated programmers have argued that exclusivity causes no cognizable public interest harm as long as the programming at issue remains available to DBS. The Commission, however, has ruled otherwise:

---

[14] *EchoStar Communications Corporation v. Comcast Corporation, et al.*, 14 FCC Rcd 2089 (CSB, 1999); *DirecTV, Inc. v. Comcast Corporation, et al.*, 13 FCC Rcd 21822 (CSB, 1998).

[15] 47 U.S.C. § 548(c)(2)(d) and (c)(4).

[16] *See Outdoor Life Network and Speedvision Network*, 13 FCC Rcd 12226 (CSB, 1998); *Cablevision Industries Corporation and Sci-Fi Channel*, 10 FCC Rcd 9786 (CSB, 1995); *Time Warner Cable (Court TV)*, 9 FCC Rcd 3221 (1994).

> While the exclusivity at issue here is not enforceable against DBS providers, the statutory public interest test requires us to consider the effect of exclusivity on *all* alternate technology competitors, not just DBS. [SMATV operator] Liberty [Cable] is an emerging competitor to Time Warner throughout New York City . . . . While potential competition from DBS is unaffected by Time Warner's contracts, Liberty as an existing alternate technology competitor to cable would clearly be affected by the proposed exclusivity [for Court TV]. The effect of the proposed exclusivity on Liberty is, therefore, highly relevant, and we conclude that this effect weighs against a finding that such exclusivity is in the public interest.[17]

Vertically integrated programmers have also contended that exclusivity is necessary to prevent competing MVPDs from "free-riding" on the marketing investments that incumbent cable operators might make towards launching new programming services on their systems. Again, the Commission disagreed:

> Time Warner's argument that exclusivity is necessary to prevent Liberty from "free riding" off of Time Warner's investment is not persuasive. Time Warner has not demonstrated that it has expended significant resources in promoting Court TV to build up audience demand in Manhattan, on which Liberty [Cable] could possibly "free ride." In any event, Congress enacted the program access provisions to allow all competitors access to programming on nondiscriminatory terms and conditions to eliminate certain barriers to entry faced by competing MVPDs.[18]

Furthermore, the Commission has been highly skeptical of any contention that newer, "niche-oriented" programming services must offer exclusivity to incumbent cable operators in order to obtain the cable carriage necessary to sustain their operations.[19] Ironically, the Outdoor Life and Speedvision cable networks (the "Networks") have admitted in their own filings before the Commission that their initial failure to obtain cable carriage was attributable to a variety of marketplace factors that have nothing to do with exclusivity. For example, the Networks stated that channel capacity, not exclusivity, was "*the number one reason* given by cable systems to

---

[17] *Time Warner Cable*, 9 FCC Rcd at 3228 (1994) (emphasis in original); *Outdoor Life*, 13 FCC Rcd at 12235-6.

[18] *Time Warner Cable*, 9 FCC Rcd at 3229; *see also Outdoor Life*, 13 FCC Rcd at 12239-40.

[19] *See, e.g., Outdoor Life*, 13 FCC Rcd at 12238-9.

new programming networks in denying carriage requests."[20] The Networks also cited a variety of other reasons for their inability to achieve wider cable distribution, most of which affect all new cable networks equally and, once again, have nothing to do with exclusivity. The following quotation is a case in point:

> While carriage decisions by MVPDs focus on matters such as rates, incentives, volume discounts and other economic terms, such negotiations are also significantly influenced by the MVPDs' perceptions of the strength and staying power of a new network, its ability to continue to fund quality programming, and its attractiveness to major advertisers; for an MVPD may be unwilling to commit a scarce, sought-after channel to a network whose growth in distribution and revenues appears, based on whatever data may be available, to be lagging behind the network's own forecasts or the growth of other networks.[21]

The Networks' admissions before the Commission merely confirm what has already been proven in the marketplace, namely that the success or failure of a cable programming network is not inextricably tied to whether the network is able to enter into exclusive contracts with incumbent cable operators. Indeed, the success of a number of cable networks that either do not or cannot offer exclusivity (*e.g.*, The History Channel, Cartoon Network, Home & Garden Network, Animal Planet, The Golf Channel) demonstrates that the quality and marketability of a cable network's programming, not exclusivity, ultimately determines whether it will achieve extensive cable distribution. Exclusivity, in other words, is "necessary" only to incumbent cable operators who want to ensure that their competitors do not have full and fair access to programming. This is not a legitimate public interest justification for the Commission to permit the ban on exclusivity to sunset next year.

---

[20] Petition for Exclusivity filed by the Outdoor Life Network and Speedvision Network, CSR-5044-P, at 15 (emphasis added) (the "Petition").

[21] Reply to Opposition to Request to Withhold Information From Public Inspection filed by Outdoor Life Network, L.L.C. and Speedvision Network, L.L.C., CSR 5044-P, at 4 (filed Aug. 20, 1997). *See also* Petition at 15-20, 39 (citing factors such as cable rate regulation, depressed cable stock prices, the cable industry's decision to devote scarce cable channels to more profitable uses (*e.g.*, home shopping, premium channels), must-carry, PEG and leased access requirements, the high cost of digital conversion and the fact that Outdoor Life transmits only in the digital mode).

D. *Additional Public Interest Factors Warrant Retention of the Statutory Ban on Exclusivity.*

At least two additional public interest factors support retention of the statutory ban on exclusivity. First, it must be remembered that the Commission explicitly refused to impose program access conditions on AT&T's acquisitions of MediaOne and Tele-Communications, Inc. ("TCI"), citing the fact that aggrieved parties may seek redress for program access abuses under the Commission's existing program access rules.[22] That safeguard, obviously, would be vitiated by a sunset of the statutory ban on exclusivity, and, since the Commission is unlikely to "unscramble" either transaction, would leave AT&T's competitors with no recourse before the Commission if AT&T (or any successor entity) were to exercise its market power to deny competing MVPDs full and fair access to cable programming.

Second, by virtue of a directive in Section 1009 of the Satellite Home Viewer Improvement Act of 1999, incumbent cable operators will be permitted to enter into exclusive retransmission consent contracts with local television stations as of January 1, 2006.[23] Thus, failure to retain the statutory ban on exclusive cable programming contracts will put cable's competitors at risk of losing access to critical cable *and* broadcast programming that is essential to their survival. The anticompetitive effects of that scenario are self-evident, and should give the Commission great pause before it even considers any action that would permit the statutory ban on cable programming exclusivity to sunset as of October 5, 2002.[24]

---

[22] *See, e.g., AT&T/MediaOne*, 15 FCC Rcd at 9854.

[23] *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5484 (2000).

[24] At paragraph 40 of the *NOI*, the Commission requests information on "the current state of high-speed data offerings by each delivery technology and comparable statistics on the availability of such service, the cost of such service, the number of homes to which the service is available, and the number of subscribers of these services." As to MDS/ITFS, the Commission's findings on these issues are set forth in its *Interim Report* and its *Final Report* on usage of the 2500-2690 MHz band, in ET Docket No. 00-258. *See* "Interim Report - Spectrum Study of the 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems," ET Docket No. 00-258 (Nov. 15, 2000); "Final Report - Spectrum Study of the 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems," ET Docket No. 00-258 (Mar. 30, 2000). WCA herein incorporates those findings by reference.

III. CONCLUSION.

MDS/ITFS-based providers of multichannel video programming remain more than willing to negotiate nonexclusive affiliation agreements with cable programmers on nondiscriminatory terms and conditions. The issue here is whether they and other alternative MVPDs will have the opportunity to do so. All available evidence reflects that elimination of the ban would only expand cable's market power at the expense of competing MVPDs and their customers, with no countervailing benefit to the public. WCA thus urges the Commission to conduct its review of the program access law in a manner consistent with the recommendations set forth above.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: ______________________
Paul J. Sinderbrand
Robert D. Primosch

WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W.
Suite 700
Washington, D.C. 20037
202.783.4141

Its Attorneys

August 3, 2001

CERTIFICATE OF SERVICE

I, Candace J. Lamoree, hereby certify that on this 3rd day of August, 2001, copies of the foregoing "Comments" were delivered via hand delivery to the following:

Michael K. Powell
Chairman
Federal Communications Commission
445 – 12th Street, S.W., Room 8-A204
Washington, DC 20554

Gloria Tristani
Commissioner
Federal Communications Commission
445 – 12th Street, S.W., Room 8-C302
Washington, DC 20554

Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 – 12th Street, S.W., Room 8-B115
Washington, DC 20554

Michael J. Copps
Commissioner
Federal Communications Commission
445 – 12th Street, S.W., Room 8-A302
Washington, DC 20554

Kenneth Ferree
Chief, Cable Services Bureau
Federal Communications Commission
445 – 12th Street, S.W
Washington, DC 20554

Deborah Klein
Division Chief
Cable Services Bureau
Federal Communications Commission
445 – 12th Street, S.W
Washington, DC 20554

Candace J. Lamoree