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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 20, 2001

BY HAND DELIVERY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: CS Docket No. 01-129 -- Reply to NAB Comments

Dear Ms. Salas:

Attached is an original and seven (7) copies of a Reply to the National Association of Broadcasters ("NAB") submitted on behalf of Charter Communications.

Thank you for your attention to this matter. If you have any questions, or if you need additional copies, please feel free to give me a call.

Sincerely,



Wes Heppler

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AUG 20 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 20, 2001

W. Kenneth Ferree
Chief, Cable Service Bureau
Federal Communications Commission
445 12th Street, SW
Room 3C740
Washington, DC 20554

Re: CS Docket No. 01-129 -- Reply to NAB Comments

Dear Mr. Ferree:

This letter is filed on behalf of Charter Communications, Inc. and its affiliates (collectively referred to herein as "Charter") in reply to certain allegations made by the National Association of Broadcasters ("NAB") in the above-referenced proceeding.¹ Specifically, Charter will address NAB's inaccurate and misguided statements that Charter's position on video streaming -- in contract negotiations with ESPN -- somehow violates the Communications Act.²

NAB states that it has read several trade press articles indicating that, in negotiations with ESPN, Charter has attempted to negotiate some limitation on the amount of ESPNNews programming that can be video streamed by ESPN onto the Internet. NAB then asserts that this negotiating position may violate both Section 616 and Section 628 of the Communications Act.³ As set forth below, not only are NAB's allegations based purely on hearsay, in addition they are both groundless and irresponsible.

These claims are made by NAB in order to allegedly demonstrate the "market power of cable system operators".⁴ NAB states that an example of such "market power" is the carriage negotiations between Charter and ESPN. The most glaring of many flaws in the NAB argument

¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Docket No. 01-129, FCC 01-191. NAB's Comments were filed on August 3, 2001.

² NAB Comments at 6-7.

³ 47 USC §§536, 548.

⁴ NAB Comments at 6.

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Chief, Cable Service Bureau
Federal Communications Commission
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is the assumption that somehow Charter holds the balance of power in negotiations with ESPN. Nothing could be further from the truth. NAB failed to mention that the Disney-ABC-ESPN media/programming behemoth has consistently used its dominant programming product position to exert tremendous bargaining leverage over cable television operators. NAB also failed to note that over each of the past three years, Disney-ABC-ESPN has imposed 20% rate increases for its ESPN programming -- over the strenuous and adamant objections of Charter and other cable operators. NAB further failed to accurately describe the Disney-ABC-ESPN requirement that ESPN programming to be carried on basic or expanded levels of service -- ESPN does not allow cable operators to offer the ESPN programming on an *a la carte* basis regardless of how high the ESPN programming fees escalate.

Given that Charter must pay dominant programmers such as Disney-ABC-ESPN tens of millions of dollars annually on an ever-escalating basis, it is not unreasonable for Charter or any other cable operator to seek some reasonable limitations on video streaming of the very same programming for which the cable operator has already paid dearly. Protecting against the immediate dilution of programming product value is a reasonable and necessary component of any cable operator's programming negotiations. It should also be noted that Charter continues to carry ESPNNews on many of its systems pending resolution of this issue.⁵

NAB's failure to understand the balance of "market power" between cable operators and dominant cable programmers is matched by its inability to accurately read the Communications Act. NAB argues that Sections 616 and 628 of the Communications Act preclude Charter from negotiating any video streaming limitations because this will result in Charter having "exclusive rights against other multichannel video programming distributors".⁶ First, it is painfully obvious that virtually all of ESPN's programming services are widely available on the nationally distributed direct broadcast satellites as well as other multichannel video programming distributors. Second, neither Section 616 nor Section 628 are applicable because: (1) programming carried over the Internet is not considered either "video programming" or "satellite cable programming" and; (2) the Internet is not considered to be a "multichannel video programming distributor".⁷

⁵ Because Charter's carriage terms for ESPNNews were not previously contractually tied to the other ESPN services and because ESPNNews is the least compelling of all the ESPN services, Charter was in the very rare position of having equal footing in the negotiations with the Disney-ABC-ESPN programming service. In nearly all other programming negotiations this is not the case.

⁶ NAB Comments at 7.

⁷ See, e.g., *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, Order On Reconsideration, 13 FCC Rcd 18962, 18987-88 (1998) (Commission rejected attempts to classify Internet programming as video programming for purposes of the over-the-air reception rules). *Internet Ventures, Inc. Internet On-Ramp, Inc., Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access of Cable Facilities Under Section 612 of the Communications Act*, File No. CSR-5407-L, Memorandum

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Chief, Cable Service Bureau
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Finally, the Commission has never found Section 628 to apply to satellite cable programming that is not vertically integrated with a cable operator.⁸

Perhaps NAB simply misread both the marketplace and the Communications Act. Or perhaps NAB was subject to some of the same Disney-ABC-ESPN leverage to which cable operators have become so familiar. In either case, the NAB allegations are without merit and should be wholly disregarded by the Commission.

Charter appreciates the opportunity to correct the record in this proceeding.

Sincerely,



Curtis S. Shaw
Senior Vice President,
General Counsel and Secretary

Opinion and Order (“IVI Order”), 15 FCC Rcd 3247, 3250 ¶ 6 (2000) (Congress intended the “video programming” definition to take its meaning from the services offered at the time (1984) when the definition was adopted); *Video Dial Tone Order*, 7 FCC Rcd 5781 ¶ 74 (1992) (imposing a severability test and finding that “programming that includes multimedia graphics and information services that incorporate video images generally would not be video programming because the video images are not severable from the program service”).

⁸ See, e.g., *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 (2000) at ¶¶ 80-83 (refusing to extend program access rules to non-vertically integrated programming or terrestrially delivered programming); *Dakota Telecom, Inc. v. CBS Broadcasting, Inc. d/b/a Midwest Sportschannel and Bresnan Communications*, 14 FCC Rcd 10500 (1999) (refusing to extend program access rules to non-vertically integrated programming); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 97-415, at ¶ 36 (1997) (expressly declining to address the issue of expansion of its rules to non-vertically integrated programmers); *American Cable Co. v. Telecable of Columbus, Inc.*, 11 FCC Rcd 10090, at ¶ 55 (August 29, 1996) (finding that unfair competition provision in Section 628(b) may not be used to strike down grandfathered exclusive agreements).