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ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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July 24, 2013

Mr. Geoffrey Manne
Senior Fellow
TechFreedom
International Center for Law and Economics
4850 S.W. Scholls Ferry Road, Suite 102
Portland, OR 97225

Dear Mr. Manne:

Thank you for appearing before the Subcommittee on Communications and Technology on Wednesday, June 12, 2013, to testify at the hearing entitled "The Satellite Television Law: Repeal, Reauthorize, or Revise?"

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Wednesday, August 7, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at Charlotte.savercool@mail.house.gov and mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Additional Questions for the Record

The Honorable John Shimkus

1. Your prepared testimony discussed program carriage issues generally and the DC Circuit's recent ruling in the Tennis Channel case specifically. The Subcommittee received a letter on this subject (copy attached) from Tennis Channel's Chairman and CEO. Does that letter change your thinking on this issue or are there any points you wish to make in response?

2. Dr. Singer suggests that a complainant in a program carriage case should not have to demonstrate that the distributor would have obtained any benefit from granting the requested carriage. What is your view on that position? Please explain.

3. Dr. Singer's testimony articulated a number of concerns about vertical integration in the cable industry. What insights does the DC Circuit's recent Tennis Channel decision yield on this issue?

The Honorable Anna Eshoo

1. Recent press reports indicated that ESPN was in talks with at least one major U.S. wireless carrier regarding a compensation scheme that would exempt their content from the carrier's monthly data caps. How would you respond to such a proposal?

TENNIS
CHANNEL

Ken Solomon
Chairman & CEO

June 12, 2013

The Honorable Fred Upton
Chair
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Henry A. Waxman
Ranking Member
Committee on Energy & Commerce
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Greg Walden
Chair, Subcommittee on Communications
and Technology
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Anna Eshoo
Ranking Member, Subcomm. on
Communications and Technology
Committee on Energy & Commerce
U.S. House of Representatives
Washington, D.C. 20510

Dear Chairmen Upton and Walden and Ranking Members Waxman and Eshoo:

The Subcommittee's hearing today is examining the video marketplace and whether changes to our laws are needed to benefit consumers. My company, Tennis Channel, is an independent cable network and while we have no position on the reauthorization of the distant satellite license, we strongly urge the Subcommittee to focus on the larger video marketplace, as Chairman Walden indicated he wanted to do,[1] and in particular examine how consumers are being served, or disserved, by recent developments. It is for this reason that I want to share with the Subcommittee the perspective of a company that offers extraordinary content such as the recent French Open and has an active fan base but has encountered problems in dealing with the vertically integrated cable companies that dominate our video marketplace today.

Who is Tennis Channel?

Tennis Channel is a national sports network that launched on May 15, 2003 and has been recognized by many awards for its outstanding coverage. Tennis Channel offers a broad range of popular year-round tennis and tennis-related programming and has become the leading outlet for

[1] Greg Walden, Chairman, Subcomm. on Commc'ns and Tech., Comm. on Energy and Commerce, U.S. House of Representatives, Address at the 2013 National Association of Broadcasters Show (Apr. 8, 2013) (transcript available at http://energycommerce.house.gov/press-release/walden-delivers-remarks-panels-agenda-nab-show).

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the sport. The network has exclusive rights to telecast portions of three of the four Grand Slam events: the French Open, the Australian Open, and Wimbledon. And in 2009, it added rights to telecast live portions of the fourth Grand Slam, the U.S. Open, as well as other prominent event coverage like exclusive telecasts of every worldwide and United States Davis Cup and Fed Cup match, and today telecasts the top 120 tournaments.

Today, approximately 26 million subscribers receive Tennis Channel from about 130 different distributors nationwide. Although many distributors have discretion regarding their placement of Tennis Channel, the vast majority—more than two thirds—offer Tennis Channel to subscribers without requiring them to purchase a premium sports tier.

Program Carriage Remains Necessary to Promote Competition and Diversity

Independent cable networks like Tennis Channel have a chance to succeed in a world dominated by vertically integrated cable companies—not a right, but a chance—because of the protections that Congress built into the law. In 1992, Congress adopted the program carriage framework in Section 616 of the Communications Act applicable to unaffiliated cable networks. In adopting Section 616's program carriage law, this Committee made clear that it was concerned about important public interest goals—fair competition, diversity, localism—and about countering cable operators' obvious incentives to discriminate in favor of their own affiliated programming. It was understood that independent cable networks could add diversity and competition to the video marketplace that would benefit consumers. When the cable industry challenged the Cable Act, the Supreme Court upheld it because the law served important governmental interests. Indeed, the Court reaffirmed that protection of diverse information sources is a governmental purpose of the highest order, because it promotes core First Amendment values.[2] Moreover, the Court expressly affirmed the clear concern by Congress that increasing market penetration by cable services, as well as the expanding horizontal concentration and vertical integration of cable operators, combined to give cable systems the *incentive and ability* to act in a discriminatory manner against unaffiliated sources of cable programmers.[3]

I want to impress upon the Committee that claims by vertically integrated cable companies that changes in technology and the video distribution marketplace somehow weaken

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[2] *Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n,* 512 U.S. 622, 663 (1994) [hereinafter *Turner I*]; *see also id.* at 663–64 ("[I]t has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'") (quoting *United States v. Midwest Video Corp.,* 406 U.S. 649, 668 n. 27 (1972) (plurality opinion)).

[3] *Turner Broad. Sys., Inc. v. Fed Commc'n Comm'n*, 520 U.S. 180, 197–98 (1997) [hereinafter *Turner II*].

the need for these vital rules—the rules that address the incentive and ability of cable operators to discriminate against competitors such as Tennis Channel—is plain wrong. The rules are in fact more important than ever.

In fairness, my friends in the cable industry are partially right. The market has changed substantially since 1992: it's gotten worse. The biggest cable company today (Comcast) is much bigger than the biggest cable company (TCI) was in 1992. And the biggest cable company today is much more vertically integrated, owning multiple sports networks along with news and entertainment and lifestyle channels, regional sports channels, owned-and-operated broadcast stations in the top markets, and an over-the-air broadcast network as well. At the same time, consumers are just as dependent upon these increasingly concentrated cable operators as they were in 1992. The FCC reports that nearly 90 percent of households with television subscribe to a multichannel video programming distributor ("MVPD") service, and nearly 70 percent of those MVPD subscribers receive programming from a franchised cable operator.[4] That means nearly 60 percent of households with a television subscribe to a cable service. That was precisely the yardstick that this Committee cited, and the Supreme Court relied on, in finding the provisions in the Cable Act were needed.[5]

Industry data also confirm that not only have the big gotten bigger in recent years, the market concentration of the cable industry has grown substantially. The four largest cable operators now have 56.75 percent of the market, a big jump from just ten years before when their market share stood at 34 percent.[6] This shows that the change in the marketplace has driven out smaller, non-vertically integrated cable operators who have lost market share.

It is clear, as the FCC has repeatedly found, that cable operators and other MVPDs have the incentive and ability to favor their affiliated programming vendors in individual cases, with the potential to unreasonably restrain the ability of an unaffiliated cable network like Tennis Channel to compete fairly.[7]

Discriminatory Conduct Harms Independent Networks

For Tennis Channel, this is not just a theoretical concern; illegal discrimination is the company's biggest problem since it blocks us from 20 million homes. In 2010, Tennis Channel brought a program carriage complaint against Comcast at the FCC because we believed that

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[4] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, 546 (2009).

[5] *See Turner I,* 512 U.S. at 633 (noting that "over 60 percent of the households with television sets subscribe to cable").

[6] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 17791, 17829–30 (2007).

[7] *See In re Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494, 11518–19 (2011).

Comcast, which is vertically integrated and owns the Golf Channel and what is now NBC Sports, acted to harm competition and in a discriminatory manner by putting the sports channels it owns on a widely distributed tier while putting Tennis Channel, which it competes with for advertisers and viewers, on an entirely different and much less distributed premium tier that costs consumers extra. We brought this complaint because we had great product, award-winning programming, advertisers and viewers that were equal to Golf Channel and superior to NBC Sports, and yet Comcast refused to distribute our channel as broadly as they distributed their own channels, which a Comcast cable distribution executive referred to as "siblings."

The FCC's Media Bureau agreed that we had made a *prima facie* case, and referred the matter to an administrative law judge. After lengthy discovery and depositions, the ALJ conducted a hearing and concluded that we had established that Comcast acted in a discriminatory manner by (a) helping the Golf Channel and NBC Sports because of their affiliation and (b) harming Tennis Channel because it was not affiliated. It bears emphasis that this was the first time an independent cable network had successfully brought a program carriage complaint to the FCC. The full Commission reviewed that decision and upheld it.

Unfortunately, a panel of the D.C. Circuit Court of Appeals has recently voted to overturn the FCC's order. We will seek appropriate review of that decision, which we believe is a miscarriage of justice and an unlawful application of principles of judicial review. Despite ample evidence that Comcast treats the unaffiliated Tennis Channel dramatically worse than it treats its similarly-situated affiliates Golf Channel and NBC Sports Network, the panel found that Comcast did not violate the program carriage rules simply because the FCC failed to find as well that Comcast would have benefitted from carrying Tennis Channel on a more advantageous tier. In doing so, this panel of the court applied a wholly new standard for how a complainant must prove discrimination under Section 616—a standard that is not found in the statute.

Conclusion

The program carriage law is no less important today as a tool to promote competition and diversity in today's video programming marketplace. The statute continues to have a role in ensuring consumers have additional choices and access to diverse programming, and that independent cable networks have a chance to succeed and to act as a check on pricing by vertically integrated cable companies. On behalf of all independent cable networks, I urge you to maintain and strengthen this important competitive safeguard. It is a safeguard that not only promotes economic competition, it also promotes alternative views and thus advances important First Amendment values. Our video marketplace remains concentrated, and we urge the Committee to seek out ways to enable new and independent voices to have a role in the cable marketplace.

Sincerely,

Ken Solomon
Chairman & CEO