UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. PRIMESTAR PARTNERS, L.P.; ATC SATELLITE, INC.; COMCAST CORPORATION; COMCAST DBS, INC.; CONTINENTAL CABLEVISION, INC.; CONTINENTAL SATELLITE COMPANY, INC.; COX ENTERPRISES, INC.; COX SATELLITE, INC.; GE AMERICAN COMMUNICATIONS, INC., GE AMERICOM SERVICES, INC.; NEWHOUSE BROADCASTING CORPORATION; NEW VISION SATELLITE; TELE-COMMUNICATIONS, INC.; TCI K-1, INC.; TIME WARNER INC.; UNITED ARTISTS K-1 INVESTMENTS, INC.; VIACOM INC.; VIACOM K-BAND, INC.; AND WARNER CABLE SSD, INC., Defendants.	Civil Action No.: 93-CIV-3913 Filed: 6/9/93

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On June 9, 1993, the United States filed a civil antitrust complaint against defendant Primestar Partners, L.P. ("Primestar"), a joint venture partnership formed by subsidiaries of seven of the largest cable multiple systems operators ("MSOs") in the United States (in terms of subscribers) and GE American Communications, Inc. ("GEA"), a subsidiary of General Electric Company. The seven MSOs are Tele-Communications, Inc.; Time Warner Inc.; Continental Cablevision, Inc.; Comcast Corporation; Cox Enterprises, Inc.; Newhouse Broadcasting Corporation; and Viacom, Inc. ("MSO defendants"). The complaint alleges that Primestar, its ten partners and its partners' corporate parents, have engaged in a continuing agreement, combination and conspiracy in restraint of competition in the provision of multichannel subscription television service, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint seeks injunctive relief to assure that Primestar does not restrain the availability of programming to multichannel subscription television service competitors of the MSO defendants, or does not deter entry into multichannel subscription television by others by serving as a device to facilitate a coordinated retaliatory response by the MSO defendants.

The complaint alleges that on or about February 8, 1990, the MSO defendants and GEA agreed to form a joint venture to use a GEA satellite, known as the K-1, to offer a direct broadcast satellite ("DBS") multichannel subscription television service to consumers and to delay, if not preempt, and to raise barriers to entry by other firms into DBS by, among other things, restraining the availability, or the terms and conditions of availability, of partner-controlled or owned programming to possible entrants, discouraging other, nondefendant programmers from making their programming available to other DBS entrants or potential DBS entrants, and facilitating a coordinated retaliatory response by the MSO defendants to DBS entry by others. The effect of the Primestar agreement has been to delay and make more difficult potentially cable-competitive entry into DBS by imposing unreasonable restraints on the availability of cable programing to DBS entrants.

The United States and the defendants have stipulated to the entry of a proposed Final Judgment, designed to remedy the anticompetive effects of the Primestar venture, after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h).

II.

EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS

Multichannel subscription television service is a service providing multiple channels of video programming to consumers for which a periodic subscription fee is charged. Cable television service, transmitted via wires directly to the home, is the predominant type of multichannel subscription television service. Other alternatives include direct-to-home satellite, Multichannel Multipoint Distribution Service ("MMDS"), and Satellite Master Antenna Television Systems ("SMATV"), but none of these alternatives has provided substantial competition to cable. Until the implementation of Primestar, direct-to-home satellite service involved the use of large, 8 to 12 foot diameter dishes receiving a fairly low power C-band frequency signal that primarily is used in rural areas. Because of its high installed cost and the size of the receiving dish required, C-band satellite service is a poor alternative to cable television service for most current or potential cable subscribers. MMDS has technological limitations, including line-of-sight requirements, that limit its availability and attractiveness as an alternative to cable television service for most current or potential cable subscribers. SMATV is essentially a private cable system fed through satellite dishes for apartment building or other high-density dwellings. C-band satellite, MMDS and SMATV have a combined total of less than 4 million subscribers, compared to more than 55 million cable subscribers.

Medium-power direct broadcast satellite (DBS) service utilizes a medium-power fixed service Ku-band frequency satellite, which can transmit to a dish between 2-1/2 and 5 feet in diameter and can be installed more cheaply than the larger dish. Medium-power DBS was seen as a potential advance over lower power C-band direct-to-home satellite service and as a service that might be more competitive with cable.

High-power DBS service is planned for 1994-95, when satellites are expected to be launched that will use the higher frequency direct broadcast portion of the Ku-band and operate at much higher power levels, allowing delivery of multichannel subscription television service to a dish as small as 18 inches across which is expected to have even lower installation costs.

Largely because of its small dish size and lower installation cost, high-power DBS is considered to be a potential competitive threat to cable.

On or about February 8, 1990, the defendants executed agreements forming a partnership to offer a DBS service using GE Americom's medium-power, Ku-band satellite known as the K-1. The partners included subsidiaries of seven MSOs, among which are the nation's five largest MSOs in terms of subscribers (Tele-Communications, Inc.; Time Warner Inc.; Continental Cablevision, Inc.; Comcast Corporation; and Cox Enterprises, Inc.) and two other large MSOs (Newhouse Broadcasting Corporation and Viacom Inc.).[1] Together the MSO defendants serve more than 50% of the nation's cable subscribers. In addition, two MSO defendants, Time Warner and Viacom, are major suppliers of multichannel subscription television programming, including such popular services as Home Box Office, Cinemax, Showtime, The Movie Channel, MTV, Nickelodeon, Comedy Channel, E! Entertainment Television and others. Various MSO defendants also hold substantial interests, individually and collectively, in other programming suppliers, including Turner Broadcasting (the supplier of Cable News Network, Turner Network Television and

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[1]One of the partners, Viacom, has ceased meeting capital calls and its partnership share has been diluted. Viacom claims that it has withdrawn from the partnership, while the other partners maintain that Viacom is still a partner. The Department takes no position on this dispute, but views Viacom as a proper defendant due to its participation in the violation alleged in the complaint, and as properly subject to the relief imposed by the proposed Final Judgment at least until its status is decided by the parties or a court.

other services), The Discovery Channel, Lifetime and Black Entertainment Television. The other joint venturer, GEA, operates the K-1 satellite that the Primestar joint venture utilizes to transmit its DBS service.

The formation of Primestar followed the passage of the Satellite Home Viewer Act (Pub. L. 100-667, 102 Stat. 3949 (1988)). This Act created a compulsory copyright license scheme that mandated access to "superstations" at a reasonable price for any direct-to-home satellite service. Thus, any entrant could be assured of at least some proven programming upon which to build a multichannel subscription television service. At about the same time, GEA was actively soliciting users for its K-1 satellite, launched in 1986.

The threat of cable-competitive entry into medium or high-power DBS motivated the MSO defendants to form with GEA what was then called K Prime Partners, L.P., the predecessor to Primestar Partners, L.P., in order to delay, if not prevent, entry into DBS by other firms. In addition to using the only suitable satellite then available for medium-power DBS (there were no satellites then available for high-power DBS), the partnership agreement contains provisions that were intended to, and have had the effect of, making it more difficult for other potential DBS competitors to obtain programming. Because the Primestar partners own or control a significant amount of popular cable programming, restrictions on access to such programming impedes competitive entry into DBS service.

The partnership agreement contains programming access guarantees in the form of a "most favored nation" provision that provides that a partner programmer must offer its programming to Primestar on terms no less favorable than those offered to any other person, and that Primestar has at least three years in which to accept the offered programming. This clause makes it more difficult for any other DBS service to obtain popular programming because it forces any Primestar partner that makes such a sale to disclose the fact and the terms of sale to its joint venture partners, and forces that partner to offer the programming on equivalent or better terms to Primestar. In any event, the MSO could not provide programming to another venture on an exclusive basis.[2]

Moreover, the Primestar venture reduces the ability and incentives of each MSO defendant to deal with or invest in another DBS venture. It simultaneously serves to assure each of the MSO defendants that no other defendant MSO is likely to invest in or sell programming on attractive terms to another DBS venture. It also facilitates their ability to coordinate a retaliatory response(s) to any cable programmer that sells programming on attractive terms to a competing DBS service. Because the MSO defendants collectively control access to a

[2]Under the partnership agreement, a programming affiliate of General Electric Company (GEA's parent), such as NBC, is not bound by this provision. However, in the event that NBC were to make programming available to a DBS competitor and not grant most favored nation treatment to Primestar under the same terms as the MSO defendants, the MSO defendants could buy out GE's partnership interest.

majority of cable households, any cable programmer who would provide programming to a DBS competitor would do so only at the risk of coordinated retaliation from the MSO defendants. Such retaliation could be in the form of refusing to promote the programmer's programming within the MSO defendants' franchise areas, assigning an unfavorable service tier or channel position to the programming, charging a high price for the programming or failing to promote it if it is a premium service, and sometimes, refusing to carry the programming at all.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act (APPA), 15 U.S.C. §16(b)-(h). The stipulation provides that entry of the Final Judgment does not constitute any evidence or admission by any party with respect to any issue of fact or law. Under the provisions of the APPA, 15 U.S.C. §16(e), the proposed Final Judgment may not be entered unless the Court finds that entry is in the public interest. The Department believes that the proposed Final Judgment provides an adequate remedy for the alleged violation and is in the public interest. The term of the proposed Final Judgment is 5 years. This term is shorter than the more typical 10 year term, and reflects the Department's recognition of the major technological changes occurring in the industry, as well as recent legislative changes affecting the subjects of the proposed Final Judgment. The following is a summary of the substantive provisions.

Section IV(A) of the proposed Final Judgment prohibits each defendant from enforcing any provision of the Primestar agreement that affects the availability, price, or terms or conditions of availability of programming to any provider of multichannel subscription television, or that could penalize a partner as a consequence of the provision of programming to any provider of multichannel subscription television. This would nullify the "most favored nation" provision of the Primestar agreement, Section 7.14, which prevents a partner from offering exclusive programming to a third party or providing such programming to a third party on terms more favorable than those given to Primestar. It would also nullify a portion of Section 10.06 of the Primestar agreement to the extent that the provision places the partnership interest of GEA at risk in the event that the National Broadcasting Company, also a subsidiary of General Electric Company, did not similarly grant Primestar "most favored nation" status. Elimination of these restrictions should remove some of the impediments to the acquisition of programming by competitors of the defendants.

Section IV(B) prohibits each MSO defendant and Primestar from entering into any form of agreement with any other defendant regarding any form of retaliation or threatened retaliation against a person that provides programming to or invests in any provider of multichannel subscription television for the purpose of deterring or preventing such provision of programming or investment.

Section IV(C)(1) prohibits each programming service controlled by one or more MSO defendants from entering into any agreement or understanding with any other programming service not under common control with respect to the terms or conditions on which either service will deal with any provider of multichannel subscription television. This Section is intended to prevent agreements between program suppliers that might restrict the availability of programming to competitors of defendants. For example, it would prohibit an agreement between programming service A, controlled by MSO defendant X, and programming service B, controlled by MSO defendants Y and Z, that neither would supply programming to a DBS service. It would also prohibit a similar agreement between a programming service controlled by MSO defendant X and a programming service jointly controlled by MSO defendants X, Y and Z. It would not, however, prohibit such agreements between programming services under common control, e.g., programming service C, controlled by MSO defendants X, Y and Z, and programming service D, also controlled by MSO defendants X, Y and Z.

Section IV(C)(2) prohibits each cable system controlled by one or more defendants from entering into any agreement or understanding with any other cable system not under common control to purchase programming on conditions that prohibit the purchase or directly affect the availability, price, terms or conditions under which any other provider of multichannel subscription television may obtain such programming. This would complement Section IV(C)(1) by prohibiting agreements between cable systems that would restrict the availability of programming to competitors of defendants. For example, it would prohibit an agreement between cable system A, controlled by MSO defendant X, and cable system B, controlled by MSO defendant Y, that neither would purchase or license programming from any programming service that supplied programming to a DBS service. As in the case of Section IV(C)(1), agreements between cable systems controlled by the same defendant or the same groups of defendants are exempt from this prohibition.

Section IV(C)(3) prohibits any cable system controlled by one or more MSO defendants from entering into or from renewing any agreements with any specified national programming service (those existing as of May 1, 1992), or any existing or new regional sports service, that contain exclusive distribution provisions that would limit the rights of such programming service to deal with other providers of multichannel subscription television, including any direct-to-home satellite service, MMDS, SMATV, or cable operator. Each MSO defendant is prohibited from enforcing any existing contract provisions that would limit the rights of such a programming service to deal with any DBS provider.

These provisions complement the prohibitions of Sections IV(c)(1) and (2) by prohibiting the MSO defendants from entering into or renewing program supply agreements that preclude competing suppliers of multichannel subscription television from gaining access to programming services that are most likely to be important to the success of potential competitors. In addition, existing contract provisions restricting a programming service from dealing with DBS providers will be enjoined upon entry of the Final Judgment.

At the same time, the proposed Final Judgment does not prohibit any MSO defendant from obtaining exclusive distribution rights to any present or future pay-per-view programming or pay-per-view programming service or obtaining exclusive distribution rights to any new national or regional non-sports programming service, nor does it prohibit the renewal or extension of an existing distribution agreement so long as such renewal or extension does not include any prohibited exclusive distribution rights. The Department's investigation did not establish that such exclusive arrangements had been or were likely to be detrimental to competition.

Section IV(D) enjoins Primestar from obtaining any exclusive distribution rights to any specified programming service (those existing as of May 1, 1992), except that if a competing DBS venture obtains any exclusive programming, Primestar may upon 60 days prior written notice to the Department obtain a reasonably comparable amount of programming of a reasonably comparable type and quality on a reasonably comparable exclusive basis. This provision is intended to prevent Primestar from using exclusive distribution rights to programming as a means to prevent competitive entry into DBS, while assuring that Primestar will be able to offer competitive programming when it faces DBS competition.

By prohibiting the MSO defendants from combining to restrict the availability of programming to competitors of their cable systems, or from coordinating a retaliatory response to competitive entry, the proposed Final Judgment fully addresses the antitrust violation alleged in the complaint. By restricting certain exclusive contracting practices of the MSO defendants, the proposed Final Judgment provides further assurance that the violation will be remedied and that the MSO defendants will not coordinate their behavior through the ostensibly unilateral conduct of vertically integrated firms with common interests. At the same time, it does not restrict those exclusive arrangements that have not been shown to threaten competitive harm.

In addition to the proposed Final Judgment, two other developments will provide additional assurances that access to programming will not be unreasonably restricted by the defendants and others in the cable television industry. Various provisions of the Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992)("Cable Act of 1992" or "the Act"), enacted last year, are intended to prevent unreasonable restrictions on access to programming. For example, Section 12 of the Act directs the Federal Communications Commission ("FCC") to establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors, to prohibit practices that would restrict the availability of programming. Section 19 of the Act prohibits unfair methods of competition the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite-delivered programming to subscribers.

The second development is that many states are filing a complaint and consent judgment the same day as the Department's complaint in this matter. The states' complaints encompass a wider range of conduct than the Department's, and the scope of the judgments is broader than the Department's, requiring, inter alia, that the Primestar partners make their programming available to DBS or MMDS providers on reasonable terms as described.

IV.

REMEDIES AVAILABLE TO PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable atttorney's fees. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Final Judgment has no prima facie effect in any subsequent lawsuits that may be brought against defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to Richard L. Rosen, Chief, Communications and Finance Section, U.S. Department of Justice, Antitrust Division, 555 Fourth Street, N.W., Room 8104, Washington, D.C. 20001, within the 60-day period provided by the Act. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment filed with this Court, litigation to seek an injunction to block the operation of Primestar and the enforcement of the Primestar agreement. The United States rejected that alternative because the relief in proposed Final Judgment should prevent Primestar from having significant anticompetitive effects on competition in the provision of multichannel subscription television service through its control of and influence over programming. As noted above, in addition to the terms of the proposed Final Judgment, the enactment of the Cable Act of 1992 and the consent agreement between the defendants and the states provide substantial added assurance that the defendants cannot use Primestar as a device to make access to programming more difficult for entrants into multichannel subscription television. Under these circumstances, enjoining the operation of Primestar would serve only to remove from the market the only operational Ku-band satellite provider of multichannel services, serving more than 50,000 households with the potential and resources to provide DBS services on a much larger scale.

VII.

DETERMINATIVE DOCUMENTS

No documents were determinative in the formulation of the proposed Final Judgment. Consequently, the United States has not attached any such documents to the proposed Final Judgment.

Respectfully submitted,

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Dated: June 9, 1993

CERTIFICATE OF SERVICE

I, N. Scott Sacks, an attorney in the Antitrust Division of the U.S. Department of Justice, certify that on this date I have caused to be served by hand and by first class mail the attached COMPLAINT, STIPULATION, PROPOSED FINAL JUDGMENT, and COMPETITIVE IMPACT STATEMENT upon the attached list of counsel for defendants in the matter of United States of America v. Primestar Partners, L.P., et. al.

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Dated: June 9, 1993

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