

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

In the Matter of	)	
	)	
Implementation of Section 11 of the	)	CS Docket No. 98-82
Cable Television Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Implementation of Cable Reform	)	CS Docket No. 96-85
Provisions of the Telecommunications Act	)	
of 1996	)	
	)	
The Commission's Cable Horizontal and	)	MM Docket No. 92-264
Vertical Ownership Limits and Attribution	)	
Rules	)	
	)	
Review of the Commission's	)	MM Docket No. 94-150
Regulations Governing Attribution	)	
Of Broadcast and Cable/MDS Interests	)	
	)	
Review of the Commission's	)	MM Docket No. 92-51
Regulations and Policies	)	
Affecting Investment	)	
In the Broadcast Industry	)	
	)	
Reexamination of the Commission's	)	MM Docket No. 87-154
Cross-Interest Policy	)	

REPLY COMMENTS OF THE DEPARTMENT OF JUSTICE

The Department of Justice hereby submits the following reply comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceedings.

I. Introduction

In this FNPRM, the Commission seeks comments on its rules and policies regarding horizontal concentration and vertical integration in the multichannel video programming

distribution (“MVPD”) industry. The Commission adopted these rules and policies in order to promote and protect diversity and competition in MVPD markets. To this end, the Commission prohibited any one entity from having an attributable interest in more than 30 percent of nationwide MVPD subscribers. The Commission also barred any cable operator from carrying attributable programming on more than 40 percent of its channels up to a 75-channel limit. In *Time Warner Entertainment Co. v. FCC*,¹ the United States Court of Appeals for the District of Columbia Circuit struck the Commission’s horizontal and vertical limits and certain of its attribution rules² and remanded the matter to the Commission for further rulemaking.

The United States Department of Justice (“Department”) is one of the federal entities responsible for enforcing the antitrust laws and promoting competition, and has participated in prior Commission proceedings involving the role of competition in telecommunications. The Department has evaluated several transactions involving MVPD markets. A number of investigations have resulted in Complaints and consensual Final Judgments requiring divestitures and other remedies to preserve competition.³

Regardless of the outcome of this proceeding, the Department will continue to review, on a case-by-case basis, mergers in the MVPD industry to determine whether they will have

¹ 240 F.3d 1126 (D.C. Cir. 2001).

² The Commission’s attribution rules define the level of ownership (e.g., 5 percent of the voting stock) a company must have in an entity in order to be counted toward the horizontal and vertical limits.

³ *E.g.*, *United States v. Primestar, Inc.*, Civ. Action No. 1:98CV01193 (D.D.C. filed May 12, 1998) (“*Primestar II*”); *United States v. Tele-Communications, Inc., et al.*, 1996-2 Trade Cas. ¶ 71,496 (D.D.C. 1994); *United States v. Primestar, Inc., et al.*, 1994-1 Trade Cas. ¶ 70,562 (D.D.C. 1994) (“*Primestar I*”).

anticompetitive consequences in violation of Section 7 of the Clayton Act. The Department submits these comments to assure the Commission that the Department will continue to safeguard competition through its enforcement activities in the industry, and does not believe that changes in the Commission's horizontal or vertical limits will diminish its ability to do so.

II. The Department's Role

The Department evaluates mergers pursuant to Section 7 of the Clayton Act which prohibits acquisitions the effect of which “may be substantially to lessen competition, or to tend to create a monopoly.”⁴ The Department analyzes mergers in MVPD markets essentially the same way it does transactions in other industries. In so doing, the Department examines a variety of competitive concerns including horizontal overlaps,⁵ vertical relationships, and potential competition. The Department's legal role is fundamentally one of enforcement, on a case-by-case basis, rather than an exercise in prospective rulemaking. The Department investigates mergers only after they are proposed, and examines the specific circumstances surrounding each transaction. The Department does not investigate issues relating solely to diversity in programming as part of its statutory merger analysis. While the Department recognizes that competition may foster diversity in programming, and that such diversity may enhance competition in MVPD markets, the Department's statutory responsibility is to protect competition, not diversity.

⁴ 15 U.S.C. § 18.

⁵ For a further explanation of the Department's horizontal merger analysis, see the *Horizontal Merger Guidelines* jointly issued by the Department of Justice and the Federal Trade Commission.

III. The Department's MVPD Cases

In the past several years, the Department has investigated a number of horizontal and vertical mergers in the MVPD industry. Depending upon the circumstances, the Department has analyzed a variety of competitive issues including whether the combined entity could use its increased size to extract anticompetitive terms and conditions from multichannel video programmers and/or raise barriers to entry for its MVPD rivals either alone or in collusion with others.⁶ The Department also has examined the extent to which MVPDs could use their own affiliated programming to harm other programmers or to raise MVPD rivals' costs.

In its investigations of MVPD mergers, the Department has defined relevant product markets for delivery of multichannel video programming services directly to the home. This, however, does not preclude the Department from concluding after investigation that there may be other product markets (narrower, broader, or simply different) that are relevant in the context of a particular transaction at a particular time. The Department also has defined markets for video programming, access to which is necessary for effective competition in MVPD markets.

⁶ *Primestar I* involved an agreement by a group of incumbent cable companies and others to purchase and operate a medium-power direct-to-home satellite service. In that case, the Department found that the agreement “facilitates [the incumbent cable companies’] ability to coordinate a retaliatory response(s) to any cable programmer that sells programming on attractive terms to a competing DBS service . . . [b]ecause the MSO defendants collectively control access to a majority of cable households” Competitive Impact Statement, *Primestar I*, 58 Fed. Reg. 33,944, 33,949 (1994). In *Primestar II*, the same group of cable companies sought to purchase certain high-power DBS assets. In suing to enjoin the acquisition, the Department alleged that “[b]y collectively agreeing to acquire the 110° slot, each of the Primestar cable owners ensures that every other cable defendant will not use this key asset to compete against it. Moreover, by purchasing the asset collectively the individual Primestar cable owners share the costs of foreclosing its use in any of their individually controlled markets.” Complaint, *Primestar II*, ¶ 101.

To date, the Department's view has been that relevant geographic markets for MVPD services are fundamentally local because the only viable choices for a consumer are those firms that offer services directly to the consumers' homes. The set of MVPD providers able to offer service to individual consumers' residences generally will be the same throughout each local community, but will differ from one community to another. In analyzing competitive implications it is therefore useful to aggregate consumers who have the same competitive choices of MVPD providers, e.g., consumers located in specific zip codes or local cable franchise areas. With respect to multichannel video programming, the Department recognizes that the relevant geographic market may be regional, national or even global.

The Department's competitive effects analyses have included consideration of the number of competitors in each market, the current shares,⁷ the potential for collusion, the likelihood of entry, and probable future development of the market. Most local MVPD markets continue to be dominated by incumbent cable operators. As the Commission recognizes, however, in the past several years, new entry (particularly by DBS firms) has begun to erode the market shares of incumbent cable operators and high-power DBS continues to be the most serious competitive threat to the cable industry.

IV. Conclusion

The Department's role in enforcing Section 7 of the Clayton Act is designed to prevent transactions that would make the market less competitive. The Department does not view the

⁷ There are many ways to measure current market share, including subscribers or revenues. The most accurate or appropriate measure depends upon the particular circumstances. Moreover, although market shares are relevant, they do not convey the entire competitive picture. See, e.g., *Horizontal Merger Guidelines*.

Commission's horizontal and vertical limits as substitutes for the Department's case-specific evaluation of such transactions. Regardless of the Commission's ultimate determination in this proceeding, the Department will continue to exercise its enforcement responsibilities and analyze the competitive implications of mergers and acquisitions in the MVPD industry.

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