

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CELLULARVISION
OF NEW YORK, L.P.

CSR 4478-P

v.

SPORTSCHANNEL ASSOCIATES

Petition for Reconsideration --
Program Access

ORDER ON RECONSIDERATION

Adopted: March 4, 1996;

Released: March 12, 1996

By the Chief, Cable Services Bureau:

I. Introduction

1. In this Order, we deny the Petition for Reconsideration ("Petition") of SportsChannel Associates ("SportsChannel") filed on September 20, 1995. In its Petition, SportsChannel seeks reconsideration of a memorandum opinion and order issued by the Cable Services Bureau (the "Bureau").¹ The Order requires SportsChannel to sell its programming to CellularVision of New York, L.P. ("CellularVision"), a wireless, cellular-based multichannel video delivery system, on non-discriminatory terms within 45 days from the release date of the Order.² For the reasons set forth below, we deny SportsChannel's Petition.

II. The Bureau's Order

2. On August 24, 1995, the Bureau released an order responding to CellularVision's program access complaint against SportsChannel alleging discrimination in the sale of SportsChannel New York ("SCNY") satellite cable programming. The Bureau found that SportsChannel discrimi-

nated against CellularVision in the sale of SCNY programming in violation of Section 628(c)(2)(B) of the Communications Act³ and Section 76.1002(b) of the Commission's rules⁴ by unreasonably refusing to sell SCNY programming to CellularVision. The Bureau found that CellularVision had met its burden as complainant under the program access provisions by showing that: (i) SportsChannel is a vertically integrated satellite cable programming vendor that meets the attribution standards outlined in the Commission's rules; and (ii) SportsChannel had engaged in some form of non-price discrimination between CellularVision and other competing multichannel video programming distributors.⁵ The Bureau further found that SportsChannel did not meet its burden of establishing that it had a legitimate business reason for refusing to sell its SCNY programming to CellularVision.⁶ In particular, the Bureau found that SportsChannel's demand for adequate assurances that CellularVision's signal security system will protect SportsChannel's SCNY programming was reasonable. However, the Bureau also concluded that CellularVision had adequately addressed SportsChannel's concerns and that SportsChannel had no reasonable basis for its continued objection to CellularVision's signal security system. Thus, the Bureau found that SportsChannel did not have a legitimate business reason for refusing to provide SCNY programming to CellularVision. As a result, the Bureau ordered SportsChannel to sell its SCNY programming to CellularVision on non-discriminatory terms within 45 days from the release date of the Order.

III. SportsChannel's Petition

3. SportsChannel, in its Petition, makes a two-pronged argument to support its assertion that the Bureau's Order must be vacated. First, SportsChannel argues that the factual predicate underlying the Bureau's Order is absent. That factual predicate, according to SportsChannel, is that CellularVision would implement the full capabilities, both video and audio encryption, of the Video PassPort signal security system manufactured by Titan Information Systems Corporation ("Titan") within a reasonable time after issuance of the Bureau's Order. CellularVision currently employs only the video encryption capability of the Video PassPort system.⁷ SportsChannel states that in preparing a licensing proposal for CellularVision following the release of the Bureau's Order, SportsChannel sought to confirm that CellularVision would be upgrading its signal security system to utilize both the audio and video encryption capabilities of the Video PassPort system within a reasonable period of time.⁸ In a letter to CellularVision dated

¹ *Cellularvision of New York, L.P. v. Sportschannel Associates*, CSR 4478-P, Memorandum Opinion and Order, 10 FCC Rcd 9273 (Cab. Serv. Bur. 1995) ("Order").

² SportsChannel also filed with the Cable Services Bureau a Request for Stay Pending Reconsideration ("Request for Stay") on September 20, 1995. CellularVision filed an Opposition to the Request for Stay on September 27, 1995. The Bureau denied SportsChannel's Request for Stay. See *CellularVision of New York, L.P. v. SportsChannel Associates*, DA 95-2134 (Cab. Serv. Bur. released October 6, 1995).

³ Communications Act § 628(C)(2)(B), 47 U.S.C. §548(C)(2)(B).

⁴ 47 C.F.R. §76.1002(b).

⁵ Order, 10 FCC Rcd at 9276.

⁶ *Id.* In order to avoid a decision in favor of the complainant in a case involving an allegation of an unreasonable refusal to

sell under the program access provisions, the defendant must establish that it has not engaged in discriminatory behavior because it has refused to sell its programming to the complainant for legitimate business reasons. See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, Report and Order, 8 FCC Rcd 3359, 3412 (1993) ("First Report and Order").

⁷ Petition at 4.

⁸ Petition at 6.

September 13, 1995, SportsChannel requested that CellularVision "confirm that [it] will begin utilizing the full capabilities of the Video PassPort system no later than January 1, 1996."⁹ SportsChannel further states that CellularVision has taken the position that it is under no obligation to utilize the full capabilities of the Video PassPort system within a reasonable period of time.¹⁰ SportsChannel argues that because CellularVision will not provide any assurances that it will ever employ the full capabilities of the Video PassPort system, the factual predicate underlying the Bureau's *Order* is absent and the Bureau's *Order* therefore must be vacated.

4. Second, SportsChannel argues that the *Order* must be vacated because it effectively denies SportsChannel the opportunity to exercise its business judgment about the adequacy of CellularVision's signal security system. SportsChannel contends that the Bureau, in its *Order*, disregards SportsChannel's judgments regarding its signal security needs and substitutes the Bureau's own assessment of those needs.¹¹ According to SportsChannel, the practical effect of the Bureau's *Order* is to nullify a programmer's ability to impose as a condition of carriage "reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality," as expressly permitted by Section 628(c)(2)(B)(i) of the Communications Act.¹²

5. In its Opposition, CellularVision contends that the Bureau's *Order* was conditioned on CellularVision employing the signal security system currently in use by CellularVision, not the full capabilities of that system.¹³ CellularVision further contends that SportsChannel's demand that CellularVision implement the full capabilities of the Video PassPort system represents an attempt by SportsChannel to impose conditions that are contrary to the Bureau's *Order*.¹⁴ CellularVision also argues that SportsChannel's claim that it has not obtained adequate assurances regarding signal security is unwarranted, and that the Bureau correctly found that SportsChannel's continued concerns about the signal security system do not constitute a legitimate business reason for its refusal to sell.¹⁵

6. In its Reply, SportsChannel reiterates its claim that the Bureau incorrectly substituted its own judgment concerning the adequacy of CellularVision's signal security system for SportsChannel's judgment. SportsChannel argues that there is no evidence that SportsChannel's signal security concerns were unreasonable, and that as long as there exists a reasonable basis for SportsChannel to be concerned with signal security, that issue appropriately remains a subject of negotiation between SportsChannel and CellularVision.¹⁶

IV. Discussion

7. We find that the arguments made by SportsChannel in its Petition do not warrant reversal of the Bureau's *Order*, and we therefore deny the petition for reconsideration. Our conclusions with respect to each of the objections raised by SportsChannel in its Petition are set forth below.

8. SportsChannel's claim that the *Order* must be vacated because it was granted only on the premise that audio encryption would be installed on CellularVision's system is contrary to the clear language of the Bureau's *Order*. SportsChannel is correct that both the Bureau's evidentiary findings regarding the adequacy of CellularVision's signal security measures and its *Order* requiring SportsChannel to sell its SCNY programming were premised on specific assumptions regarding the capabilities of the Video PassPort signal security system. However, contrary to SportsChannel's claim, the Bureau based its *Order* on the current capabilities of CellularVision's Video PassPort security system, not the potential full capabilities of the Video PassPort system. While the Bureau's *Order* acknowledged the potential audio encryption capability of the Video PassPort system, the Bureau's *Order* did not require the introduction of this technology to CellularVision's system.¹⁷

9. In its *Order*, the Bureau conditioned its mandate that SportsChannel provide SCNY programming to CellularVision on the premise that:

the Video Passport signal security system described by [Charles F.] Newby [Vice President and General Manager of the Broadcast Communications Division of Titan] in his February 14, 1995 letter to [Peter] Lubell [Director of Affiliate Engineering, Rainbow] and in the Newby Affidavit [attached to CellularVision's Reply] currently is employed by CellularVision on its Brighton Beach system and will be employed by CellularVision on systems in other locations within its authorized service area.¹⁸

The February 14, 1995 letter from Newby to Lubell and the Newby Affidavit cited in the Bureau's *Order* contain a description of the attributes of the Video PassPort system currently employed by CellularVision and of the full capabilities of the Video PassPort system. Both the February 14, 1995 letter and the Newby Affidavit make clear that the signal security system currently employed by CellularVision does not employ the full capabilities of the Video PassPort system.¹⁹ Thus, we reject SportsChannel's claim that, by incorporating a description of the potential audio encryption capability of CellularVision's signal secu-

⁹ Petition, Exhibit 2 (September 13, 1995 letter from Andrea Greenberg to Gary MacGregor).

¹⁰ CellularVision responded to SportsChannel's September 13, 1995 letter by stating in a letter dated September 14, 1995 that "[w]hen and if CellularVision decides to incorporate the full capabilities of the Video PassPort system . . . is a business decision of CellularVision." Petition, Exhibit 1 (letter from John J. Prisco to Andrea Greenberg).

¹¹ Petition at 12.

¹² Petition at 10.

¹³ Opposition at 3-4.

¹⁴ Opposition at 10.

¹⁵ *Id.*

¹⁶ Reply at 7.

¹⁷ In its *Order*, the Bureau discussed at length the current and potential capabilities of the Video PassPort signal security system, as well as SportsChannel's knowledge of these capabilities. *Order*, 10 FCC Rcd at 9278.

¹⁸ *Order*, 10 FCC Rcd at 9278.

¹⁹ The Newby Affidavit states that Newby informed Lubell "that initially CellularVision would operate their system using synchronization pulse elimination and video inversion while transmitting the audio via dual subcarrier via a narrow band (20 GHz bandwidth) frequency modulated intermediate frequency carrier in the 28 GHz band." Reply, Exhibit A. The February 14, 1995 letter provides a description of the "[i]nitial features" of the Video PassPort system employed by CellularVision. Complaint, Exhibit 20.

rity system in its *Order*, the Bureau required Cellularvision to implement the full capabilities of the Video PassPort system as a condition of its *Order* granting Cellularvision's program access complaint.

10. SportsChannel states that CellularVision's failure to employ the significant capabilities of the Video PassPort system is significant because it will materially increase the risk of signal theft. SportsChannel provides an affidavit from Peter D. Lubell, Director of Affiliate Engineering and Signal Integrity for Rainbow Network Communications,²⁰ in which Lubell states that CellularVision does not employ an adequate means of protecting the audio portion of the clear because under the signal security system currently employed by CellularVision, the audio is transmitted in the clear in unscrambled form and therefore can be downconverted easily to be received on conventional television receivers. Lubell states that the alleged ease with which the audio signal can be downconverted increases the incentive for pirates to crack the video portion of the signal.²¹ However, SportsChannel's claim that CellularVision's signal security system leaves the SCNY signal vulnerable to theft is speculative. The fact that the audio portion of the signal may be delivered in the clear does not make it any easier for the would-be-pirate to crack the security for the video portion of the signal.²² We therefore are unpersuaded by SportsChannel's claim that the Bureau's *Order* leaves the SCNY signal vulnerable to theft on CellularVision's LMDS system. We note that our decision here does not preclude SportsChannel from requiring enhanced signal security measures from CellularVision in the future if there is evidence that CellularVision's signal security system does not adequately protect the SCNY programming.

11. We also reject SportsChannel's claim that the *Order* must be vacated because the Bureau substituted its own judgment concerning the adequacy of CellularVision's signal security system, thereby effectively denying SportsChannel the opportunity to exercise its own business judgment in this matter. While the program access provisions clearly allow programmers to refuse to provide programming for a legitimate business reason, such as concerns about signal security, the Commission cannot simply defer to a programmer's assessment of whether its concerns are reasonable.²³ If that were the case, the prohibition contained in the Communications Act against discrimination in access to programming would be meaningless. The Commission clearly has the authority to

determine whether, based on the record, a programming vendor's concerns are reasonable. As the Commission stated in the *First Report and Order*, it is the Commission's task to "distinguish unreasonable" refusals to sell from certain legitimate reasons that could prevent a contract."²⁴

12. In this case, the Bureau found, based on the record, that SportsChannel's stated concerns did not constitute a legitimate business reason for refusing to provide SCNY programming to CellularVision. The Bureau did not make an independent assessment of the adequacy of CellularVision's signal security system; rather, the Bureau found that the concerns raised by SportsChannel as the basis for its continued objection to selling SCNY programming to CellularVision were in fact addressed by CellularVision.²⁵ Thus, we find that SportsChannel's claim that the Bureau exceeded the scope of its authority in finding that SportsChannel's stated concerns about the adequacy of CellularVision's signal security system did not constitute a legitimate business reason for refusing to provide SCNY programming to CellularVision is without merit.

V. Ordering Clauses

13. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by SportsChannel Associates IS DENIED.

14. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

²⁰ Petition, Exhibit 3 ("Lubell Affidavit").

²¹ Lubell Affidavit at 2-3.

²² The Lubell Affidavit also questions the adequacy of the protection of the video portion of the signal under CellularVision's security system. The Affidavit states that the video signal "is transmitted using an out-of-date encryption modality, which is easily defeated." Lubell Affidavit at 4. SportsChannel did not raise this issue in its Answer to CellularVision's program access complaint, although the attributes of the signal security system currently utilized by CellularVision were known to SportsChannel at the time it filed its Answer and have not changed since that time. Thus, we decline to consider these allegations in ruling on SportsChannel's Petition. See 47 C.F.R. § 1.106(c). Moreover, as with SportsChannel's claims about the adequacy of the protection of the audio portion of the signal, SportsChannel's claims about the alleged ease with which the security for the video

portion of the signal may be cracked are speculative.

²³ Communications Act §628(c)(2)(B), 47 U.S.C. §548(c)(2)(B); 47 C.F.R. §76.1002(b).

²⁴ *First Report and Order*, 8 FCC Rcd at 3412.

²⁵ In particular, the Bureau found, based on the evidence presented, that: (i) CellularVision provided SportsChannel with information concerning the descrambling equipment to be used, as requested by SportsChannel; (ii) CellularVision disclosed to SportsChannel that it was evaluating different systems and that SportsChannel was provided with a detailed description of the system chosen by CellularVision and a demonstration of the system in operation; and (iii) SportsChannel received a detailed description of the capabilities of the Video PassPort system to protect the audio portion of signals and of the technology currently employed by CellularVision to protect the audio portion. *Order* 10 FCC Rcd at 9277-79.

²⁶ 47 C.F.R. § 0.321.