

How Powerful Are Broadcasters?

Do television networks or their affiliate stations possess market power? If so, they would be subject to a higher level of antitrust scrutiny.

This issue was the subject of a recently settled lawsuit filed by EchoStar Communications Corp. against Viacom Inc. EchoStar alleged that Viacom's bundling of its CBS television programming with its less desired cable programming properties (e.g., Spike TV) constituted an antitrust violation. EchoStar based its allegations on findings made by the Federal Communications Commission regarding a television broadcaster's economic power — findings that have no precedential value in an antitrust court.

The U.S. Supreme Court has held that bundling violates antitrust norms in cases where the seller has market power or where the bundle causes substantial anti-competitive effects. Without wielding market power, it is unlikely that Viacom forced the purchase of the unwanted goods or services.

Three tests determine whether a defendant wields economic power. The most reliable method is to measure economic power by direct evidence of economic effects.

Had Viacom historically charged super-competitive rates to advertisers, a market power charge may have been sustained. However, it is unlikely that CBS has unilaterally raised prices for an extended period. If it had done so, a sig-



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nificant amount of advertisers would have likely defected to other networks or broadcasters.

A second way of determining whether a broadcast network wields market power is to review indirect evidence of it. Such evidence takes the form of the percentage share of the marketplace held by the defendant. At a minimum, a plaintiff relying on indirect evidence of market power must demonstrate that

the defendant possesses 30% of the relevant market. Under this approach, EchoStar would have had to show that CBS stations account for over 30% of either the television broadcast viewership or advertising revenues in the designated marketing areas at issue. EchoStar may not have been able to meet this showing.

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The third test is where, in the words of the Supreme Court, “the seller offers a unique product that competitors are not able to offer.” EchoStar alleged that distribution of programming exclusive to CBS, such as the Super Bowl, caused it to wield market power. EchoStar also asserted that “there is no adequate substitute in consumers’ eyes for such CBS content as *Survivor*, *Everybody Loves Raymond*, *60 Minutes* and *CSI: Miami*.”

Economic logic dictates that, if such programming was truly unique, broadcasters could

individually charge more (either in the terms of dollars, or in terms of additional programming required to be carried) for retransmission consent. Since the price charged to advertisers for all network programming is seemingly constrained by competitive television and cable programming, I do not believe EchoStar could have proven this

theory. I also do not believe that the mere showing of one high-demand program (such as the Super Bowl), which is broadcast for merely a few hours, would cause a network or its affiliates to wield market power.

The evidence shows that television networks and their affiliate broadcast stations do not wield market power and that they should not be subject to heightened antitrust scrutiny.

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