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January 24, 1994

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-265

Dear Mr. Caton:

Pursuant to Section 1.1206(a)(1) of the Commission's Rules and Regulations on Ex-Parte presentations, there is transmitted herewith for inclusion in the above-referenced Docket, two copies of the correspondence addressed to Chairman Hundt and each of the three Commissioners on this date.

Should there be any questions, please communicate with the undersigned.

Very truly yours,

Marvin Rosenberg
Marvin Rosenberg
Counsel for United States
Satellite Broadcasting
Company, Inc.

MR:ik
Enclosures

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JAN 24 1994

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Federal Communications Commission

WASHINGTON, D.C. 20554

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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)

To: The Commission

**EX PARTE RESPONSE TO EX PARTE PRESENTATION BY THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

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NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

SUMMARY

United States Satellite Broadcasting Company, Inc. ("USSB"), herein respectfully responds to the written "Ex Parte Presentation by the National Rural Telecommunications Cooperative" ("NRTC Presentation") that was recently presented to several Commissioners and members of the Commission's staff and filed in this proceeding on November 19 and 22, and December 14 and 16, 1993, by the National Rural Telecommunications Cooperative (NRTC) in connection with NRTC's pending Petition for Reconsideration of the First Report and Order in MM Docket 92-265, 8 FCC Rcd 3359 (1993) ("First Report and Order"). As is demonstrated herein, the NRTC Presentation is misleading and inaccurate in numerous respects and includes statements and representations that are simply not true.

The general theme of the NRTC Presentation is that "[t]he USSB/Time Warner/Viacom Exclusivity Arrangement is Prohibited by the Cable Act and is Contrary to the Public Interest in Developing a Competitive DBS Marketplace." That statement is an intentionally misleading contrivance, since NRTC knows full well that **there is no "USSB/Time Warner/Viacom arrangement."** Moreover, none of the agreements to which USSB is a party is prohibited by the Cable Act or is contrary to the public interest.

NRTC makes four additional arguments. First, NRTC contends that the Commission must not allow the cable industry and one DBS operator to control the development of the entire DBS market. USSB agrees in principle but demonstrates that the Commission's current regulations do not do so; whereas, what NRTC seeks would lead to one operator, DirecTv, Inc. ("DirecTv"), controlling the development of the DBS market. Second, NRTC states that there is no public policy benefit for the Commission to prohibit -- in areas not served by cable operators -- only exclusive arrangements involving cable operators. USSB demonstrates that NRTC has ignored the legislative history of the Cable Act, the record of this proceeding, and specific findings of the Commission that such contracts by cable operators are a "key area of concern." Third, NRTC contends that other program delivery technologies have developed without the "benefit" of exclusive arrangements. However, NRTC offers only one example. In contrast, USSB demonstrates that exclusive contracts are common in the broadcast and entertainment industries and are widely

recognized as promoting competition, diversity, and maximum use of the spectrum. Fourth, NRTC claims that the Primestar Consent Decree made no finding "in any shape, manner or form" as to the legality of the "USSB/Time Warner/Viacom deal" under the Cable Act. However, in making this point, NRTC deliberately distorts USSB's presentations in this proceeding and falsely attributes remarks to USSB.

The legislative history of the Cable Act and the record in this proceeding led the Commission to adopt regulations that were entirely consistent with the Cable Act, with the intent of Congress, and with the expressed concerns of the participants in MM Docket 92-265. USSB has entered into programming arrangements that fully comply with the Act and with the Commission's regulations. Those arrangements do not restrict or limit the availability of DBS programming to the consumer. To the contrary, consumers will have a wider array of program offerings if exclusive program contracts are permitted in DBS. Such contracts promote competition within DBS and do not affect the availability of programming to the consumer from any other multichannel video programming distributors.

There is no reason for the Commission to amend or disturb the regulations it adopted in its First Report and Order in this proceeding. The Commission has authorized two DBS service providers which will soon commence service at 101° WL. Together these DBS service providers, DirecTv and USSB, will in a few short months offer a wide variety of programming choices to consumers across the country, with the programming services of

both DBS providers available to all Americans in a seamless system, **using the same satellite and the same receive system.** The Commission should not, on the eve of this new service, disrupt the programming plans and contracts of the DBS service providers solely because one of them, DirecTv, did not acquire all of the programming services available. The Commission's focus should be on consumers -- not on NRTC's or DirecTv's marketing plans or their contractual commitments to each other. Under the existing regulations and the existing programming arrangements, which ensure competition within the DBS service while offering the consumer the widest array of programming services available anywhere on cable, the consumer is best served.

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United States Satellite Broadcasting Company, Inc. ("USSB"), hereby respectfully responds to the written "Ex Parte Presentation by the National Rural Telecommunications Cooperative" ("NRTC Presentation") that was recently presented to several Commissioners and members of the Commission's staff and filed in this proceeding on November 19 and 22, and December 14 and 16, 1993:

I. INTRODUCTION

On several occasions in recent weeks representatives of the National Rural Telecommunications Cooperative (NRTC) have made written and/or oral ex parte presentations to Commissioners and members of the Commission's staff in connection with NRTC's pending Petition for Reconsideration of the First Report and Order in MM Docket 92-265, 8 FCC Rcd 3359 (1993) ("First Report

and Order"). The written ex parte presentation generally consisted of the above-referenced NRTC Presentation. As is demonstrated below, the NRTC Presentation is misleading and inaccurate in numerous respects and includes statements and representations that are simply not true.

The general theme of the NRTC Presentation is that "[t]he USSB/Time Warner/Viacom Exclusivity Arrangement is Prohibited by the Cable Act and is Contrary to the Public Interest in Developing a Competitive DBS Marketplace." See NRTC Presentation at 1. That statement in itself is an intentionally misleading contrivance, since NRTC knows full well that **there is no "USSB/Time Warner/Viacom arrangement."**¹ USSB has negotiated for and entered into contracts for programming with several companies providing cable programming services, including Home Box Office ("HBO"), Showtime Networks Inc. ("Showtime"), and MTV Networks ("MTV"). Neither Viacom nor any of its subsidiaries or affiliates is a party to any of USSB's contracts or negotiations with Time Warner and/or its affiliated program services. Neither Time Warner nor any of its subsidiaries or affiliates is a party to any of USSB's contracts or negotiations with Viacom and/or its

¹NRTC falsely states that "USSB unsuccessfully lobbied on the side of the cable programmers in opposing the program access provisions of the Cable Bill. Now these efforts have apparently been 'rewarded' by Time Warner and Viacom with exclusivity arrangements." NRTC Presentation at page 11, note 8. USSB did not oppose program access provisions and did not lobby on behalf of the cable industry. As the legislative history reflects, USSB favored the Manton-Rose amendment, which was not adopted, rather than the Tauzin amendment, which was ultimately adopted. 138 CONG. REC. 6535 (daily ed. July 23, 1992) (statement of Mr. Manton, reading excerpt of letter from Stanley Hubbard into the record). Thus, NRTC's "reward" theory is nothing but bad fiction.

affiliated program services. Moreover, as demonstrated below, none of the agreements to which USSB is a party is prohibited by the Cable Television Consumer Protection and Competition Act of 1992 ("the Act" or "the Cable Act"), or is contrary to the public interest. In fact, DirecTv, Inc. ("DirecTv") originally sought to acquire on an exclusive basis some of the programming obtained by USSB, including (according to representatives of HBO) programming from Time Warner's HBO. It is therefore disingenuous of DirecTv's distribution agent, NRTC (which would have benefitted from any such exclusivity if DirecTv had been successful), to now challenge the exclusivity protections USSB successfully obtained and the legality of exclusive programming contracts in DBS generally.

In addition to its general theme, which is discussed in greater detail below, NRTC makes four specific arguments in its NRTC Presentation. First, NRTC contends that the Commission must not allow the cable industry and one DBS operator to control the development of the entire DBS market. USSB agrees with that principle but shows that NRTC's fears are misplaced. Indeed, the reconsideration of the Commission's regulations that NRTC seeks would lead to one operator, DirecTv, controlling the DBS market. Second, NRTC states that there is no public policy benefit for the Commission to prohibit -- in areas not served by cable operators -- only exclusive arrangements involving cable operators. USSB demonstrates in response that NRTC has ignored the legislative history of the Cable Act, the record of this

proceeding, and the findings of the Commission that such contracts by cable operators were a "key area of concern." Third, NRTC contends that other program delivery technologies have developed without the "benefit" of exclusive arrangements. However, NRTC offers only one example. In contrast, USSB demonstrates that exclusive contracts are common in the broadcasting and entertainment industries and are widely recognized as promoting competition, diversity, and maximum use of the spectrum. Fourth, NRTC claims that the Primestar Consent Decree made no finding "in any shape, manner or form" as to the "legality of the USSB/Time Warner/Viacom deal" under the Cable Act. However, in making this point, NRTC deliberately distorts USSB's presentations in this proceeding and falsely attributes remarks to USSB. In short, NRTC's Ex Parte Presentation does not offer any valid reasons or support for reconsideration of the First Report and Order or the regulations adopted therein.

II. BACKGROUND

Initially, it should be noted that the NRTC Presentation, like NRTC's filings in the Primestar Partners proceeding, State of New York, et al. v. Primestar Partners, et al., 93 Civ. 3868 (JES), in the U.S. District Court, S.D.N.Y., contains untrue and misleading characterizations concerning the initiation of DBS service. NRTC begins by misleadingly stating that "DirecTV is expected to initiate **the first DBS service in the United States** in early 1994" (emphasis added) and that "USSB also will begin operation of its DBS system from the 101° orbital position in

1994...." This suggests that USSB will initiate service at some point after DirecTv, which NRTC knows is not true. NRTC apparently seeks to create an impression that there will be two separate and distinct DBS services provided from 101° West Longitude (WL), between which consumers will have to choose. However, while USSB and DirecTv will offer separate and distinct services, unlike cable television service where the consumer generally can receive only one service (or, in those few areas where there are competing cable services, must select one of the services), with DBS the entire continental U.S.² will be encompassed by the signals from both USSB and DirecTv. The consumer will be able to receive both DBS services on the same Digital Satellite System ("DSS™") receiver and will not be forced to select one service and reject the other.³

²Full-CONUS service will be obtained from the first satellite at 101° WL. Herein, the term "continental U.S." is used to refer to the 48 contiguous United States.

³To ensure that there would be no confusion to consumers, USSB and DirecTv contractually agreed to share the same receive system. In fact, in a recent article in U.S. News & World Report, "Fast Lane to the Future," January 17, 1994, at 58, the observation was made that

 DirecTv and Hubbard Broadcasting's USSB will be both competitors and colleagues. USSB will broadcast 25 channels from the same satellite, and subscribers will use the same equipment to receive the two services. **Most DBS customers will probably end up subscribing to both.**

See Attachment 7 hereto, emphasis added.

The first high-powered DBS satellite was launched on December 17, 1993. The satellite is the first of two to be located at the 101° WL location and will have sixteen transponders, each capable of four to eight channels of video programming (the capacity varies with the type of programming carried). DirecTv and USSB **will commence service from this first satellite at the same time.** Neither will enjoy a coverage or technical advantage. The most significant difference between the two is that DirecTv will at the outset control more than twice as many channels as USSB. After DirecTv's parent company, Hughes Communications Galaxy, Inc. ("Hughes"), launches a second satellite later this year, that difference will be even more dramatic. Hughes/DirecTv will control more than **five times** the DBS channel capacity of USSB.

NRTC also misleadingly states that USSB will begin operation of its DBS system from the 101° WL orbital position "utilizing a five transponder payload located on one of [Hughes Communications Galaxy, Inc.'s] satellites." NRTC Presentation at 2. However, as NRTC knows full well, **ownership of the first satellite at 101° WL is shared by USSB and Hughes,** a subsidiary of GM Hughes Electronics, which is a subsidiary of General Motors, in proportion to the number of transponders each has on the satellite. USSB is authorized by the FCC to own and operate DBS satellite transponders, the same as Hughes, and both share the transmit/receive system.

NRTC also suggests that its own agreement with DirecTv, which gives NRTC the **exclusive** distribution rights to approximately 20 channels of DirecTv subscription programming in rural areas, is comparable to USSB's relationship with DirecTv. There is, however, no comparison. Created in 1981 for the singular purpose of owning and operating a DBS system, USSB is the U.S. DBS permittee of longest standing. For over a decade, USSB has worked towards making DBS a reality. In contrast, NRTC is not a licensee or permittee. It has no FCC DBS authorizations. According to press reports, NRTC will be solely a **marketing agent and a distributor for DirecTv's** subscription programming. Thus, NRTC's role in the provision of DBS service cannot be compared to USSB's.

NRTC also misleadingly portrays the nature of the service available to the consumer, particularly to its members, with the initiation of DBS service. DBS service will be unique. Every consumer will be able to receive every program offered by USSB⁴ **and** every program offered by DirecTv, using the same receive system, the DSS™ system. With the ability to select programs from DirecTv and USSB, the DBS consumer, anywhere in the

⁴USSB understands that at one time NRTC maintained that it could own equipment that it would lease to NRTC customers; and, through its control of its own equipment, NRTC could limit its customers to receiving NRTC-distributed programming only. This has nothing to do with the way the DBS signal is designed to be delivered and received and is contrary to the contractual arrangements that USSB has with Hughes. Until recently, FCC Chairman Reed Hundt represented Hughes/DirecTv with respect to USSB's contractual claim.

continental U.S., will have instant access to a wider variety of programs than is currently available on all but a few cable systems in this country.⁵ The transmission and encryption systems are fully shared by Hughes/DirectV and USSB; thus, the consumer will be able to access both the USSB and DirectV programming services, using the same equipment, with seamless flexibility. See Attachment 1 hereto.

It is obvious that the NRTC Presentation is misleading and disingenuous. It is against this background that NRTC's arguments should be considered and rejected.

⁵Arrangements have already been announced for the availability of nearly all of the most popular cable programming services on DBS from the 101° orbital location. USSB will be offering from its transponders 14 multiplexed and time shifted channels of HBO, Showtime, Cinemax, The Movie Channel, and Flix, as well as: MTV; VH-1; Nickelodeon/Nick At Nite; Lifetime; Comedy Central; and All News Channel. USSB also intends to offer one or more free channels of programming to all DBS consumers. According to press reports, DirectV will be offering from its transponders: ENCORE and its six new multiplexed thematic premium channels; the Disney Channel; ESPN; Turner Classic Movies; Superstation TBS; The Cartoon Network; CBC Newsworld; CNN International; C-SPAN; C-SPAN2; Country Music Television; The Nashville Network; E! Entertainment Television; The Family Channel; The Learning Channel; CNN; CNN Headline News; Discovery Channel; Turner Network Television; USA Network; the Playboy Channel; Northstar (Canada); Sci-Fi Channel; the Golf Channel; the Weather Channel; and 50-65 pay-per-view movie channels through arrangements (some of which USSB understands to be exclusive) with Paramount, Columbia/TriStar, Sony Pictures, and Universal. Anyone with a DSS™ receiving system can subscribe to any of USSB's and/or DirectV's channels.

**III. THE COMMISSION'S RULES AND USSB'S
PROGRAMMING AGREEMENTS ARE NOT PROHIBITED
BY THE CABLE ACT OR CONTRARY TO THE PUBLIC INTEREST**

Notwithstanding NRTC's repeated assertions, the Commission's new rule, Section 76.1002(c)(1), adopted in the First Report and Order, is not "contrary to the plain language of the Cable Act, contrary to the text of the Commission's First Report and Order, and contrary to the public interest." NRTC Presentation at 3-4. As USSB has previously demonstrated in its "Opposition to Petition for Reconsideration of the National Rural Telecommunications Cooperative" ("USSB Opposition"), the rules adopted by the Commission pertaining to exclusive program contracts are entirely consistent with the Cable Act, its legislative history,⁶ the record in MM Docket 92-265, and the public interest. USSB's programming agreements do not violate the Act or the Commission's Rules and are not contrary to the public interest.

In fact, in recent Comments published in the Federal Register in connection with the proposed Final Judgment in United States v. Primestar Partners, L.P., et al., 58 Fed. Reg. 60672, 60673-76 (November 17, 1993) ("DOJ Comments"), the U.S. Department of Justice, Antitrust Division, specifically disputed similar arguments raised in Comments filed by DirecTV and NRTC in opposition to certain provisions of the proposed Final Judgment

⁶NRTC has yet to point to any statement in the legislative history of the Cable Act that supports NRTC's interpretation of the Act.

that addressed DBS and the issue of exclusive program contracts, stating:

The proposed Final Judgment does not undermine the 1992 Cable Act. **That statute prohibits exclusive arrangements between programming vendors and cable operators but does not expressly prohibit such arrangements between programming vendors and a non-cable firm such as USSB.**

58 Fed. Reg. at 60675 (emphasis added).

Moreover, while NRTC takes issue with USSB's September 1993 ex parte Presentation ("USSB Presentation") to the extent that it includes certain Comments of Judge John E. Sprizzo on September 3, 1993, in consideration of the proposed Final Judgment in State of New York, et al. v. Primestar Partners L.P., et al., NRTC cannot deny that Judge Sprizzo stated quite clearly on the record:

Exclusive contracts are not forbidden now under the law.

See Attachment 2, Tr. 18 (emphasis added). In that same proceeding, the Attorneys General of **45 states and the District of Columbia** joined together in a filing, the "Plaintiff States' Memorandum of Law In Support of the Consent Decrees" ("States' Memorandum"), in which they stated in response to the contentions of DirecTv and NRTC, that

The 1992 Cable Act does prohibit certain exclusive contracts as unlawful per se and presumes other exclusives to be anticompetitive. See Section 628(c)(2)(C) and (D). These explicit proscriptions, however, only apply to exclusive contracts between vertically integrated cable programmers and cable operators and not to DBS operators as DirecTv suggests.

States' Memorandum at 16, n. 15.

Exclusive program contracts between cable operators and programming vendors were specifically addressed by Congress in Section 19 of the Cable Act, which amended the Communications Act of 1934 by adopting a new Section 628. Section 628(c)(2)(C) of the Cable Act requires the FCC to adopt regulations that

prohibit practices, understandings, arrangements, and activities, **including exclusive contracts** for satellite cable programming or satellite broadcast programming **between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor...**for distribution to persons in areas not served by a cable operator....

47 U.S.C. § 628(c)(2)(C) (emphasis added). The only exclusive contracts that are flatly prohibited by the Cable Act are those to which a cable operator is a party **and** where the contract gives the cable operator the exclusive right to distribute programming in an area not served by cable.⁷ In areas served by cable, exclusive contracts with cable operators are even permitted, under Subsection 628(c)(2)(D), if the FCC determines that such contracts are in the public interest. This Section, too, refers only to contracts to which a cable operator is a party. USSB is

⁷The intent of Congress was to eliminate unreasonable practices in the vertically integrated cable industry that were threatening the development of new technologies and inhibiting the provision of service to the public. Thus, the only exclusive program contracts that were **absolutely prohibited** were those by which **cable operators** were contracting with cable and satellite program vendors for exclusivity in areas **not served by cable, i.e., areas which therefore would not receive any programming.** Such agreements were clearly anticompetitive and contrary to the public interest. By such contracts, cable operators were precluding other multichannel video program distributors from bringing programming to areas that the cable operators themselves did not serve.

not a cable operator. Thus, the contracts it has with programming vendors are clearly not within the prohibitions of Section 628(c)(2)(C) or 628(c)(2)(D). Moreover, the legislative history of the Cable Act is crystal clear that only contracts involving **cable operators**⁸ were intended to be prohibited and restricted in Section 628(c)(2). See H.R. CONF. REP. No. 102-862, 102d Cong., 2d Sess. 92-93 (1992). See also discussion at pages 23-24, infra.

By intentionally omitting in the NRTC Presentation key language in Section 628(c)(2)(C) and totally ignoring the legislative history of this Section of the Act, NRTC concludes that Section 628(c)(2)(C) does not proscribe only conduct involving cable operators but prohibits all "practices, understandings, arrangements, and activities... that prevent a multichannel video programming distributor from obtaining such programming... for distribution to persons in areas not served by a cable operator...." NRTC Presentation at 3 (emphasis added). From this fractured quotation, NRTC contends that Section 628(c)(2)(C) applies to all exclusive contracts, not just those involving cable operators.⁹ The NRTC Presentation, at 3, ¶6,

⁸Even opponents of the restrictions viewed the restrictions on exclusive contracts as applying solely to cable operators -- not to DBS operators and other multichannel video program providers. See, e.g., 138 CONG. REC. 6540 (daily ed. July 23, 1992) (statement of Mr. Richardson).

⁹At the same time, NRTC concedes that Section 628(c)(2)(D) prohibits only exclusives involving cable operators. NRTC Presentation at 8, ¶18. There is absolutely nothing to support NRTC's very different reading of Subsections 2(C) and 2(D).

deletes and ignores the language in Section 628(c)(2)(C) that states "including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor." That language is the essence of the section and cannot be ignored without materially altering the meaning and intent of the entire section. Indeed, the reference to "such programming" in the language that NRTC quoted makes no sense without the language NRTC intentionally omitted.

Furthermore, Section 628(c)(2)(C) cannot be read without reference to Section 628(c)(2)(D) or Section 628(b). Section 628(c)(2)(D) is clearly the parallel to Section 628(c)(2)(C), as is evident in the report of the Conference Committee on this Section of the Act. See pages 23-24, infra. Section 628(b), which sets out the conduct that is prohibited, proscribes "unfair methods of competition or unfair or deceptive acts or practices." There is nothing unfair or deceptive about contractual guarantees of exclusivity generally. Indeed, Congress and the Commission have recognized that exclusivity is a normal tool in the video marketplace, is pro-competitive, and is in the public interest. See pages 26-29, infra.

The Cable Act flatly prohibited exclusive contracts involving cable operators in areas unserved by cable because such contracts were being used by the cable industry to preclude

services competitive to cable in a way that resulted **in no service being provided to the consumer**. Such contracts were unfair and deceptive, unlike the exclusive contracts generally used in the broadcast and entertainment industries. The guarantees of exclusivity in the DBS programming contracts that USSB has bear no resemblance to the exclusive contracts prohibited by the Cable Act. USSB's contracts do not deprive the consumer of service, because USSB will be providing service to the entire continental U.S., including rural areas unserved by cable. As the legislative history of Section 628 reflects, this section of the Cable Act was designed to address cable's refusal to deal with the other multichannel video program distributors competing with cable. Any exclusivity provisions in USSB's programming contracts give USSB exclusivity only against its direct competitors in DBS, which serve the same areas and market as USSB will serve. No other multichannel video program distributors are affected.

Time Warner and Viacom have not refused to make their programming services available over DBS. Time Warner and Viacom have dealt with USSB in arrangements that will enable USSB to distribute their programming nationwide, in competition with cable operators everywhere. Indeed, that was the objective of the program access provisions of the Cable Act. Obviously,

USSB's agreements are consistent with the letter and the spirit of the Cable Act.¹⁰

IV. THE CURRENT REGULATIONS DO NOT ALLOW THE CABLE INDUSTRY AND ONE DBS OPERATOR TO CONTROL THE DEVELOPMENT OF THE ENTIRE DBS MARKET

NRTC has reportedly contracted with DirecTv to offer a package of 20 DirecTv services to approximately six million rural households. The NRTC sold franchises to its member utility companies (and others) to offer DirecTv's programming and, according to published accounts, paid DirecTv \$125 million for the exclusive distribution rights to certain DirecTv services in the specified rural territories. NRTC's Presentation must be considered in this context. NRTC would like to offer HBO and Showtime as part of its **exclusive right** to distribute a 20 channel package of DirecTv programming.

¹⁰Nothing in the legislative history suggests that Congress intended to prevent DBS and other multichannel video programming distributors from entering into exclusive contracts. As Congressman Tauzin stated in support of the amendment that eventually became Sections 628(c)(2)(C) and (D): "There is an argument against our amendment someone made. The argument is that we no longer allow for exclusive type programs that are important to people who develop a product. Not so.... **our Amendment says that exclusive programming that is not designed to kill the competition is still permitted.**" 138 CONG. REC. 6534 (daily ed. July 23, 1993) (statement of Mr. Tauzin, emphasis added). The entire thrust of the legislation was to foster an **alternative to cable** by requiring cable programming vendors to sell programming to distributors of programming other than cable operators, so that the American public has an alternative to cable. The purpose of this section of the Act was to make programming accessible to other multichannel video programming distributors, such as DBS and MMDS. The Act did not and was not intended to guarantee that every MMDS operator and every DBS operator can obtain every programming service.

Although NRTC's programming supplier, **DirectTv**, itself sought **exclusive program arrangements from Time Warner and others**, NRTC now contends that USSB's success in obtaining exclusive programming from Viacom and Time Warner is the result of the cable industry's plan (together with USSB) to control the development of the entire DBS market. Such a contention is outrageous, and NRTC offers no support whatsoever for its fanciful theory. Moreover, the contractual guarantees of exclusivity to which NRTC objects as evidence of this plan are entirely consistent with the regulations adopted by the Commission to implement the program access provisions of the Cable Act!

NRTC essentially contends that, in order for DBS to provide effective competition to cable, **DirectTv** must be able to offer on its transponders every major cable programming service that is available on any cable system, even if it will be available from USSB on the same satellite and through the same receiver by which DirectTv programming will be available. That is obviously a flawed hypothesis, since the consumer will be able to receive every program service offered by DirectTv and USSB with equal ease using the same shared DSS™ receiver. The consumer will not care whether HBO is received via a DirectTv or a USSB transponder.¹¹ What the consumer will care about is having a variety of

¹¹USSB is offering HBO, Showtime, and other premium services in a manner that will permit DirectTv customers, if they so choose, to select only HBO or only Showtime from USSB.

programming choices at competitive prices. Affording DirecTv the right to duplicate USSB's programming will only serve to reduce the number and variety of programming choices for the consumer. For every channel duplicated, the consumer loses a potential channel of diverse programming.

It is outrageous for NRTC to contend that DirecTv and NRTC are being denied access to programming they must have to attract consumers.¹² The key programming necessary to attract consumers to DBS will be easily available to all consumers. NRTC members and consumers who acquire the DSS™ system from NRTC will have full and easy access to every program offered by USSB. Consumers do not have to choose between DirecTv/NRTC and USSB for their DBS programming. Furthermore, they do not even have to select DirecTv's and USSB's full complement of program offerings.

¹²NRTC's claim that USSB's contracts for various programming services of Time Warner and Viacom (which NRTC misleadingly characterizes as the "USSB/Time Warner/Viacom exclusivity arrangement") deny NRTC access to the full menu of key programming that it must have to attract subscribers is misleading and disingenuous. NRTC did not reveal to the Commission that, on November 19, 1993, when the NRTC Presentation containing this statement was first made to the Commission, NRTC had pending before it USSB's "Proposal For Qualified Franchisees Of The National Rural Telecommunications Cooperative To Be Limited Non-exclusive 'Sales Agents' for USSB-distributed DBS Programming Services." That proposal, in which USSB offered to provide its programming (including HBO and Showtime programming) to NRTC to distribute to its members, albeit not exclusively, and which would not have required any cash payment from NRTC, in contrast to the large, up-front payment reportedly paid by NRTC to DirecTv, was delivered to NRTC on October 26, 1993. USSB did not receive any response (other than to be told that its proposal was being considered) until November 30, 1993, when USSB received a letter dated November 24, 1993, from the Chief Executive Officer of NRTC, rejecting USSB's proposal.

Consumers will be able to "cherry pick" their programming from the programming offered over DirecTv's transponders **and** those offered over USSB's transponders. As has been publicly reported, USSB's programming will be offered at a range of prices and options, including a la carte, and there will be no attempt at bundling. See "Prices for DBS Programming Launched," Broadcasting & Cable (Jan. 3, 1994), at 47. For example, viewers will be able to buy any of USSB's premium program services on a stand-alone basis, which would include that service's multiplexed version. Id.

Moreover, DirecTv, according to its own press releases and public statements, has secured "30 popular cable networks" and premium cable programming services that directly compete with USSB's programming services, including HBO and Showtime. DirecTv recently announced that it will offer ENCORE, an all-movie, commercial-free entertainment service, plus its six new thematic multiplexed movie channels. See Attachments 3-4. According to press reports, ENCORE has recently been successful in signing exclusive film licensing agreements with studios that previously had such agreements with Showtime. For example on October 4, 1993, Cable World reported that ENCORE had landed an exclusive film licensing deal valued at \$1 billion with Walt Disney Studios, outbidding Showtime.¹³ Prior to securing Disney,

¹³It is not clear from DirecTv's recent press release whether DirecTv intends to offer ENCORE's new STARZ! channel, a new first-run network that will be packaged with ENCORE. If DirecTv has taken all of ENCORE's services except STARZ!, that