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September 2, 1994

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: Ex Parte Presentation -- MM Docket No. 92-265

Dear Mr. Caton:

You are hereby advised, on behalf of United States Satellite Broadcasting Company, Inc. ("USSB"), that on this date the attached written ex parte presentation was made in the above-referenced proceeding to the following Commission personnel:

Chairman Hundt  
Commissioner Quello  
Commissioner Barrett  
Commissioner Chong  
Commissioner Ness  
William E. Kennard, Esquire  
Meredith Jones, Esquire  
William H. Johnson, Esquire  
James W. Olson, Esquire  
Diane L. Hofbauer, Esquire  
Amy Zoslov, Esquire

The presentation submitted herewith supports USSB's "Opposition to Petition for Reconsideration of the National Rural Telecommunications Cooperative," submitted in MM Docket No. 92-265, on July 14, 1993. USSB also participated in this proceeding by filing comments and reply comments.

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Mr. William F. Caton  
September 2, 1994  
Page 2

An original and one copy of this letter and the attached presentation are being filed. If additional copies of this filing are required, USSB will supply them immediately upon request.

Should any questions arise concerning this matter, or should any additional information be necessary or desired, please communicate with this office.

Very truly yours,

FLETCHER, HEALD & HILDRETH

  
Patricia A. Mahoney  
Counsel for United States  
Satellite Broadcasting  
Company, Inc.

PAM/dlr

cc: Chairman Reed E. Hundt  
Commissioner James H. Quello  
Commissioner Andrew C. Barrett  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness  
William E. Kennard, Esquire  
Meredith Jones, Esquire  
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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

SEP -2 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Implementation of Sections 12 )  
and 19 of the Cable Television )  
Consumer Protection and )  
Competition Act of 1992 )

MM Docket No. 92-265

Development of Competition )  
and Diversity in Video )  
Programming Distribution and )  
Carriage )

To: The Commission

EX PARTE REPLY

UNITED STATES SATELLITE  
BROADCASTING COMPANY, INC.

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Its Attorneys

September 2, 1994

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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Development of Competition	)	
and Diversity in Video	)	
Programming Distribution and	)	
Carriage	)	

To: The Commission

**EX PARTE REPLY**  
**SUMMARY**

Herein United States Satellite Broadcasting Company, Inc. (USSB), respectfully submits its Ex Parte Reply to the Ex Parte Response of DirecTv, Inc. (Ex Parte Response), filed at the Commission on May 26, 1994, and addresses other recent ex parte submissions in and/or concerning this proceeding, as well.

USSB demonstrates herein that, in the Ex Parte Response filed more than one year after release of the First Report and Order in this proceeding (1st Report), more than one year after petitions for reconsideration of the 1st Report were due to be filed at the FCC, and **almost one year after DirecTv, Inc. (DirecTv)** opposed petitions for reconsideration and **called on the Commission to affirm the rules** adopted in the 1st Report, DirecTv, for the very first time in its Ex Parte Response, essentially requests reconsideration of both Section 76.1002(c)(1) and Section 76.1002(c)(2) of the Rules.

DirecTv's Ex Parte Response is thus an untimely and unacceptable petition for reconsideration that must be stricken without consideration.

Whether or not DirecTv's recent Ex Parte Response is stricken, it must be recognized as what it is -- a tactic in DirecTv's continuing attempt to neutralize the only serious DBS competitor it faces in the near future -- USSB. DirecTv has over the last year and again in its Ex Parte Response, zealously and recklessly made untrue and unsupported allegations designed to appeal to Congress and to compel the Commission to amend its rules, portraying itself as a victim of a (wholly fictitious) USSB/cable industry strategy to control DBS. This, too, is a competitive ploy. DirecTv knows full well that USSB is not in league with the cable industry and that there is no USSB/cable industry strategy or scheme.

As the post-comment period filings in this proceeding reflect, the dispute over Section 76.1002(c)(1) and now Section 76.1002(c)(2) is not a dispute between the cable industry and the nascent DBS industry, as DirecTv and the National Rural Telecommunications Cooperative (NRTC) would have Congress and the Commission believe. This dispute is quite simply a dispute between competitors whereby the larger competitor (DirecTv, a subsidiary of the world's largest corporation) is attempting to neutralize the smaller competitor (USSB) by eliminating the key difference between them that ensures that the smaller can compete. DirecTv and its marketer/distributor NRTC seek to invalidate contracts that USSB has successfully negotiated with the cable programming subsidiaries of two vertically integrated cable companies, Viacom and Time Warner, because those contracts include varying degrees of exclusivity protections for USSB vis-a-vis DirecTv.

What DirecTv and NRTC seek in this proceeding is for the Commission to revise and expand its rules adopted in the 1st Report in a way that would virtually guarantee that the programming that USSB now offers to distinguish its service from DirecTv's will no longer be unique to USSB. There is, however, no reason and no justification to reconsider the 1st Report and revise the rules as requested by NRTC and DirecTv. As USSB has already demonstrated, and as USSB demonstrates herein, the Commission's 1st Report properly considered and is consistent with the Cable Act, its legislative history, and the record of the proceeding before it. Thus, the rules adopted in the 1st Report should be affirmed.

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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of )  
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Consumer Protection and )  
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Development of Competition )  
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To: The Commission

**EX PARTE REPLY**

United States Satellite Broadcasting Company, Inc. (USSB),<sup>1</sup> by its attorneys, hereby respectfully submits its Ex Parte Reply to the Ex Parte Response of DirecTv, Inc. (Ex Parte Response), filed at the Commission on May 26, 1994, and addresses other recent ex parte submissions in and/or concerning this proceeding, as well:

---

<sup>1</sup>USSB, a subsidiary of Hubbard Broadcasting, Inc. (HBI), has been licensed by the FCC to operate a Direct Broadcast Satellite (DBS) system with five transponders at 101° West Longitude (WL). For over a decade, USSB has worked to make DBS a reality. On June 17, 1994, DBS service was formally initiated with the sale of the first Digital Satellite System (DSS™) receiver in Jackson, Mississippi. DBS service is being provided by DirecTv, Inc. (DirecTv) and USSB to all 48 contiguous United States (hereinafter referred to as the "continental" United States or U.S.) from a high power Ku band satellite at 101°WL. Ownership of the satellite is shared by DirecTv's affiliated company, Hughes Communications Galaxy, Inc. (Hughes), and USSB. The transmission and encryption systems are also shared; thus, the consumer is able to access both USSB's and DirecTv's programming using the same dish and receiver with equal ease. USSB owns five of the sixteen transponders on the first satellite, and Hughes owns the other eleven. A second satellite at 101° WL (with another sixteen transponders), owned solely by Hughes, was launched on August 3, 1994. Hughes recently filed an application for a third satellite, also to be located at 101° WL.

## I. PRELIMINARY STATEMENT

Of the nine petitions for reconsideration that were filed in response to the First Report and Order, 8 FCC Rcd 3359 (1993) (1st Report), in this proceeding, only that of the National Rural Telecommunications Cooperative (NRTC),<sup>2</sup> seeks reconsideration of new Section 76.1002(c)(1) of the Commission's Rules, implementing new Section 628(c)(2)(C) of the Communications Act, adopted in Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the Cable Act). No petition for reconsideration seeks reconsideration of Section 76.1002(c)(2) of the rules.<sup>3</sup>

DirecTv, Inc. (DirecTv)<sup>4</sup> did not file a petition for reconsideration of the 1st Report in this proceeding, nor did it file comments in support of NRTC's Petition.<sup>5</sup> In

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<sup>2</sup>The position that NRTC advanced in its Petition For Reconsideration was not one that NRTC had advanced in its Comments or Reply Comments in this proceeding; and the proposed alternative language that NRTC advanced in its Petition for Reconsideration as a substitute for Section 76.1002 (c)(1) adopted in the 1st Report is not the same as the language originally proposed by NRTC in its Comments in this proceeding as its recommended text for the Commission's rule. See USSB's Opposition to Petition for Reconsideration of the National Rural Telecommunications Cooperative at page 2 and note 3.

<sup>3</sup>Section 76.1002(c)(1) prohibits exclusive program contracts between a cable operator and a vertically integrated cable programmer in areas unserved by cable. Section 76.1002(c)(2) prohibits exclusive contracts between a cable operator and a vertically integrated cable programmer in areas served by cable unless the FCC determines that such contracts serve the public interest.

<sup>4</sup>DirecTv is a wholly-owned subsidiary of Hughes Aircraft Company and an affiliate of Hughes Communications Galaxy, Inc. DirecTv is a unit of GM Hughes Electronics Corp., a wholly-owned subsidiary of General Motors Corp. (GM), the world's largest corporation.

<sup>5</sup>NRTC is not a DBS licensee or permittee. In its Comments in CS Docket 94-48, filed June 29, 1994, DirecTv explained that it has a "marketing arrangement" with NRTC. In its same Comments at 15, DirecTv also referred to NRTC as one of its three channels of distribution of its programming. **NRTC has an exclusive arrangement with DirecTv** whereby NRTC has reportedly paid DirecTv \$125,000,000.00 (NRTC told the Commission in its June 29, 1994 Comments in CS Docket 94-48 that it paid over

fact, DirecTv opposed four of the petitions for reconsideration, contending that the "Commission should re-affirm its program access rules."<sup>6</sup> See Opposition of DirecTv, Inc. to Petitions for Reconsideration," at 15, filed by DirecTv on July 14, 1993.

Now, more than one year after release of the 1st Report, more than one year after petitions for reconsideration of the 1st Report were filed at the FCC, and **almost one year after DirecTv** opposed petitions for reconsideration and **called on the Commission to affirm the rules** adopted in the 1st Report, DirecTv, for the very first time, in its Ex Parte Response essentially requests reconsideration of both Section 76.1002(c)(1) **and** Section 76.1002(c)(2) of the Rules! DirecTv's Ex Parte Response is thus an untimely and unacceptable petition for reconsideration that must be stricken without consideration.

Whether or not DirecTv's recent Ex Parte Response is stricken, it must be recognized as what it is -- a tactic in DirecTv's continuing attempt to neutralize the only serious DBS competitor it faces in the near future<sup>7</sup> -- USSB. DirecTv has over the last year and again in its Ex Parte Response, zealously and recklessly made untrue and unsupported allegations designed to appeal to Congress and to compel the

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\$100,000,000.00) for the exclusive right to market and distribute DirecTv programming in certain rural areas (**where NRTC has in turn sold exclusive DirecTv franchises**). USSB has no such exclusive distribution arrangements and in fact has an open retail policy.

<sup>6</sup>However, DirecTv later reversed its position and supported NRTC's Petition for Reconsideration in a pleading responsive to USSB's "Opposition to Petition for Reconsideration of the National Rural Telecommunications Cooperative." DirecTv, although not itself a petitioner, filed a Reply to USSB's Opposition.

<sup>7</sup>In its June 29, 1994, Comments in CS Docket 94-48, DirecTv stated that it was highly unlikely Primestar would ever develop into a real alternative to cable, and USSB agrees.

Commission to amend its rules, portraying itself as a victim of a (wholly fictitious) USSB/cable industry strategy to control DBS.<sup>8</sup> This, too, is a competitive ploy. DirecTv knows full well that USSB is not in league with the cable industry and that there is no such USSB/cable industry strategy or scheme.

With the Ex Parte Response, it should be evident to the Commission, as is demonstrated below, that DirecTv is not concerned about how faithfully the Commission's Rules implement the Cable Act,<sup>9</sup> it is concerned about manipulating those rules for competitive purposes. It is not concerned about the diversity of program choices for the consumer,<sup>10</sup> it is concerned about eliminating its competition. It is not concerned about its programming lineup,<sup>11</sup> it is concerned that its competitor has programming that is unique.<sup>12</sup> It is not concerned about the availability of programming

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<sup>8</sup>Why USSB, which has been dedicated to bringing DBS to the American public longer than any other entity and which has battled the cable industry for years, would ever participate in such a scheme is never explained by DirecTv or NRTC.

<sup>9</sup>As demonstrated infra at pages 6-18, DirecTv's statutory construction arguments are amazingly contradictory.

<sup>10</sup>The consumer's choices will be decreased if DirecTv can offer the same programming USSB already offers in the same market and over the same shared facilities.

<sup>11</sup>Representatives of DirecTv and NRTC have stated publicly that they are satisfied with their programming lineup. They do not need the programming for which USSB has exclusivity protections. See pages 32-33, infra.

<sup>12</sup> While USSB offers premium services such as HBO, Showtime, Cinemax, and The Movie Channel, most of the programming on those services consists of movies that will be available to DirecTv and will be carried exclusively on DirecTv's 40 or more pay per view movie channels long before they will be available even to HBO, Showtime, Cinemax, and The Movie Channel. In fact, DirecTv's "Direct Ticket Pay Per View Guide" for August 1994 invites the consumer to: "Enjoy Hollywood's hottest hits before they appear on HBO and Showtime...."

to rural Americans,<sup>13</sup> it wants no competition in the provision of service to rural or other Americans.

As the post comment period filings in this proceeding reflect, the dispute over Section 76.1002(c)(1) and now Section 76.1002(c)(2) is not a dispute between the cable industry and the nascent DBS industry, as DirecTv and NRTC would have Congress and the Commission believe. This dispute is quite simply a dispute between competitors whereby the larger competitor (DirecTv, a subsidiary of the world's largest corporation) is attempting to neutralize the smaller competitor (USSB) by eliminating the key difference between them that ensures that the smaller can compete. DirecTv and its marketer/distributor NRTC seek to invalidate contracts that USSB has successfully negotiated with the cable programming subsidiaries of two vertically integrated cable companies, Viacom and Time Warner, because those contracts include varying degrees of exclusivity protections for USSB vis-a-vis DirecTv.

What DirecTv and NRTC seek in this proceeding is for the Commission to revise and expand its rules adopted in the 1st Report in a way that would virtually guarantee

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<sup>13</sup>Notwithstanding misleading allegations by NRTC in this proceeding and in CS Docket 94-48, no agreement, understanding, practice, or action of USSB denies any consumer, urban or rural, access to DBS programming. The USSB programming DirecTv and NRTC want to distribute is the programming USSB is already distributing to consumers through the DSS™ system, i.e., the programming USSB has widely publicized may be distributed by NRTC members and affiliates through USSB's open retail policy. It is therefore misleading of NRTC to state as it does in its June 29 Comments in CS Docket 94-48 at iii and 11 that "full and fair access to ... DBS programming at nondiscriminatory rates is still largely unavailable to rural Americans even at this late date." The only reason the service is unavailable at the current time is that the DSS™ equipment is not yet nationally available. USSB's programming is available now at nationally uniform packages and pricing to anyone in the continental U.S. who has a DSS™ receiver. Thus, USSB's prices are nondiscriminatory and its programming will be available to consumers everywhere, as NRTC knows full well.

that the programming that USSB now offers to distinguish its service from DirecTV's will no longer be unique to USSB.<sup>14</sup> There is, however, no reason and no justification to reconsider the 1st Report and revise the rules as requested by NRTC and DirecTV. As USSB has already demonstrated, the Commission's 1st Report properly considered and is consistent with the Cable Act, its legislative history, and the record of the proceeding before it. Thus, the rules adopted in the 1st Report should be affirmed.

**II. THE COMMISSION SHOULD NOT PROHIBIT (IN NON-CABLED AREAS) AND PRESUMPTIVELY DISFAVOR (IN CABLED AREAS) EXCLUSIVE PROGRAM CONTRACTS BETWEEN NON-CABLE MVPDs AND VERTICALLY INTEGRATED CABLE PROGRAMMERS**

DirecTV's position on the Commission's program access rules has been in a constant state of flux over the last year as DirecTV's competition with USSB changed from a competition for programming to a competition for subscribers. DirecTV's latest position on how the Commission should regulate exclusive program contracts is amazingly contradictory. When discussing Section 76.1002(c)(1) of the Rules, DirecTV contends that NRTC's interpretation of Section 628(c)(2)(C) is mandated by the "plain meaning" of the statutory language itself, and that the Commission should not and cannot look to the legislative intent of the section (such as the very clear and unambiguous statements in the Conference Committee Report). However, when discussing Section 76.1002(c)(2) of the Rules, DirecTV essentially contends that the Commission should ignore the plain meaning of the very specific and unambiguous language in Section

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<sup>14</sup>Exhibit 2 hereto is a chart that recently appeared in the July 15, 1994, issue of DBS World. The chart shows all of the programming services that are now available on DBS. What is at once clear is that DirecTV's DBS programming includes programming from many more programmers than USSB and medium power DBS service provider Primestar.

628 (c)(2)(D) of the Act and presumptively disfavor all exclusive contracts (not just those involving a cable operator) -- not because the plain meaning of the Act requires it (indeed, there is no way the Act could be read to require it) but "in light of the purpose and legislative scheme of the 1992 Cable Act's program access provisions." DirecTv's position on Section 76.1002(c)(2) is a new one--raised for the first time in its Ex Parte Response. Thus, the Ex Parte Response is essentially a grossly untimely petition for reconsideration that should be summarily dismissed. DirecTv's arguments therein are also fundamentally flawed, as is demonstrated below.

**A. The Cable Act Does Not Prohibit Exclusive Contracts Between Vertically Integrated Cable Programmers and Non-Cable MVPDs**

**1. Section 628(c)(2)(C)**

DirecTv and NRTC contend that NRTC's interpretation of Section 628(c)(2)(C) requires the Commission to revise new Section 76.1002(c)(1) of the FCC's rules to prohibit agreements such as those USSB (not a cable operator) has with Viacom's Showtime and Time Warner's HBO and others because "the plain meaning of the text should govern, in accordance with traditional principles of statutory construction and administrative law," citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984), for the point that, where Congress has spoken directly to the question at issue through the plain language of the statute, "that is the end of the matter." In order to discern the "plain meaning" of the statute in this instance, DirecTv and NRTC maintain that the Commission should totally ignore 26 words in the statute.

Section 628(c)(2)(C) of the Communications Act, adopted in Section 19 of the

1992 Cable Act, states that the Commission shall promulgate regulations which shall:

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, that prevent a multichannel video programming distributor from obtaining **such programming** from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section;....

(Emphasis Added.) DirecTv and NRTC contend that the phrase "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" is simply one example of the conduct prohibited by this Section. They contend that the Section must be read without the above-quoted phrase. Without that phrase, the section looks like this:

prohibit practices, understandings, arrangements, and activities,

, that prevent a multichannel video programming distributor from obtaining **such programming** from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section;....

(Emphasis added.) DirecTv and NRTC contend that the section, without the "example," constitutes a broad prohibition against any practice, understanding, arrangement, or activity that results in any MVPD being unable to obtain programming

from a vertically integrated cable operator. However, read without the phrase that DirecTv and NRTC omit, the reference to "such programming" (highlighted above) in the broad prohibition has no meaning. The "programming" at issue is only described in the phrase that DirecTv and NRTC omit. It is obvious that the phrase "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" is not meant to be simply one example of conduct prohibited in a broad per se ban but is instead an integral part of the section.

Moreover, without the language that NRTC and DirecTv would omit, Section 628(c)(2)(C) would extend far beyond what Congress intended. According to DirecTv, "Section 628(c)(2)(C) contains a broad, per se ban on 'practices, understandings, arrangements, and activities ... that prevent a multichannel video programming distributor ("MVPD") from obtaining any such programming from any satellite cable programming vendor in which a cable operator has an attributable interest' in areas that are unserved by cable operators." Ex Parte Response at 2. Read without the phrase that NRTC and DirecTv contend is only illustrative of the conduct prohibited, the entire section becomes a vague, broad proscription against certain conduct without any indication of the actor(s) whose conduct is to be regulated. It is not difficult to imagine a whole host of practices that could fall within such a broad restriction. For example, if the lending practices of a bank were to result in the denial to a multichannel video programming distributor of a loan because the MVPD did not meet the bank's standards, and the denial of such a loan were to prevent the MVPD from securing the programming it wanted, the bank's practices would literally fall within the language of

the statute as interpreted by DirecTv and NRTC. DirecTv's and NRTC's construction of the statute, which requires the Commission to ignore 26 words, would compel that absurd result. Obviously Congress did not intend to prohibit such a practice or to subject everybody in the U.S., in whatever industry, to a review of their "practices, understandings, arrangements, and activities" to determine if in some way a multichannel video programming distributor is prevented from obtaining the programming of a vertically integrated cable programmer. Rather Congress intended to prohibit such practices, understandings, arrangements, and activities only **between a cable operator and a satellite cable programming vendor** or satellite broadcast programming vendor.<sup>15</sup> What Congress did intend is very clearly stated in the Conference Report. That is why DirecTv and NRTC would have the Commission ignore legislative history in construing Section 628(c)(2)(C). That is why they invoke Chevron.

However, the Chevron case does not compel an agency in construing a statute to ignore an entire Section of an Act, its Title, its Congressional findings, and its specific purpose. The "plain meaning" of Section 628(c)(2)(C) includes the "plain meaning" of the title of the Cable Act and the findings in the Act that relate to Section 628(c)(2)(C):

The cable industry has become vertically integrated; cable operators and

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<sup>15</sup>In its two recent decisions construing the program access rules, the Commission recognized that "Section 628(c)(2)(C) of the 1992 Cable Act contains a flat prohibition against 'practices, understandings, arrangements and activities, including exclusive contracts...between a cable operator and a [vertically integrated programming vendor] in areas not served by a cable operator ...." See Time Warner Cable, FCC 94-132, slip op. at 2, n. 3 (released June 1, 1994); New England Cable News, FCC 94-133, slip op. at 2, n. 4 (released June 1, 1994).

cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.

See Section 2(a) of the Cable Act. The "plain meaning" includes all of Section 19 of the Cable Act (Section 628 of the Communications Act), including the 26 words DirecTV would have the Commission ignore. Read together, all relevant sections of the Cable Act<sup>16</sup> reflect that the "plain meaning" of Section 628(c)(2)(C) specifically requires the Commission to adopt regulations to prohibit exclusive contracts for programming between cable operators and vertically integrated cable programmers in areas unserved by cable. Section 76.1002(c)(1) of the Rules, adopted in the 1st Report, does just that. Nothing in the "plain meaning" of the Act requires the Commission to adopt a regulation that would prohibit any other exclusive contracts.

More importantly, in the ten years since Chevron, the Supreme Court has made it clear that:

Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since **the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."** *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48, 73 L. Ed. 170, 49 S. Ct. 52 (1928) (Holmes, J.). See also *United States v. American Trucking Assns., Inc.* 30 U.S. 534, 543-544, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its

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<sup>16</sup>Section 628(c)(2)(C) and Section 628(c)(2)(D) of the Act must be viewed together. It is obvious that they were intended as companion provisions. The clearest indication of what the two provisions accomplish is in the Conference Committee Report. See discussion at pages 14-15, infra.

use, however clear the words may appear on 'superficial examination'") (citations omitted).

Public Citizen v. United States Department of Justice, 491 U.S. 440, 455 (1989)

(emphasis added). The Court in Public Citizen also held:

**Where the literal reading of a statutory term would "compel an odd result,"** *Green v. Bock Laundry Machine Co.* 490 U.S. 504, 509, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989), **we must search for other evidence of congressional intent to lend the term its proper scope.** See also, e.g., *Church of the Holy Trinity*, *supra*, at 472, 36 L. Ed. 226, 12 S. Ct. 511; *FDIC v. Philadelphia Gear Corp.* 476 U.S. 426, 432, 90 L. Ed. 2d 428, 106 S. Ct. 1931 (1986). "The circumstances of the enactment of particular legislation," for example, "may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Watt v. Alaska*, 451 U.S. 259, 266, 68 L. Ed. 2d 80, 101 S. Ct. 1673 (1981). Even though, as Judge Learned Hand said, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing," nevertheless "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 90 L. Ed. 165, 66 S. Ct. 193 (1945).

Id. at 454-55 (emphasis added).

To construe Section 628(c)(2)(C) as suggested by DirecTv and NRTC, without the language that NRTC and DirecTv find merely "illustrative," would lead to odd or absurd results. As Viacom demonstrated in this proceeding in its July 14, 1994 "Ex Parte Response of Viacom International Inc." at pages 16-22, NRTC's and DirecTv's interpretation of Section 628(c)(2)(C) and (D) would lead to the absurd result of **placing cable operators in a more favored regulatory position than competing non-cable distributors** -- a result that is fundamentally contrary to the purposes of the 1992 Act. Only by construing the section as the Conference Committee Report explained and as the Commission's 1st Report did is it consistent with the entire Cable Act. To construe Section 628(c)(2)(C) in a way that would require every vertically

integrated programmer to make every one of its programming services available to every service provider that provides programming **over the same facilities in the same market** would compel an odd result.<sup>17</sup> The immediate result would be a decrease in diversity of program choices to the consumer (and an inefficient use of the spectrum).<sup>18</sup> Yet it was the availability of programming to the consumer that Congress had in mind when it enacted the Cable Act.<sup>19</sup> In the case of DBS service provided at 401° WL, the result would also be an immediate threat to any meaningful competition between the only two high power DBS service providers, clearly a result never intended by Congress.

It is also apparent that members of Congress fundamentally disagree about what the "plain meaning" of Section 628(c)(2)(C) is. Compare letters in Exhibit 1 hereto to the June 15, 1994 letter of Rep. Tauzin et al.<sup>20</sup> It is therefore, as the Court in Public Citizen clearly held, perfectly proper for the Commission to consider the legislative history of the Cable Act, particularly the history of Section 19. The legislative history is

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<sup>17</sup>Moreover, to construe the plain meaning of Section 628(c)(2)(C) in a way that would have the potential of creating a DBS Titan that can reach every home within the continental U.S. and thus be far more formidable than any cable operator in existence when the Cable Act was passed would clearly "compel an odd result."

<sup>18</sup>USSB's market research has shown that "variety of programming" is one of the most important factors to consumers considered likely to subscribe to DBS.

<sup>19</sup>The more programs available over DBS, the greater potential DBS has to be an effective competitor to cable across the country. The goal of diversity is obviously best served when the consumer has the maximum possible choices of programs. If the Commission amends its rules so that DirecTv has the right to offer any and every program service that USSB offers, the consumer will have fewer program choices.

<sup>20</sup>In the June 15, 1994, letter of Rep. Tauzin et al., the statement was made that the Commission's regulations include a "critical loophole." When one compares the regulations adopted by the Commission to the Cable Act and the Conference Report, see Exhibit 3 hereto, it is clear that there is no loophole in the regulations.

not ambiguous, as DirecTv claims. The practices, understandings, agreements, and exclusive contracts discussed and intended to be prohibited by Congress were those by which the vertically integrated programmers were favoring their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies. Such contracts in non-cabled areas were particularly offensive because they resulted in no service to the consumer. See USSB's "Opposition to Petition for Reconsideration of the National Rural Telecommunications Cooperative," filed in this proceeding.

It is also perfectly proper to consider the Conference Committee Report for the Cable Act, which very clearly describes what Sections 628(c)(2)(C) and 628(c)(2)(D) require the Commission to prohibit:<sup>21</sup>

With regard to areas not passed by a cable system, the regulations required by the House amendment **prohibit exclusive contracts and other arrangements between a cable operator and a vendor** which prevent a multichannel video programming distributor from obtaining programming from a satellite cable programming vendor affiliated with a cable operator.

With regard to areas served by cable operators, the FCC's regulations must prohibit exclusive contracts for satellite cable programming between a cable operator and a satellite cable programming vendor affiliated with a cable interest, unless the FCC determines such a contract is in the public interest.

H.R. CONF. REP. No. 102-862, 102d Cong., 2d Sess. 92 (1992)(emphasis added).

**Congress could have easily prohibited all exclusive contracts, but it did not. The**

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<sup>21</sup>Congressman Tauzin was a member of the Conference Committee, as was Congressman Hall. While they may now be willing to support NRTC's and DirecTv's position, the Commission must consider what they said at the time the legislation was pending, as members of the Conference Committee, to induce their colleagues to support the legislation. To the best of USSB's knowledge, there was no dissent to the Conference Committee Report on this issue and no revision of the explanation of what Section 19 of the Act was to accomplish.

**only exclusive contracts mentioned at all in the statute and in the Conference Report<sup>22</sup> were those involving cable operators.** Indeed, nowhere in the legislative history of the Cable Act is there anything to support DirecTV's and NRTC's position.

It is similarly perfectly proper for the Commission to consider that, in the floor debate on the legislation, Congressman Richardson described the Tauzin amendment, which became this Section of the Act, as follows:

**"The Tauzin amendment allows MMDS operators and DBS operators to enter into exclusive contract arrangements,** and there is no reason why they should not be allowed to do so. Why is it then that cable programmers cannot enter into the same lawful exclusive contract arrangements as their competitors can for future programming investments. That is simply unfair, and represents nothing more than a punitive attack on the cable industry."

138 CONG. REC. at 6540 (daily ed. July 23, 1992)(statement of Mr. Richardson)

(emphasis added). It matters not that Mr. Richardson was opposing the Tauzin amendment when he made his remarks. He was stating why he opposed it, and his understanding of what the amendment meant is therefore very relevant. He indicated that he opposed it because it restricted cable operators from entering into exclusive contracts but **allowed DBS** and **MMDS** operators to enter into such contracts. No one corrected or contradicted him or otherwise disputed his interpretation. No limitations on the ability of a DBS operator to contract for programming were mentioned by anyone.

The Commission may also properly consider that, whereas the industry

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<sup>22</sup>It is clear that the Conference Committee believed it was prohibiting only exclusive contracts between cable operators and vertically integrated cable programmers in areas unserved by cable. As USSB demonstrated in its Opposition to NRTC's Petition for Reconsideration, **such contracts were per se prohibited because they resulted in no service being provided to the consumer.** Such contracts served no purpose except to keep out competition. Such contracts were purely anti-competitive.

Congress sought to regulate by the Cable Act was a mature cable industry, there was no evidence before Congress that the embryonic DBS industry needed the regulations being required for cable. As Judge Thomas Penfield Jackson recognized in Daniels Cablevision, Inc. v. U.S., 835 F. Supp. 1, 8 (D.D.C. 1993), in reviewing constitutional challenges to 11 provisions of the 1992 Cable Act:

There is absolutely no evidence in the record upon which the Court could conclude that regulation of DBS service providers is necessary to serve any significant regulatory or market-balancing interest.

As the full title<sup>23</sup> of the Cable Act makes abundantly clear, the Cable Act was specifically designed to address the problems experienced by the public as a result of the practices of many in the cable industry. A key provision of the Act was Section 19, which addresses cable programming practices. As the letters in Exhibit 1 hereto attest, Section 19 does not address, and was not intended to address, program contracts between DBS operators and vertically integrated cable programmers. In the letters attached hereto, **Democratic and Republican members of the House and Senate submit that a search of the entire Cable Act and its legislative history will confirm that only program contracts involving cable operators were intended to fall within the province of Section 19 and the Act as a whole.** The members also confirm that the Commission's initial conclusions in its 1st Report, i.e., that Section 19 applies only to cable operators - were correct **and that the rules adopted by the FCC thus properly implement Section 19.**

The Attorneys General of 45 states and the District of Columbia, the Antitrust Division of the Department of Justice, and a federal judge, concerned with the public

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<sup>23</sup>The Cable Television Consumer Protection and Competition Act of 1992.

interest and not their own private interests, have all reviewed the Cable Act and concluded that it does not prohibit exclusive contracts between non-cable MVPDs and vertically integrated cable programmers. They have all reached the conclusion the Commission drew in its 1st Report. Obviously the Commission correctly concluded that Section 628(c)(2)(C) does not apply to contracts, practices, understandings, arrangements, and activities between non-cable MVPDs and vertically integrated cable programmers.

## **2. Section 628(c)(2)(D)**

For areas served by cable, there is absolutely no statutory authority to support DirecTv's most recent request for a prohibition or presumptive disfavoring of exclusive contracts other than those involving cable operators. There is no ambiguity whatsoever in Section 628(c)(2)(D) of the Communications Act, which requires the Commission to adopt regulations that:

(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines....

47 U.S.C.A. § 628 (c)(2)(D). Neither the "plain meaning rule" nor anything in the legislative history of the Cable Act provides any support for DirecTv's position.

Moreover, no other section of the Act supports or requires the presumptive disfavoring of non-cable exclusives (in areas served by cable) that is now being sought by DirecTv. In fact, the Act is very specific as to the factors that the Commission may consider in its determination of whether or not an exclusive contract is in the public interest; and the only Section of the Act that addresses those factors specifically

applies only to a determination of whether an exclusive contract is in the public interest for purposes of Section 628(c)(2)(D), which only applies to contracts between a **cable operator** and a vertically integrated cable programming vendor. See 47 U.S.C.A. §628(c)(4). Obviously Congress did not intend to ban all exclusive contracts involving distributors other than cable operators while at the same time permitting cable operators to demonstrate that their agreements were in the public interest.

Rather than revising its regulations implementing Section 628(c)(2)(D) in the way requested by DirecTv, the Commission should view this section as the companion to the section immediately preceding it -- as further evidence that Congress did not address and did not intend to prohibit or restrict any exclusive program contracts, arrangements, or understandings other than those between cable operators and vertically integrated cable programmers.

### **3. Section 628(b) and Section 628(c)(2)(B)**

Other sections in the Cable Act do not prohibit exclusive program contracts, as DirecTv contends. DirecTv maintains, for example, that Section 628(b)'s prohibition of "unfair practices" is also violated by exclusive program contracts. At the very same time, however, DirecTv states that:

"DIRECTV has never been opposed to exclusive arrangements, which can serve valuable competitive purposes in protecting unique investments or building long-term relationships. Indeed, DIRECTV has actively pursued exclusive contracts in context where there is no legal/regulatory concern with such arrangements, including exclusives with non-vertically integrated program suppliers."

Ex Parte Response at 18. DirecTv has exclusive programming contracts and exclusive distribution agreements. Obviously DirecTv recognizes that exclusive contracts are not "unfair practices." Exclusive contracts do not and were never intended to fall within the