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Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

Dear Mr. Caton:

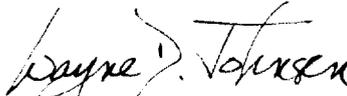
Viacom International Inc. ("Viacom"), by its attorneys and pursuant to Section 1.1206(a)(2) of the Commission's rules, hereby submits an original and one copy of this memorandum regarding a permitted ex parte presentation to the Commission's staff regarding MM Docket No 92-265.

On the afternoon of Monday, December 5, 1994, Lawrence W. Secrest, III, of this office, along with Ellen Schned and H. Gwen Marcus of Viacom, met with Mary P. McManus of Commissioner Ness's office. The discussion related to Viacom's prior filings in the above-referenced proceeding.

Copies of the attached documents were presented to Ms. McManus.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,

  
Wayne D. Johnsen

WDJ/rr  
Enclosure  
cc: Mary P. McManus

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List A B C D E

SECTION 19—DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO  
PROGRAMMING DISTRIBUTION

*Senate bill*

The Senate bill bars national and regional cable programmers who are affiliated with cable operators from (1) unreasonably refusing to deal with any multichannel video programming distributor; and (2) discriminating in the price, terms, and conditions in the sale of their programming to multichannel video distributors if such action would impede retail competition.

National and regional programmers affiliated with cable operators are required by the Senate bill to offer their programming to buying groups on terms similar to those offered to cable operators. However, reasonable cost-related conditions and certain other reasonable requirements can be imposed.

The Senate bill also requires any programmer who scrambles satellite cable programming for private viewing to make that programming available for private viewing by C-band home satellite dish owners.

Under the Senate bill, a satellite carrier that provides service pursuant to the provisions of the Home Satellite Viewers Rights Act, 17 U.S.C. Section 119, shall not (1) unreasonably refuse to deal with any distributor of video programming who provides service to home satellite dish subscribers who meet the requirements of the Home Satellite Viewers Right Act, or (2) discriminate in price, terms and conditions of the sale of programming among the distributors to home satellite dish owners qualified under the Home Satellite Viewers Rights Act or between such distributors and other multichannel video distributors.

The Senate bill directs the FCC to prescribe rules to implement this section, including rules for expedited review of complaints made pursuant to this section. This section does not apply to television broadcast signals retransmitted by satellite.

**LEGISLATIVE HISTORY**

HOUSE CONF. REP. NO. 102-862

[page 92]

*House amendment*

The House amendment makes it unlawful for a cable operator or satellite cable programming vendor affiliated with a cable operator to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming to subscribers or consumers. The FCC is required to promulgate regulations to implement this section.

At a minimum, the regulations must prevent a cable operator affiliated with a satellite cable programming vendor from unduly or improperly influencing the vendor's decision to sell, or the price, terms, and conditions of sale of, programming to any unaffiliated multichannel video programming distributor. The regulations also must prohibit a satellite cable programming vendor affiliated with a cable operator from discriminating in the price, terms, and conditions in the sale or delivery of programming to cable operators, other multichannel video programming distributors, and their buying agents. However, such a vendor may impose reasonable cost-related and other reasonable requirements and may grant reasonable volume discounts.

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. In determining whether such an exclusive contract is in the public interest, the FCC shall consider the effect of the contract on competition in local and national multichannel video programming distribution markets, the effect on competition from multichannel video programming distribution technologies other than cable, the effect on the ability to attract capital investment in new satellite cable programming, the effect on the diversity of programming in the multichannel video programming distribution market, and the duration of the exclusive contract. The House amendment's provisions limiting exclusive contracts in areas served by cable operators expire in 10 years. Exclusive contracts for satellite cable programming that were entered into on or before June 1, 1990 for geographic areas not served by cable operators are grandfathered under the House amendment.

The requirements imposed by this section do not apply to the signals of the broadcast affiliates of the national television networks that are retransmitted by satellite, nor do they apply to internal satellite communications of any broadcast or cable network. Furthermore, the requirements of the House amendment do not require those distributing programming regionally or nationally to make that programming available in any area beyond which it has been authorized or licensed for distribution.

Under the House amendment, any multichannel video programming distributor aggrieved by conduct that it alleges violates this section or the FCC's implementing regulations may begin an adjudicatory proceeding at the FCC. The FCC shall provide for an expedited review of complaints made pursuant to this section and shall order appropriate remedies.

#### *Conference agreement*

The conference agreement adopts the House provisions, with amendments. The conference agreement clarifies that programming distributed by satellite broadcast programming vendors (fixed service satellite carriers) is covered by this section. Satellite broadcast programming vendors are to be held to the same standards as the programming vendors to whom this section applies.

Under the conference agreement, the limitations on exclusive contracts and other arrangements regarding programming distributed within an area served by a cable operator shall expire after 10 years, except that the FCC may extend the limitation if it determines that such limitations are necessary to preserve and protect competition and diversity in the distribution of video programming. For purposes of this section, the conferees intend that an area "served" by a cable system be defined as an area actually passed by a cable system and which can be connected for a standard connection fee.

In lieu of permitting volume discounts, the conference agreement amends the House provision regarding discrimination by satellite cable programming vendors affiliated with cable operators to permit such vendors to establish different prices, terms and conditions which take into account economies of scale, cost savings, or other direct and economic benefits reasonably attributable to the number of subscribers served by the distributor.

In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.

**SEC. 628. [47 U.S.C. 548] DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.**

(a) **PURPOSE.**—The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

(b) **PROHIBITION.**—It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

(c) **REGULATIONS REQUIRED.**—

(1) **PROCEEDING REQUIRED.**—Within 180 days after the date of enactment of this section, the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies, prescribe regulations to specify particular conduct that is prohibited by subsection (b).

(2) **MINIMUM CONTENTS OF REGULATIONS.**—The regulations to be promulgated under this section shall—

(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;

(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from—

(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

(iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

(iv) entering into an exclusive contract that is permitted under subparagraph (D);

(C) 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; and

(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 (in accordance with paragraph (4)) that such contract is in the public interest.

### (3) LIMITATIONS.—

(A) GEOGRAPHIC LIMITATIONS.—Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

(B) **APPLICABILITY TO SATELLITE RETRANSMISSIONS.**—Nothing in this section shall apply (i) to the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast programming, or (ii) to any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.

(4) **PUBLIC INTEREST DETERMINATIONS ON EXCLUSIVE CONTRACTS.**—In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

(A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

(B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

(C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

(D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

(E) the duration of the exclusive contract.

(5) **SUNSET PROVISION.**—The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

(d) **ADJUDICATORY PROCEEDING.**—Any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission.

(e) **REMEDIES FOR VIOLATIONS.**—

(1) **REMEDIES AUTHORIZED.**—Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.

(2) **ADDITIONAL REMEDIES.**—The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under title V or any other provision of this Act.

(f) PROCEDURES.—The Commission shall prescribe regulations to implement this section. The Commission's regulations shall—

(1) provide for an expedited review of any complaints made pursuant to this section;

(2) establish procedures for the Commission to collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section; and

(3) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

(g) REPORTS.—The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (c), annually report to Congress on the status of competition in the market for the delivery of video programming.

(h) EXEMPTIONS FOR PRIOR CONTRACTS.—

(1) IN GENERAL.—Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990, except that the provisions of subsection (c)(2)(C) shall apply for distribution to persons in areas not served by a cable operator.

(2) LIMITATION ON RENEWALS.—A contract that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of this section shall not be exempt under paragraph (1).

(i) DEFINITIONS.—As used in this section:

(1) The term “satellite cable programming” has the meaning provided under section 705 of this Act, except that such term does not include satellite broadcast programming.

(2) The term “satellite cable programming vendor” means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor.

(3) The term “satellite broadcast programming” means broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

(4) The term “satellite broadcast programming vendor” means a fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming.

**OUTLINE FOR VIACOM FCC MEETINGS  
ON NON-CABLE EXCLUSIVITY  
December 5, 1994**

**Policy**

1. *Viacom objective: promote competition among distributors.*
2. *Exclusive agreements generally procompetitive.*
  - *Added basis for distributor differentiation.*
3. *Viacom/Hubbard agreement illustrates pro-competitive potential.*
  - *Direct TV has a 5 to 1 advantage in transponder capacity (150 vs. 30 channels)*
  - *Regardless of regulatory outcome, Direct TV will have de facto exclusivity with regard to numerous services*
  - *Hubbard needs some exclusives to survive as a competitor.*
4. *Exclusives also promote diversity and efficient use of spectrum*
  - *Limit duplication of services*
  - *Expand total DBS service offerings to consumers*

**Legal**

1. *Objective of 1992 Cable Act: limit market power of cable operators.*
2. *Logical interpretation of 628(c)(2) (C) and (D): only targets cable operators*
  - *Makes no sense to flatly prohibit non-cable exclusives in areas not served by cable. (Subsection C).*
  - *DirectTV position would turn Act upside down: permitting only cable to fully protect its service area (under Subsection D).*

CONFERENCE REPORT

\* 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. In determining whether such an exclusive contract is in the public interest, the FCC shall consider the effect of the contract on competition in local and national multichannel video programming distribution markets, the effect on competition from multichannel video programming distribution technologies other than cable, the effect on the ability to attract capital investment in new satellite cable programming, the effect on the diversity of programming in the multichannel video programming distribution market, and the duration of the exclusive contract. The House amendment's provisions limiting exclusive contracts in areas served by cable operators expire in 10 years. Exclusive contracts for satellite cable programming that were entered into on or before June 1, 1990 for geographic areas not served by cable operators are grandfathered under the House amendment.

SECTION 628(c)(2)(C) and (D)

(C) 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; and

(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 (in accordance with paragraph (4)) that such contract is in the public interest.

the very dangers that led to passage of the 1992 Cable Act, raising the specter of a cable-like, DBS "monopolist in the sky."

III. The 1992 Cable Act's Legislative History Supports the Commission's Conclusion That Non-Cable Exclusives Are Not Prohibited

In an attempt to support its reading of the statute, NRTC spends a large portion of its pleadings discussing Congressional intent with respect to exclusive arrangements between vertically integrated programmers and non-cable distributors. See, e.g., First NRTC Ex Parte Presentation at 4-5, 8-10; Second NRTC Ex Parte Presentation at 8-24. Significantly, the examples NRTC cites from the legislative history do not support its strained reading of Section 628(c)(2)(C). Indeed, those examples indicate that the harm Congress sought to address flowed from the grant of exclusive distribution rights to cable operators.<sup>15</sup> They do not even remotely suggest that Congress was concerned about exclusive arrangements with non-cable distributors.

To the contrary, the legislative history indicates that the 1992 Cable Act was not designed to prohibit or restrict all exclusive arrangements, but only those in which cable operators are granted exclusive distribution rights -- the very type

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<sup>15</sup> As indicated by Home Box Office in its ex parte filing, the legislative history referenced in the NRTC filings deals with matters such as the market power of cable operators or non-cable distributors' support of the program access provision. See Ex Parte Response of Home Box Office to Ex Parte Presentations of the National Rural Telecommunications Cooperative, MM Docket No. 92-265, at 4-5 (Apr. 15, 1994).

precluded by the Commission in Section 76.1002(c) of its rules. For example, the Conference Committee Report accompanying the 1992 Cable Act clearly states that "the regulations required . . . prohibit exclusive contracts and other arrangements between a cable operator and a vendor . . ." H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 92 (1992), reprinted in 1992 U.S.C.C.A.N. 1231, 1274 ("Conference Report"). There simply is no evidence in the record that Congress was concerned about exclusive distribution arrangements with non-cable distributors or that the statutory provision was intended to have the broad scope advocated by NRTC and DirectTV.

Moreover, notwithstanding NRTC's claims, it is not "inconceivable" that Congress intended only to prohibit exclusive grants to cable operators in areas unserved by cable. As the Commission found in the First Report and Order cable operators had obtained exclusive distribution rights that prohibited the distribution of programming by others into areas unserved by cable.<sup>16</sup> By preventing cable operators from entering into such arrangements, Congress ensured that consumers in all areas would be able to receive the same programming available to consumers with access to cable. There simply is no indication in the record that the exclusivity provisions of the 1992 Cable Act were designed to do more than this. On the contrary, the record is replete with references acknowledging the pro-competitive aspects

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<sup>16</sup> 8 FCC Rcd at 3378.

of exclusive arrangements. See, e.g., S. Rep. No. 92, 102d Cong., 1st Sess. 28 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1161; 138 Cong. Rec. H6537 (daily ed. July 23, 1992) (statement of Cong. Schaeffer).

IV. NRTC's and DirecTv's Interpretation of the Program Access Provision Stands the 1992 Cable Act On Its Head By Placing Cable Operators in a More Favorable Regulatory Position than Non-Cable Distributors

As demonstrated above, Viacom's exclusive arrangements with USSB will enhance diversity and strengthen competition within the DBS market. Moreover, the legislative history supports the conclusion that the exclusivity provisions of Sections 628(c)(2)(C) and (D) were designed to limit the ability of vertically integrated programmers to enter into exclusive arrangements with cable operators, and not to preclude or otherwise limit exclusive arrangements with non-cable distributors. Thus, Section 76.1002(c)(1) of the Rules adopted by the Commission reflects Congressional intent and was appropriately crafted to implement the fundamental statutory objectives. Nevertheless, NRTC and DirecTv urge the Commission to reverse course and adopt a strained interpretation of the statute that, as shown below, would effectively place cable operators -- who exercise effective monopoly power -- in a more favored regulatory position than non-cable distributors.

The 1992 Cable Act was based, in large part, on Congressional findings that cable operators were able to exert

undue market power. See, e.g., 1992 Cable Act § 2(a)(2), 106 Stat. at 1460 ("Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers."). Because of that market power, Congress found that "cable operators have the incentive and ability to favor their affiliated programmers" and that "[v]ertically 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." Id. § 2(a)(5), 106 Stat. at 1460.<sup>17</sup>

In light of these findings, one of the principal policy objectives underlying the 1992 Cable Act is to make available to the public a diversity of views and information by fostering the development of competing video programming distributors. Id. § 2(b)(1), 106 Stat. at 1463. Section 628 of the Act in particular was intended to encourage competition by DBS and other alternative MVPDs in order to lessen the market power of cable operators and to enhance diversity in the distribution of video programming. 1992 Cable Act § 19, 106 Stat. at 1494; see also Time Warner Cable, FCC 94-132, ¶ 23 (rel. June 1, 1994) ("Time

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<sup>17</sup> Based upon these findings, Congress made clear that the 1992 Cable Act was intended to ensure that cable operators do not continue to have undue market power vis-à-vis video programmers and consumers. Id. § 2(b)(5), 106 Stat. at 1463.

Warner Cable"). The provision also was designed to "extend[] programming to areas not served by cable." Conference Report at 92, reprinted in 1992 U.S.C.C.A.N. at 1275.

In construing the statute, the Commission must ensure that the regulations it adopts further these underlying Congressional goals and policies.<sup>18</sup> The Commission already has determined that it was the "use of exclusive contracts between vertically integrated programming vendors and cable operators [that] served to inhibit the development of competition among distributors."<sup>19</sup> As demonstrated above, however, Viacom's exclusive arrangements with USSB will enhance diversity and strengthen competition within the developing DBS marketplace. Thus, Viacom submits, the Commission correctly designed Section 76.1002(c)(1) to limit exclusive grants to cable operators, while not restricting exclusive grants to emerging MVPD competitors, who lack cable's market power. By contrast, and as explained below,<sup>20</sup> the interpretation of the statute urged upon the Commission by NRTC and DirecTV would lead to the absurd result of placing cable

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<sup>18</sup> It is a fundamental tenet of statutory construction that a statute must be construed in a manner that will achieve a harmonious result among its various sections. 2A Sutherland Stat. Const. § 46.05 (5th ed. 1992). Similarly, a result that runs counter to the intent of the overall legislation cannot be favored. Id. Thus, in construing any provision of the 1992 Cable Act, it is imperative that the Commission look to its overall structure and intent in order to ensure that the core policies underlying the Act are fulfilled.

<sup>19</sup> Time Warner Cable ¶ 23.

<sup>20</sup> See discussion at pages 19-21, infra.

operators in a more favored regulatory position than competing non-cable distributors -- a result that simply cannot be reconciled with the purposes of the 1992 Cable Act.

DirectTV and NRTC argue that exclusive contracts are prohibited, not only by the specific provisions of Sections 628(c)(2)(C) and (D), but also implicitly by the more general language of Sections 628(b) and 628(c)(2)(B). DirectTV Ex Parte Presentation at 5-6; Second NRTC Ex Parte Presentation at 10.<sup>21</sup> As an initial matter, the position advanced by NRTC and DirectTV would effectively make the specific prohibition on exclusive grants to cable operators contained in subsection (C) superfluous. If the general language had been intended to prohibit all exclusives, as NRTC and DirectTV argue, it would have been totally unnecessary to structure specific prohibitions

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<sup>21</sup> NRTC also raises the specious argument that, because a vertically integrated programmer must, by definition, also be a cable operator, Section 628(c)(2)(C) applies to any arrangement by which a vertically integrated programmer grants exclusive distribution rights. First NRTC Ex Parte Presentation at 9-10. The 1992 Cable Act, however, clearly and consistently distinguishes between a vertically integrated programmer as the grantor of distribution rights and the cable operator itself as the grantee of such rights. As demonstrated herein, the program access provisions are designed to prevent cable operators from obtaining grants of exclusive distribution rights that served to prevent consumers living in non-cabled areas from receiving vertically integrated programming. The Commission should reject out of hand NRTC's facile attempt to blur the grantor/grantee distinction contained in the 1992 Cable Act.

against a particular category of exclusives elsewhere in the statute.<sup>22</sup>

The fact remains that the only specific restrictions on exclusive contracts in the program access provisions are found in Sections 628(c)(2)(C) and (D). Further, only exclusive grants to cable operators are discussed in those provisions of the statute. Thus, Viacom submits, the Commission correctly determined that the 1992 Cable Act's restrictions on exclusive contracts were directed at exclusive grants to cable operators, whose market power Congress sought to limit. The Commission properly crafted its implementing regulations to address that objective. Indeed, the "presumption" against all exclusives advocated by NRTC/DirectV is totally without support in any provision of the statute. Moreover, as demonstrated below, under the NRTC/DirectV approach, Sections 628(c)(2)(C) and (D) would operate in combination to place cable operators in a more advantageous regulatory position than non-cable distributors -- the intended beneficiaries of the Congressional plan.

Section 628(c)(2)(D) states that cable operators may enter into exclusive arrangements within their service areas if the Commission determines that the public interest would be served. Indeed, the Commission already has found that at least one cable-exclusive distribution arrangement serves the public interest.

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<sup>22</sup> A reading of the statute that results in a provision being superfluous is not favored. 2A Sutherland Stat. Const. § 46.05 (5th ed. 1992).

New England Cable News ¶ 53 (allowing New England Cable News to enter into exclusive distribution agreements with cable operators). By its terms, however, Section 628(c)(2)(D) applies only to cable operators. There simply is no parallel provision concerning exclusive arrangements with non-cable distributors. Accordingly, only cable operators are provided a mechanism under the statute to demonstrate that the public interest would be served by an exclusive distribution arrangement.

Thus, the end result of the NRTC/DirectV interpretation is that, although the FCC might allow a cable operator to obtain exclusivity within its service area, the Commission would lack the power to permit a grant of similar exclusive rights to a non-cable distributor, even if the Commission determined that such a grant would serve the public interest.<sup>23</sup> Under the NRTC/DirectV view of the statute, therefore, an MMDS operator seeking to compete with cable operators in the New England area would be prohibited from obtaining the same type of exclusive rights that the Commission has determined may be granted to cable operators.

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<sup>23</sup> NRTC/DirectV must either acknowledge this illogical result or argue that Congress expressly required a public interest showing to be made by a cable operator in Section 628(c)(2)(D) and implicitly mandated the same showing for non-cable distributors elsewhere in the statute. There is no evidence in either the 1992 Cable Act itself or its legislative history, however, that the public interest standard applicable to cable operators was to be used to determine whether non-cable distributors could enter into exclusive arrangements as well. The absence of a parallel "safety valve" provision for non-cable exclusives provides compelling support for the Commission's determination, in adopting Section 76.1002(c)(1), that Congress did not intend to limit such arrangements.

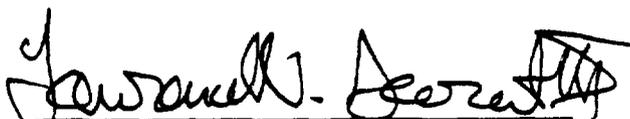
Such a result is so antithetical to the purposes of the 1992 Cable Act that Viacom submits that it cannot be countenanced. Rather, the better interpretation of the statute is the one taken by the Commission in its rules -- that the provisions of Section 628(c)(2)(C) and (D) were intended to limit the ability of cable operators to obtain exclusive rights to vertically integrated programming. More specifically, Section 628(c)(2)(C) was designed to prevent cable operators from obtaining exclusive rights with respect to areas unserved by cable, thus ensuring that consumers in such areas would be able to obtain from a non-cable distributor the same programming available to consumers in areas served by cable. Section 628(c)(2)(D) in turn creates a limited opportunity for cable operators to obtain exclusive rights, but only within areas served by cable and only if the Commission determines that the public interest would be served by such arrangements. Exclusive arrangements with emerging non-cable distributors, that lack the market power of their established cable competitors, clearly do not pose the same anticompetitive threat. Thus, the Commission correctly concluded, in promulgating Section 76.1002(c)(1) to implement Section 628(c), that non-cable exclusives are not prohibited by the statute.

V. Conclusion

In Section 76.1002(c) of its rules, the Commission has properly determined Congressional intent with respect to the ability of vertically integrated programmers to grant exclusive distribution rights to non-cable distributors. These arrangements will help to create competition in the distribution of programming via DBS, to the benefit of consumers and programmers. Accordingly, Viacom once again respectfully urges the Commission to deny NRTC's petition for reconsideration with respect to exclusive arrangements with non-cable distributors.

Respectfully submitted,

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July 14, 1994