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WILEY, REIN & FIELDING

1776 K STREET, N.W.  
WASHINGTON, D. C. 20006  
(202) 429-7000

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WRITER'S DIRECT DIAL NUMBER  
(202) 429-7303

FACSIMILE  
(202) 429-7049

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DEC - 6 1994

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 Jill Luckett of Commissioner Chong's office. The discussion related to Viacom's prior filings in the above-referenced proceeding.

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

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,

  
Wayne D. Johnsen

WDJ/rr  
Enclosure  
cc: Jill Luckett

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

DEC - 6 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**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 DirecTv.

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.

DirectV 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). DirectV 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 DirectV 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 DirectV 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.

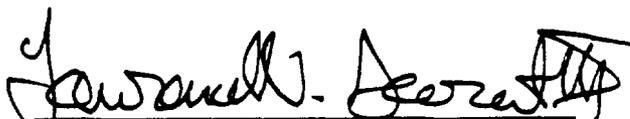
Such a result is so antithetical to the purposes of the 1992 Cable Act that Viacom submits that it cannot be countenanced. Rather, the better interpretation of the statute is the one taken by the Commission in its rules -- that the provisions of Section 628(c)(2)(C) and (D) were intended to limit the 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,

VIACOM INTERNATIONAL INC.

By: 

Richard E. Wiley  
Lawrence W. Secrest, III  
Philip V. Permut  
Wayne D. Johnsen  
of  
WILEY, REIN & FIELDING  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 429-7000

Its Attorneys

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