BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington DC 20054

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	
Act of 1992	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity	)	
in Video Programming Distribution:	)	
Section 628(c)(5) of the Communications	)	
Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF SEREN INNOVATIONS, INC.

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EXECUTIVE SUMMARY

Seren Innovations, Inc. ("Seren") is a relatively new entrant into the multichannel video programming distribution (MVPD") marketplace, with cable franchises in California and Minnesota. Seren is dedicated to bringing competition to the entrenched cable monopolists in its areas of operation as part of its integrated Internet, video and telephone broadband network..

Seren competes directly with cable operators and other multichannel video programming distributors ("MVPDs"), as well as incumbent and competitive local exchange carriers, and Internet service providers. With over 120 thousand households already under franchise, over 20,000 current subscribers, and more than 1,000 miles of constructed broadband network, Seren represents one of the best opportunities to satisfy expanding demand for competitive residential broadband services in it's geographic areas of operation.

This proceeding is of significant importance to Seren. The provision of high quality content is the cornerstone of our bundled, multichannel video offerings. Without such content, any multichannel provider, broadband or otherwise, would be unable to compete.

The deployment of competitive broadband infrastructure has become the central communications policy objective today, and emerged as the fundamental priority of the Commission. At the core of the broadband debate is the provision of facilities-based competition through multiple broadband platforms, which will provide the most substantial benefits to consumers.

The deployment of new, high-capacity facilities by Seren allows for the provision of next-generation, advanced services, which cannot be provided on existing legacy networks. In addition, direct, head-to-head competition from advanced networks leads to significant competitive responses from incumbent providers. In addition to decreasing prices, increasing channel offerings, improving customer service, and offering new, innovative services, incumbent providers also respond by upgrading and investing in their own networks to provide advanced services that are competitive with those of the new entrant. Competitive entry therefore brings a second key benefit – the substantial investment dollars associated with the construction of multiple, competing networks.

Broadband deployment and facilities-based competition, however, have yet to reach ubiquitous levels. One factor that continues to slow competitive entry is ongoing impediments to acquiring programming content that subscribers deem important to multichannel video offerings, despite the program access provision of the Communications Act.

In enacting Section 628, Congress expressed its concern that competitors to incumbent cable operators often face insurmountable hurdles in seeking access to critical programming required to compete. Congress found that cable-affiliated programmers have the "incentive and ability" to favor cable operators over MVPDs. Through Section 628, Congress sought to break the cable industry's "stranglehold" over programming, which had historically been enforced through exclusivity arrangements and other market power abuses exercised by cable operators and their affiliated programming suppliers that denied programming to competitive technologies, or made programming available on discriminatory terms and conditions.

Even though competitors have made some in-roads, local programming distribution markets remain highly concentrated, and the vertical relationships that dominated the market in 1992 have become further entrenched. Competitors are often denied access to programming services that are unaffiliated with incumbent cable operators, which are not covered by the program access rules. And notwithstanding the program access rules, cable operators still withhold programming that is within the ambit of the rules. Resumption of the "cable-friendly" exclusive arrangements that dominated the industry before the 1992 Cable Act was passed would add to this mix, critical cable-affiliated programming services, which would absolutely stifle new facilities-based entry from the competitive broadband industry.

The Commission must therefore find that the exclusivity prohibition continues to be necessary to preserve competition and diversity in the distribution of video programming, and continue the prohibition in effect. The Commission should also take this opportunity to address competitive concerns regarding discriminatory and exclusionary conduct involving cable-affiliated, terrestrially-delivered regional sports programming and other such services, access to which is necessary for new providers to compete effectively.

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WASHINGTON, D.C. 20554

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Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
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COMMENTS OF SEREN INNOVATIONS, INC. dba ASTOUND BROADBAND

INTRODUCTION

Seren Innovations, Inc., is a Minnesota corporation headquartered in Minneapolis, Minnesota. Seren is a wholly-owned, non-regulated subsidiary of Xcel Energy. Seren was formed in 1996 to provide high-speed Internet, cable television and local and long distance telephone service to residential and business customers through state-of-the-art hybrid fiber coaxial broadband networks. Seren's goal is to fulfill the pro-competitive purpose of the Telecommunications Act of 1996 through facilities-based entry into markets dominated by entrenched cable and telephone incumbents.

December 3, 2001

Seren's, products marketed through its "Astound" brand, is now available in ten (10) franchises in the St. Cloud, Minnesota area and two (2) franchises in the East Bay area of San Francisco, California. Seren has plans to file additional franchise applications in adjacent communities in the coming months.

BACKGROUND

Seren Innovations, Inc., dba. Astound Broadband, is a five year old company that began the delivery of facilities based local and long distance telephone, High Speed Internet and multichannel video services in late 1998, initially to St. Cloud, Minnesota and three surrounding communities. Since then, Seren has expanded its service territory to five townships and the community of St. Joseph. Seren also has been active in the East Bay area of San Francisco, and in 1999 signed franchises in Concord and Walnut, California. Seren has over the 20,000 cable subscribers in these markets and is looking to expand into other adjacent communities.

These proceedings are of significant importance to us. Fair access to competitive programming remains absolutely essential to our vitality. Advanced technology and stellar customer service would not afford us the ability to compete with the incumbent cable operator unless we also offer competitive programming content. Without competitive content we would be doomed to failure.

The Commission must therefore find that the exclusivity prohibition continues to be necessary for Seren and Seren like MVPDs'.

Access to Programming is Key to Competition

Chairman Powell has recognized that in the broadband world "*content is king*." (*See,e.g. Telecommunications Reports, November 19, 2001 at page 5)* Key among the content question was the program access provision – Section 628 of the Communications Act. In enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that MVPD's face insurmountable hurdles in seeking access to critical programming required to compete. Congress also has found that "vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over programming distributors using other technologies." (See 1992 Cable Act, 2(a)(5). Through Section 628, Congress sought to break the cable industry's "stranglehold" over programming, which had been enforced through exclusivity arrangements exercised by cable operators and their affiliated programming suppliers. Thus, through the program access provisions, Congress directed 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." (See House Comm. On Energy and Commerce, H.R. Rep. No. 102-862,102 Con.,2d /sess, at 93(1992).

Seren has been held in an exclusive programming "stranglehold" as witnessed in our October 29, 1998, Petition to Deny The Applications of Tele-Communications, Inc. and AT&T Corporation, in CS Docket No. 98-178. When a very popular regional sports network, Midwest Sports Channel (MSC) was held out of our channel line up, by an exclusive agreement with the incumbent cable operator. The issue was later resolved when MSC was sold to Fox Sports Network, a vertically intergraded programming network. This example is offered only to show that when the incumbent cable operator can "lock out" competition, it will do so. In our situation, the incumbent was originally a Bresnan Cable operation; it was then sold to TCI, and then sold to Charter, with all three companies retaining the exclusive programming contact with MSC.

Direct, head to head facilities-based competition, is the key to providing consumers with the choice of bundled broadband services at the most competitive price. Without access to programming content, required to compete effectively with the incumbent, no amount of new services such as ITV or VOD can make up the difference.

THE COMMISSION SHOULD EXTEND THE SUNSET DATE OF THE PROHIBITION ON EXCLUSIVE CONTRACTS

Section 628 was created to promote fair competition and to stimulate the development of new technologies. Seren Innovations, Inc. has spent millions of dollars to deploy last mile facilities based broadband networks that are serving consumers with these new, state-of-the-art, broadband technologies. New entrants, such as Seren, are forced to market our services against incumbent cable operators who have substantial advantages in the competitive battle: name recognition, embedded customer base, strong economies of scale, and a corporate presence in the community.

To succeed in spite of these formidable obstacles, new entrants must be able to attract a substantial share of existing cable operator's subscribers. To do so requires the ability to offer the basic product desired by subscribers and currently available through the incumbent provider. Without the ability to secure and offer the most popular and the most variety of programming, no consumer will be willing to migrate from the incumbent– no matter how otherwise attractive and cost effective the offering might be.

Simply put, the general public cares more about content than it does about technology, corporate structure, or abstract theories of competition. Therefore, access to programming is a major key to successful implementation of competitive services. Accordingly, allowing the exclusivity prohibition to sunset will have dire consequences for competition and diversity in the national programming marketplace, and its retention is absolutely vital if broadband, facilities-based competition like Seren is to succeed.

THE COMMISSION SHOULD ADDRESS COMPETITIVE CONCERNS REGARDING ACCESS TO TERRESTRIALLY-DELIVERED, CABLE-AFFILIATED PROGRAMMING SERVICES NECESSARY TO COMPETE

Since as early as 1994, competitive MVPDs, the cable industry, and the Commission have had an ongoing debate regarding the extent to which Section 628 reaches conduct involving cable-affiliated programming services delivered by terrestrial technologies, rather than by satellite. This issue, particularly with respect to cable-affiliated regional sports programming services, is critically important to the Seren Innovations, Inc. as witnessed by our episode with Midwest Sports Channel, and one that is directly relevant to the Commission's consideration of the sunset of the exclusivity prohibition required by Section 628(c)(2)(D). As discussed more fully below, rather than eliminating the exclusivity prohibition, the Commission should instead take this opportunity to adopt regulations prohibiting discriminatory conduct and exclusive dealing arrangements involving terrestrially delivered, cable affiliated sports programming services.

Importance of Regional Sports Programming.

As the Commission recognizes in the *Notice*, "'certain programming services may be more essential than others to the viability and success of competing program distributors. Regional sports programming services that telecast local professional league games is such an essential programming service. In the *1998 Cable Report,* the Commission observed "Sports programming warrants special attention because of its widespread appeal and strategic significance for MVPDs." And in last year's report, the Commission noted that "Regional sports programming continues to be an important segment of programming for video distributors." In a report released last year, GAO likewise characterized sports programming as "marquee programming" because of its attractiveness to cable viewers

In enacting the program access provision in the 1992 Act, Congress recognized that access to existing programming services was an effective barrier to entry to new competition, in part given the sheer cost for new competitors to vertically integrate upstream into program supply to create new programming services. In the case of regional sports programming, the issue is even more extreme. Sports programming, and in particular local sports programming is unique. It cannot be duplicated by competing MVPDs or acquired from alternative sources, even if the cost of doing so were not an issue. The denial of regional sports programming to Seren would be a roadblock of our ability to survive.

<u>Cable Industry Control Over Regional Sports Programming.</u>

As was the case with satellite-delivered programming generally, prior to passage of the 1992 Cable Act, cable MSOs in markets throughout the country, have now acquired a "stranglehold" over regional sports programming – programming that is absolutely essential to continued competitive entry in what continue to be highly concentrated local markets for programming distribution. MSOs also operate significant regional clusters that compete with competitive broadband providers. As Congress found in 1992 in enacting program access with respect to cable-affiliated programming services generally, such cable affiliated sports programming services have the same "incentive" to favor their affiliated cable operators over programming distributors using other technologies."(1992 Cable Act 2(a)(5) There is little question that in the absence of the program access prohibitions contained in Section 628, they would also have the "ability" to do so, thereby thwarting entry by competitive broadband providers.

Revising the Commission's Historical View of the Program Access Provision

Section 628 has two operative sections. Section 628(b) makes it unlawful for a cable operator or a vertically integrated "satellite cable 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 MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." Section 628(c)(1) directs the Commission to prescribe regulations specifying the particular conduct that is prohibited by 628(b). Subsection 628(c)(2) specifies the "minimum content" of such regulations, including that such regulations must, at a minimum:

> To prohibit a cable operator from unduly or improperly influencing the decision of a satellite cable programming vendor to sell satellite cable programming to unaffiliated MVPDs, or the prices, terms and conditions of such sale (Section 628(c)(2)(A));
>
> To prohibit a cable-affiliated "satellite cable programming vendor" from discriminating in the prices, terms or conditions of sale of satellite cable programming to competing MVPDs (Section 628(c)(2)(B)); and
>
> To prohibit, in areas served by cable, exclusive contracts for satellite cable programming between a cable operator and a cable-affiliated satellite cable programming vendor, unless the Commission finds such contract is in the public interest (Section 628(c)(2)(D)).

The Commission has concluded that the focus of Section 628 generally, and Section 628(c)(2)'s required "minimum regulations" is on conduct involving access to "satellite cable programming" as opposed to programming delivered by terrestrial networks;[1] indeed, the Commission's regulations pursuant to Section 628(c) listing specific prohibited conduct under Section 628(b) essentially repeats verbatim the Section

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[1] *See, e.g., Echostar v. Comcast Corporation,* Memorandum Opinion and Order, 14 FCC Rcd 2089, at ¶ 20 (CSB 1999)("Section 628 is generally understood to be a mechanism for ensuring that MVPDs that are competing with traditional cable television systems are not deprived, through exclusive contracts, discriminatory pricing, or otherwise, of access to vertically integrated "satellite cable programming.").

628(c)(2) minimum prohibitions and their focus on the conduct of cable operators and affiliated programmers involving the provision of access to satellite delivered programming to competing providers.

Beginning with the *First Cable Competition Report* in 1994, competing MVPDs raised the concern that incumbent cable operators might try to shift programming previously distributed by satellite to terrestrial transmission in an effort to avoid application of the Commission's program access rules, and asked that the Commission make clear that the program access rules apply to such conduct.[2] The Commission addressed these concerns for the first time in 1996 in its *Second OVS Report and Order*.[3] While declining to extend its program access rules adopted pursuant to Section 628(c) to non-satellite delivered programming, the Commission did "not foreclose a challenge under *Section 628(b)* to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs."[4] In 1998, this time responding to a Petition for Rulemaking of Ameritech New Media,[5] the Commission again declined to impose rules under Section 628 governing the movement of programming from satellite delivery to

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[2] *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* First Annual Report, 9 FCC Rcd 7442, 7531 quoting Comments of Liberty Cable Co. ("1994 *Competition Report*") ("[U]nless corrected, the problem will grow in the future because vertically integrated programming vendors will have the incentive to modify the distribution of their programming, using fiber optics or other non-satellite means, in order to evade application of the program access requirements."). The issue has since been raised in every one of the FCC's annual video competition reports.

[3] *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* Second Report and Order, FCC Rcd 18223. (1996)

[4] *Id.* at n.451 (emphasis added).

[5] Cite.

terrestrial delivery, finding that the record before it failed to indicate a significant competitive problem.[6] The Commission continued that (emphasis added):

> While the record does not indicate a significant anti-competitive impact necessitating Commission action at this time, *we believe that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace.*[7]

After noting that Congress was at that time considering legislation on this issue, the Commission indicated its commitment to "monitor the issue and its impact on competition in the video marketplace."[8]

Since that time, the Cable Bureau, affirmed by the Commission, has denied three separate program access complaints brought under Sections 628(b) and 628(c) by non-cable MVPDs involving the refusal of cable-affiliated programmers to make available to them, terrestrially delivered regional programming services that included regional sports programming previously delivered by satellite. Two of the cases involved the regional cluster of cable MSO Comcast in the Philadelphia area, and its refusal to provide its terrestrially distributed SportsNet service to DirecTV and Echostar.[9] The third case involved the regional cluster of cable MSO Cablevision Systems in the New York metropolitan area, and Cablevision's refusal to provide its terrestrially distributed MetroChannels service to RCN.[10]

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Cite. Comcast, the nation's third largest MSO with over 8 million subscribers, has assembled a mid-Atlantic "super cluster" along the corridor from Baltimore and Washington through Wilmington and Philadelphia and into central New Jersey. Comcast reportedly has 2 million subscribers in the Philadelphia metropolitan area. According to the Commission, Comcast-Spectacor, 66% owned by Comcast, owns the NBA and NHL franchises in Philadelphia, the Philadelphia 76ers and Philadelphia Flyers, respectively. In 1996 Comcast-Spectacor and the Philadelphia Phillies formed a joint venture to create SportsNet, which now holds the rights to televise most 76ers, Phillies, and Flyers games in the Philadelphia market. SportsNet is a terrestrially delivered service. *Id.*

[10] Cite. Cablevision, one of the nation's ten largest MSOs, has an extensive regional cluster in the New York metropolitan area, providing MVPD service to approximately 2.7 million subscribers in the region. According to

In affirming the Bureau's denial of the claims under 628(c), the Commission indicated its view that the prohibitions in Section 623(c) expressly are limited to "satellite cable programming."[11] Given that statutory limitation, the Commission concluded that the Bureau properly found in all three cases that Section 628(c) had not been violated, regardless of the cable operator's decision to deliver the programming terrestrially. In other words, in the Commission's view, unless the claim involves conduct involving satellite-delivered programming, a Section 628(c) discrimination or exclusivity claim will not lie, essentially irrespective of the nature, purpose or effect of the cable operator's conduct.

As both the Commission and the Bureau have recognized in the context of these program access complaints and elsewhere, the substantive prohibition contained in Section 628(b) is not so limited, and that provision is far more general than the specific conduct prohibited under the minimum contents of regulations required under Section 628(c)(2).[12] Rather, Section 628(b) makes it unlawful for a cable operator or cable affiliated satellite programmer "to engage in unfair methods of competition or unfair or deceptive acts or practice, the *purpose or effect* of which is to *hinder significantly or prevent* any MVPD from providing satellite delivered programming . . . to subscribers or consumers." As discussed above, the Commission has

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the Commission, Cablevision owns a majority interest in Rainbow Media Holdings, which in turns owns a controlling interest in the entity which ultimately owns and controls Madison Square Garden Network ("MSG") and Fox Sports Net – New York ("Fox Sports/NY). MSG and Fox Sports/NY are satellite-delivered programming services operating in the New York metro area which own the rights to televise professional sports events of New York area teams in the National Basketball Association (the Knicks and Nets) , the National Hockey League (the Rangers, Islanders and Devils), and Major League Baseball (the Yankees and Mets). In 1998, Cablevision's Rainbow affiliate, launched MetroChannels, which is comprised of three services delivered using Cablevision's local fiber network. One of those MetroChannels services is now used to distribute "overflow" games that had previously been distributed on MSG and Fox Sports/NY. *Id.*

[11] *See, e.g.,* RCN (refusal to provide terrestrial delivered programming to a competitor is outside the anti-discrimination provision of 628(c), which explicitly prohibits discrimination "in the prices, terms, and conditions of sale of *satellite cable programming* . . .").

[12] In this regard, we note that the *Notice* states that "Section 628(b) applies to satellite programming." This is both wrong, and inconsistent with the Commission's prior findings.

repeatedly found that "There may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming."[13] In other words, under this prohibition, unlike the Section 628(c) minimum regulations, the Commission has found correctly that there is no requirement that the conduct directly involve satellite delivered programming; only that, it is an "unfair method of competition or deceptive act or practice" and that the conduct has the purpose or effect of hindering significantly or preventing the competing MVPD's delivery of satellite delivered programming. In the three program access complaints, the Commission essentially was unconvinced, that the migration to terrestrial delivery was for the purpose of evading the Commission's rules, and hence an unfair method of competition or practice, or for the purpose of preventing distribution of a satellite programming service.[14]

The Commission's Narrow Construction Of The Law Threatens The Ability Of MVPDs To Secure Essential Sports Programming From Increasingly Clustered And Vertically-Integrated Cable Incumbents.

Given the Commission's existing program access rules adopted pursuant to 628(c)(1) and its construction of Section 628(b), cable operators have significant freedom, with the thinnest of justifications, to move affiliated satellite programming services to terrestrial delivery, and thereby avoid application of the rules' prohibition on discrimination and exclusive contracts. As discussed above, given the absence of the program access limitations, cable operators now have, not only the incentive, *but the ability* to use their control over regional sports programming to

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[13] *See, e.g., RCN* at ¶ 15;

[14] Based on these decisions, it appears that a terrestrial migration complaint will be denied if the cable operator can show that there were legitimate and significant cost savings and efficiencies associated with the move, a relatively low threshold for operators to meet.

foreclose competitive entry from competing distributors. The threat here is far from insignificant or illusory, but is palpable and real.[15]

As discussed above, in New York, Philadelphia and D.C., the incumbent cable operator has established a strong local cluster, has acquired a controlling interest in the regional sports network with distribution rights to local professional sports, and has moved distribution of sports programming previously distributed by satellite, to a terrestrial network. Fiber-based networks now deliver local cable programming in other markets across the country, including Chicago, Boston, Indianapolis, Minneapolis, Orlando, Columbus, and Kansas City.[16]

The Commission's ruling in *Comcast* essentially suggests that aggregating all of the transmission rights to virtually every local professional sport event in a metro area with the clear intent of eliminating DBS access to previously satellite-delivered regional sports programming is not an unfair practice. The Commission and the Bureau have made much of Comcast's representations, that apart from its refusal to distribute SportsNet to DBS providers, it still deals with all other competing MVPDs in the area.[17] At the same time, the Commission is silent as to what claim or remedy competing providers might have, should Comcast decide at some future point, for whatever reason, to discontinue providing this critical service to competitors, or to do so on discriminatory terms and conditions.[18] As one analyst has noted, "If you want to see these teams on the tube in Philly, you need Comcast."[19]

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[15] *See Ameritech* at 71.

[16] *See* WCA Comments at 4 in Docket No. 01-129.

[17] Cite.

[18] In this regard, RCN has provided in its comments for the *2002 Cable Report* examples of anticompetitive strategic conduct, short of an actual refusal to deal by Comcast, involving its control over SportsNet. According to RCN, Comcast was initially unwilling to provide it with access to SportsNet to distribute on a an overbuilt system competing with Comcast, and eventually only agreed to a short term agreement. Comcast has since refused to enter into a multi-year industry-standard contract for local sports programming in Philadelphia typical for the industry, but keeps RCN on a revolving three-month renewal. This leaves RCN in a tenuous position as it seeks to persuade

The same, of course can be said in New York and other markets. Even where cable-controlled sports programming is today delivered by satellite, as discussed above, the Commission has set an extremely high bar for challenging migration to terrestrial distribution as unfair competition under Section 628(b). As one commentator has noted about New York, in a comment that is equally apt in markets throughout the country, through exclusive arrangements such as that of Cablevision and New York professional sports teams, "the Yankees have allowed Cablevision to preclude potential competitors from entering the New York cable market".

In its most recent *Cable Report,* the Commission recognized the potential adverse impact from terrestrial distribution of sports programming, and its removal from the ambit of the program access rules:

> We recognize that the terrestrial distribution of programming, including in particular regional sports programming, could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace. We will continue to monitor this issue and its impact on the competitive marketplace.[20]

Seren Innovations, Inc. respectfully submits that no further monitoring is required. Critically important regional sports programming is today being distributed terrestrially in key markets. There is no question regarding the incentive and ability *today* of cable operators to use their control over this programming to engage in predatory conduct; they already have. There is a problem that needs to be fixed, and rather than continuing to merely monitor the issue, the time for the Commission to act is now.

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existing Comcast subscribers to try the newcomer: while RCN currently has the SportsNet programming, it cannot provide assurances that it will continue to have such programming over the long run. Cite.

[19] Business Week Online, June 1, 2001 Friday, Why Comcast Leads the Pack (available at http://www.businessweek.com/bwdaily/dnflash/may2001/nf2001061_141.htm)

[20] *2001 Cable Report* at ¶ 15.

The Commission Should Modify its Program Access Rules to Apply to Terrestrially Distributed Regional Sports Programming.

Given the foregoing, the Commission should adopt rules pursuant to its authority under 628(c)(1) making clear that discriminatory conduct and exclusive contracts involving cable-affiliated regional sports networks are within the prohibition of Section 628(b). While the movement of satellite programming to terrestrial distribution to evade the program access rules may continue to be actionable under 628(b), the migration of programming should not be the touchstone of the 628(b) violation. Rather the harm to competition is caused by the refusal to deal, or other discriminatory term or condition. Seren Innovations, Inc. believes that given the undisputed record on the importance of regional sports programming to the viability of MVPD entry, a rule which prohibits discrimination and exclusive contracts for such programming is well within the Commission's direct jurisdiction under Section 628.

As discussed above, 628(b) makes it unlawful for a cable operator or a cable-affiliated satellite programmer "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 MVPD from providing satellite cable programming . . . to subscribers or consumers." Section 628(c)(1) directs the Commission to prescribe regulations specifying the particular conduct that is prohibited under Section 628(b). The limits of those regulations may be drawn, in the first instance, from the language of 628(b) itself (as well as statements in 628(a) as to the purpose of the section, and in 628(c)(1) as to the purpose of the regulations).

As the Commission recognized in its *Second OVS Report and Order,* in extending the program access regime to cable affiliated OVS program providers,

> We believe that Section 628(b) authorizes the Commission to adopt additional rules to accomplish the program access statutory objectives 'should additional types of conduct emerge as barriers to competition and obstacles to *the broader distribution of satellite cable and broadcast programming*.[21]

In addition, the Commission made clear in its *Third OVS Report and Order*, in rejecting the NCTA's challenge to the Commission's extension of its program access rules, in the event that such additional obstacles do emerge, Section 628(b) is:

> a "clear repository of Commission jurisdiction" to address those obstacles. By entitling Section 628(c) "Minimum Contents of Regulations," Congress gave the Commission authority to adopt additional rules that will advance the purposes of Section 628; *it did not limit the Commission to adopting rules only as set forth in that statutory provision.*[22]

We think that the language and intent of 628(b) would permit a regulation prohibiting refusals to deal and other discriminatory conduct involving essential or critical programming owned by cable operator, whether or not such programming is distributed by satellite. There is no dispute that refusals to deal and other discriminatory conduct can constitute unfair competition or unfair acts or practices for purposes of Section 628(b).[23] In addition, given the importance of such programming to competitive providers, there is similarly no question that refusals to deal and other discriminatory conduct with respect to such programming can hinder

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[21] *Second OVS Report and Order,*

[22] *Third OVS Report and Order,*

[23] In the *Program Access Report and Order*, the Commission recognized that among the types of discrimination covered by Section 628(c)(2)(B), are forms of non-price discrimination such as a vendor's "'unreasonable refusal to sell' or refusing to initiate discussions with a particular distributor when the vendor has sold is programming to that distributor's competitor" 8 FCC Rcd 3359, (1993). Since 628(c) sets forth the "minimum contents of regulations" that are to "specify particular conduct that is prohibited by subsection (b)" unreasonable refusals to deal can obviously be "unfair methods of competition or unfair or deceptive acts or practices" within Section 628(b).

significantly or prevent an MVPD from entering and providing satellite programming to subscribers.[24]

Finally, even if the Commission were to conclude that it did not have direct authority under Section 628(b) to prevent cable operators from refusing to provide terrestrial delivered sports programming to competing MVPDs, the Commission has ancillary authority to prohibit such conduct under Sections 4(i) and 303(r) of the Communications Act.[25] Indeed, the Commission has explicit authority to adopt the provision here under another provision of the Communications Act added by the 1992 Cable Act – Section 613(f)(1) relating to horizontal ownership limitations. That provision requires the Commission to "prescribe rules establishing reasonable limits on the number of cable subscribers a person may reach" and consider the necessity and appropriateness of imposing limitations on the degree to which MVPDs may engage in the creation or production of video programming."[26] In proscribing such rules, the Commission is directed to ensure, *inter alia*, that no cable operator because of its size can "unfairly impede the flow of video programming from the video programmer to the consumer"

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[24] In its comments on Ameritech New Media's program access rulemaking petition, NCTA essentially urged the same construction of Section 628(b). *See* Ameritech Report and Order at 67 ("NCTA asserts that the test under Section 628(b) is not whether the denial of a particular programming service to an MVPD significantly hinders or prevents the MVPD from providing that programming to service. The test is whether the unavailability of a service has a significant adverse effect on the ability to compete in the provision of video programming to subscribers or consumers.").

[25] 47 U.S.C. §§ 154(i), 303(r). *See also City of Dallas v. FCC*, 165 F.3d 341, 352 (5th Cir. 1999)("If FCC had ancillary authority to adopt an entire regulatory regime for cable television, it surely has ancillary authority to extend" a regulatory regime to a class of providers not explicitly included in the statute).

[26] Communications Act, § 613(f)(1)(A), (C). As indicated in the *NPRM* (at ¶ 9), the Commission recently initiated a proceeding to resolve the D.C. Circuit's remand of its horizontal ownership rules adopted pursuant to Section 613(f). The Commission notes that the remand proceeding "will directly address the effect of consolidation and vertical integration on the market for video programming production and packaging" and asks for comment on the impact of the remand proceeding here.

and that cable operators affiliated with video programmers do not "unreasonably restrict the flow of the video programming of such programmers to other video distributors."[27]

[27] *Id.*

CONCLUSION

For all the foregoing reasons, the Commission should extend the sunset date of the prohibition on exclusive contracts as such prohibition is necessary to preserve competition and diversity in the national MVPD marketplace. The statutory limits on exclusivity are vital to competitive MVPD entrants and the Commission would be gravely threatening broadband competition if it allowed the prohibition to lapse.

In addition, the Commission should take this opportunity to modify its program access rules to prohibit discriminatory and exclusionary conduct involving cable-affiliated regional sports programming services that are delivered terrestrially.

Respectfully submitted,

SEREN INNOVATIONS, INC.

By:______________________

Dated: December 3, 2001

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