

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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 THE COMPETITIVE BROADBAND COALITION

**CT Communications Network, Inc.
First Mile Technologies, LLC
Lexcom Cable Services, LLC
Next Level Communications
Paul Bunyan Rural Telephone Company
RTC Communications Corp.
VideoTele.com, Inc.**

December 3, 2001

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Summary

The Competitive Broadband Coalition urges the Commission to extend the current prohibition on exclusive contracts for vertically integrated satellite cable and satellite broadcast programming. Both the statute and its legislative history make clear that any determination to allow the prohibition on exclusive contracts to sunset requires the Commission to find that competition and diversity in video programming distribution will not be adversely affected. The cable industry, by far the dominant MVPD, has become increasingly concentrated and the programming market continues to be vertically integrated to a large degree. Access to video programming remains the key to fostering MVPD competition and the deployment of competing advanced broadband networks. The ten-year sunset period envisioned by Congress in 1992 to allow a competitive market to develop has proven to be overly optimistic. Additional time is required to ensure that repeal of the exclusivity prohibition will not erode the gains competition has made in the MVPD market.

The growth of DBS would not justify allowing the exclusivity prohibition to sunset. The cable industry's MVPD market share remains five times that of DBS, its next largest competitor. Furthermore, unlike any other competitor in the MVPD market, DBS is unique in that it has a national reach. Its uniqueness makes it particularly unsuitable as a bellwether for predicting the impact that elimination of the exclusivity prohibition would have on competition from local facilities-based advanced broadband networks. This is particularly true where, unlike DBS, such competitors are offering bundled video, voice and data services to match similar offerings by cable companies. Nor should the Commission use the effective competition test developed for rate regulation purposes to determine whether or not to retain the exclusivity prohibition. The policies underlying the rate regulation and program access

provisions of the Act are not interchangeable. The very incentives which the statute seeks to create for rate regulation purposes would actually undermine the goals of program access.

The exclusivity prohibition has a continuing role to play in fostering competition and the deployment of facilities-based networks capable of offering advanced broadband services. Content remains the driving force behind the deployment of such networks, a fact acknowledged by cable industry executives. Without access to comparable video content, such networks cannot be economically justified and deployment will cease. Access to video content is essential not only to increase competition for video services, but also to ensure the deployment of competing broadband networks capable of providing bundled multimedia services.

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COMMENTS OF THE COMPETITIVE BROADBAND COALITION

The Competitive Broadband Coalition (“CBC”) hereby respectfully submits these comments in response to the above-captioned *Notice of Proposed Rulemaking* released by the Federal Communications Commission (“FCC” or “Commission”) on October 18, 2001.¹ CBC urges the Commission to extend the current prohibition against exclusive contracts for vertically integrated satellite cable programming and/or satellite broadcast programming, contained in section 628(c)(2)(D) of the Communications Act of 1934, as amended (“Communications Act” or “Act”), beyond the current October 5, 2002 sunset date.²

1. INTRODUCTION

CBC is a group of companies, representing various segments of the broadband industry, who share a common understanding that nondiscriminatory access to video programming content is essential to the successful deployment of competitive broadband

¹ *Notice of Proposed Rulemaking*, CS Docket No. 01-290, FCC 01-307, 66 FR 54972 (October 31, 2001) (“NPRM”).

² 47 U.S.C. §548(c)(2)(D).

facilities throughout the United States. CBC participants include multichannel video programming distributors (“MVPDs”) utilizing a variety of technologies and network architectures, such as fiber to the curb, traditional hybrid fiber/coax, and xDSL over copper pair to provide consumers with a competitive alternative source for video programming and other services, as well as equipment manufacturers, software developers and systems integrators that provide products and services supporting the development and implementation of broadband networks. All participants have a keen interest in, and would be directly affected by, the outcome of this proceeding. A brief description of the individual companies follows.

CT Communications Network, Inc. (“CTCN”) is a wholly owned subsidiary of The Champaign Telephone Company, an independent 100-year-old telephone company serving 171 square miles of rural Champaign County in west-central Ohio with 12,000 access lines. CTCN is now beta testing, and will soon be marketing, a digital television service that will be delivered to the home over regular telephone lines via a DSL-type broadband connection. The video service will consist of 134 channels of local broadcast, network, and premium programming, an interactive program guide, pay-per-view with on-screen information and ordering, parental controls, video on demand service with DVD-quality, and full VCR-type functionality. The DSL platform will also be used to deliver high-speed, broadband Internet content to the television as well as to personal computers.

FirstMile Technologies,LLC (FirstMile) is a broadband services provider focused on private new home and apartment residential communities. A facilities-based carrier, FirstMile utilizes a hybrid fiber/coax plant architecture. Voice, data, and video services are delivered over a single coax drop to each home served. FirstMile’s bundled services now include local

and long distance telephone, video entertainment, high-speed Internet access, community Intranet, and security monitoring services. The company is based in Indianapolis, Indiana, where it is currently deploying its capabilities to eight residential communities throughout the metropolitan area. Expansion beyond Indianapolis is targeted for several additional metropolitan areas in states where FirstMile has obtained authority to operate as a competitive local exchange carrier (“CLEC”).

Lexcom Cable Services, LLC (“Lexcom”) is a wholly-owned subsidiary of Lexcom Telephone Company, a 105 year old independent local exchange carrier (“ILEC”) serving 206 square miles of Lexington, and rural Davidson County, NC with 33,386 access lines, 5500 dial-up internet subscribers and 58 DSL subscribers.. Lexcom Cable operates a traditional hybrid fiber/coax facility as a franchised cable operator in the City of Lexington and Davidson County, North Carolina in direct head-to-head competition with AOL Time Warner. Lexcom Cable presently offers it’s 10,400 subscribers 88 video channels along with cable modem high speed internet access for 1200 of it’s cable subscribers.

Next Level Communications (“Next Level”) is a world leader in integrated broadband access platforms for delivering any combination of voice, high-speed data and multi-stream digital video services into the home or office. Next Level offers a unified multi-service, multi-band platform that lets communications service providers deliver a virtual communications and entertainment center over existing copper telephone lines. Founded in 1994 and headquartered in Rohnert Park, Calif., the company has deployed its state-of-the-art systems for more than 110 communications service providers worldwide.

Paul Bunyan Rural Telephone Cooperative (“Paul Bunyan”) is a member owned cooperative formed in 1952. The cooperative’s local exchange area covers some 3,300 square

miles of rural north-central Minnesota and also offers dial-up Internet and long distance services to non-members in an additional 2,000 square miles. Paul Bunyan's service area increased in 2000 when it was granted authority as a CLEC to provide competitive voice and data services in and around the City of Bemidji. Membership now represents more than 17,000 access lines. Paul Bunyan, as a certified open video system ("OVS") operator, offers bundled high-speed Internet and digital television services to much of its ILEC and CLEC areas over its existing telephone plant using Next Level's VDSL platform. In its CLEC area, Paul Bunyan's digital television service competes with Charter Communications. In most of its ILEC area, which geographically represents the majority of the 3,300 square miles served, Paul Bunyan is providing residents their first-ever option to receive high-speed Internet or a "wired" local television service.

RTC Communications Corp. ("RTC") is a wholly owned subsidiary of Rochester Telephone Co. Inc., an independent 105-year-old telephone company serving 260 square miles in north-central Indiana with 9,000 access lines. RTC began providing service as a facilities-based CLEC in September, 2000. RTC has built a fiber-to-curb distribution system that provides telephone, cable television and data services in Akron, Indiana. The present video offering includes 65 channels of local broadcast, network, and premium programming.

VideoTele.com, Inc. ("VideoTele.com") is the single source supplier of Digital Headend solutions enabling home entertainment delivery via the broadband Internet. Building on 20 years of experience in video over telecommunications networks, VideoTele.com assists broadband providers with innovative products, strategic consulting, and premier performance in system design, deployment and support. VideoTele.com's Digital Headend solutions are

used today by regional Bell Operating Companies (“RBOCs”), ILECs and CLECs. Headquartered in Lake Oswego, Oregon, VideoTele.com is a subsidiary of Tektronix, Inc.

2. SECTION 628(c)(2)(D) OF THE ACT SHOULD NOT BE ALLOWED TO SUNSET PREMATURELY

In 1992, Congress amended the Communications Act to prohibit exclusive contracts for satellite cable and satellite broadcast programming between vertically integrated programming vendors and cable operators. Section 628(c)(2)(D) of the Communications Act required the FCC to prescribe regulations that:

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 . . . that such contract is in the public interest.

47 U.S.C. §548(c)(2)(D). The FCC was directed to re-examine the prohibition on exclusive contracts during the tenth year of its existence to determine whether it should be retained or allowed to sunset. Thus, section 628 (c)(5) of the Act provides:

The prohibition [on exclusive contracts] 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.

47 U.S.C. §548(c)(5). The Commission has commenced this proceeding pursuant to section 628(c)(5) of the Act to determine whether the prohibition on exclusive contracts for satellite cable and satellite broadcast programming between vertically integrated programming vendors and cable operators continues to be “necessary to preserve competition and diversity in the distribution of video programming.”

As the statutory language clearly states, any determination to allow the prohibition against exclusive contracts to sunset requires the Commission to find that competition and diversity in video program distribution will not be adversely affected or threatened thereby. While the video program distribution market is somewhat more competitive than it was in 1992, when the exclusivity prohibition was enacted, that market has not yet reached a level of competition that is sustainable should the exclusivity prohibition be allowed to sunset. Cable remains by far the dominant MVPD, accounting for over 80 percent of the MVPD market.³ According to the Commission's 7th *Annual Report*, the programming market continues to be vertically integrated to a large degree, with 99 out of 281 nationally distributed cable networks, representing 35 percent, being vertically integrated with at least one cable MSO.⁴ At the same time, the cable industry has become increasingly consolidated, so much so that, for the first time, the *Television and Cable Factbook* has begun ranking the top 25 cable operators rather than the top 50.⁵ The prohibition on exclusive programming contracts continues to be essential to ensure the development of a competitive market for video distribution. The modest inroads that competition has made into cable's overwhelmingly dominant MVPD market share must be weighed against that industry's continued control over a substantial segment of program production and its increasing horizontal concentration.

The legislative history accompanying passage of section 628 clearly indicates that Congress was concerned with the increasing vertical integration of ownership within the cable

³ *Implementation of Section 19 of the 1992 Cable Act, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, Seventh Annual Report, 16 FCC Red 6005 at Appendix C, Table C-1 (2001) ("7th Annual Report").

⁴ 7th *Annual Report* at ¶173.

⁵ Warren Publishing, Inc., *Cable Operators Feel Pressure As Take Rate Slows*, Warren's Cable Regulation Monitor (November 26, 2001).

television industry, and the ability of that industry to stifle the emergence of competition through its control of the most popular satellite cable programming services.

The Committee received much testimony about cable operators exercising their market power derived from their de facto exclusive franchises and lack of local competition. This testimony provided evidence that programmers are sometimes required to give cable operators an exclusive right to carry the programming . . . as a condition of carriage on the cable system.

* * *

[T]he Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors. The provisions adopted in the legislation reflect that concern.

* * *

Vertical integration in the cable industry raises two concerns. First, the Committee received testimony that vertical integration gives cable operators the incentive and ability to favor their affiliated programming services.

Second, the Committee received testimony that vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms. Alternatively, these cable programmers may simply refuse to sell to potential competitors.

S. Rep. No. 92, 102d Cong., 1st Sess. 24-25 (1991) (“*Senate Report*”). The adoption of section 628 of the Act in 1992, embodies the realization, equally valid today, that full and nondiscriminatory access to video programming content is a *sine qua non* for the development of meaningful and robust MVPD competition. Congressman Tauzin, in introducing the House amendment that eventually formed the basis for section 628, characterized program access as the “heart and soul” of the 1992 Cable Act and clearly indicated that access to video programming content was the key to creating facilities-based competition.⁶ Without access to

⁶ Congressional Record, H6533-6535 (July 23, 1992).

comparable video content from multiple competing MVPDs, consumers will not have a meaningful choice of content providers and facilities-based competition cannot be sustained.⁷

Congress' purpose in enacting the program access provisions of the Act is set forth in section 628(a), which states:

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.

47 U.S.C. §548(a). As the foregoing language indicates, the statutory goals are threefold. First Congress sought to increase competition and diversity in the multichannel video markets. Second Congress sought to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural markets and other areas not currently able to receive such programming. Third, Congress desired to spur the development of new communications technologies. Insufficient progress has been made in each of these areas to justify allowing the prohibition on exclusive contracts to sunset.

When Congress enacted section 628, it envisioned a future time when a fully competitive marketplace would allow marketplace solutions to displace regulatory prohibitions and included a sunset provision in the statute. Wisely, the Congress also gave the Commission the authority to extend the prohibition beyond the sunset date if events failed to transpire. In fact, competition has developed more slowly than anticipated by Congress in 1992. The fact that Congress felt compelled to undertake a major rewrite of the

⁷ The Conference Report evidences Congress' clear desire that section 628 be used by the Commission to encourage facilities-based competition to incumbent cable systems. "The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable . . ." H.R. Conf. Rep. No. 862, 102d Cong, 2d Sess. 93 (1992).

Communications Act in 1996 to create the regulatory predicate for the development of a competitive communications market serves to underscore that the ten-year initial term for the exclusivity prohibition originally envisioned by Congress in 1992 was unduly optimistic. Furthermore, even after the regulatory prerequisite for such competition was established in 1996, the technological predicates that would allow competitive facilities to be built in an economically feasible manner were not yet in place. Unfortunately, once these preconditions finally began falling into place, the capital markets in the telecommunications sector drastically constricted. As a result, the investment in new technologies and expenditures for network improvements have been severely curtailed. While regulatory and technological conditions may be ripe for the deployment of new competitive broadband facilities, financial conditions are not allowing such deployment to occur at the pace that might otherwise occur in a more conducive financial market. As a result, nascent competition has not yet reached the point where Congress envisioned the exclusivity prohibition would no longer be necessary, and an extension of the exclusivity prohibition is required.

3. THE COMMISSION SHOULD NOT FOCUS EXCLUSIVELY ON DBS

The *NPRM* notes that the cable industry's share of the MVPD market has fallen from 95.5 percent in 1992 to 80 percent today, largely due to the growth of DBS.⁸ It also questions whether the availability of DBS service throughout the United States represents “effective competition” to the cable industry that would justify elimination of the exclusivity prohibition.⁹ Any suggestion that the exclusivity prohibition should be tied to the availability or market penetration of DBS is misplaced for several reasons.

⁸ *NPRM* at ¶8, citing the 7th Annual Report at Appendix C, Table C-1..

⁹ *Id.*

First, as the very market share figures cited by the Commission indicate, the cable industry remains the overwhelmingly dominant MVPD nationwide, with a market share more than five times that of DBS, its largest competitor.¹⁰ While the growth of DBS is certainly an indication that competition is developing, the cable industry's continued dominance and increasing concentration strongly suggest that such competition may not be sustainable should cable operators be allowed to use program exclusivity as a tool to stifle competition. Past experience indicates that rather than encouraging program diversity, program exclusivity will reduce consumer choice of competing MVPDs as these MVPDs lose access to vertically integrated video programming services. The legislative history of the program access provisions is replete with testimony as to use of exclusivity as a means to successfully stifle emerging competition.¹¹ The fact that Comcast, presently the third largest cable MSO, has chosen to use terrestrial fiber transport in place of satellite transport to distribute popular regional sports programming in which it has an ownership interest so as avoid having to sell that programming to its competitors serves to highlight the desire and willingness of large and powerful cable MSOs to withhold programming product from their competitors if permitted to do so.¹²

CBC members have experienced difficulties in obtaining video programming. For example, CTCN, a registered and franchised cable operator, has been unable to purchase the

¹⁰ Cable's market share dominance is far greater when compared to facilities-based terrestrial competitors.

¹¹ *Senate Report* at 24-28. *See also*, H.R. Rep. No. 682, 101st Cong. 2d Sess. 90-92 (1990) ("*1990 House Report*").

¹² *DIRECTV v. Comcast*, 13 FCC Rcd 21822 (CSB 1998); *EchoStar v. Comcast*, 14 FCC Rcd 2089 (CSB 1999); *cases consolidated and review denied*, Memorandum Opinion and Order, 22 CR 898, 2000 FCC LEXIS 6130 (2000). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, Seventh Annual Report, 22 CR 1414, 2001 FCC LEXIS 98 (released January 8, 2001) ("*7th Annual Report*").

affiliated HITS transport service from AT&T Broadband, the nation's largest cable operator, despite repeated attempts to do so. CTCN has been stonewalled for over six months by AT&T, first being told that it would be able to purchase HITS service, then being told that it had to wait until AT&T formulated a new contract for dealing with DSL providers, and finally not receiving any return calls in response to its attempts to purchase HITS service. Based on its own experience and conversations with other companies who have experienced similar problems, CTCN believes that AT&T is refusing to sell HITS to any company using DSL technology to deliver video services over existing phone lines because such companies would directly compete with AT&T's entry into the local telephone market using both its own cable systems and the cable plant of unaffiliated cable operators.¹³ AT&T simply does not want any terrestrial based competition by other broadband networks capable of providing bundled video, voice and data services.¹⁴ There is little doubt that if programming exclusivity could be used in a like manner, cable operators affiliated with satellite delivered video programming services would not hesitate to do so. Should the exclusivity prohibition be allowed to sunset, there is a substantial likelihood that the hard won gains realized by competitive MVPDs over the last decade will be eroded.

¹³ Offering bundled local phone service both as part of its own cable offerings and of the offerings of unaffiliated cable operators appears to be a central feature of AT&T's business plan. *See, e.g.,* Mike Farrell, *AT&T: We'll Double Cash Flow*, Multichannel News (July 24, 2001); Martin J. Moylan, *AT&T Offers Cable Phone Service in Part of St. Paul, Minn.* Saint Paul Pioneer Press (November 8, 2001); Jennifer Beauprez, *Executives Defend AT&T Broadband, Vow to Become a Market Leader*, Denver Post (July 25, 2001). *Insight Communications Plans to Offer Phone Service in Indiana by 2003*, The Indianapolis Star (October 11, 2001).

¹⁴ Because they deliver video programming directly to customers via their own satellites, DBS providers such as Echostar and DirecTV do not need HITS transport services. Furthermore, the DBS medium is far better suited for providing one way "broadcast" traffic, such as multiple channels of video entertainment programming, than for providing switched two way high speed data or voice services, and thus would not pose the same triple play threat to emerging broadband cable networks as is posed by wireline DSL and fiber based competitors. *See, e.g.,* Warren Publishing, Inc., *VOD, High-Speed Data, Voice Keys To Cable Future, Operators Say*, Communications Daily (November 29, 2001).

Second, DBS is unique among MVPDs in that it is an inherently national medium. This uniqueness makes it unsuited as a benchmark by which to judge the continuing need for the exclusivity prohibition. DBS' national reach and channel line up uniformity makes it an attractive distribution outlet for national and regional video programming services.¹⁵ Even vertically integrated programming services might have some reluctance to withhold their product from this medium, which has the additional characteristic of superior digital quality.¹⁶ There can be little doubt that DBS' ubiquity as a national distribution medium explains, at least in part, the fact that DBS growth accounts for almost all of the inroads into the cable industry's MVPD market share over the last decade. However, the growth of DBS does not address the fact that there are an increasing number of local terrestrially based alternatives to the cable industry that are beginning to emerge in the competitive landscape.

Local exchange carriers, public and private utilities, and municipalities are beginning to employ new technologies such as xDSL and fiber to the home to provide facilities-based broadband alternatives to cable in rural as well as urban markets.¹⁷ Unlike DBS, these endeavors are essentially local or, in some cases, regional in scope. Hence they lack the horizontal reach of the cable companies they compete with or the national distribution capability of DBS. While even vertically integrated video programming services might be reluctant to grant exclusivity to DBS operators and potentially cut themselves off from

¹⁵ This is further underscored by the ability of DBS operator, DirecTV, from its inception, to secure exclusive rights to distribute out of market professional sports events, something that no other nascent competitor could hope to duplicate without a national audience reach.

¹⁶ Indeed, the strong support of the television broadcast industry for the "local into local" provisions of the Satellite Home Viewer Improvement Act and the implementation of those provisions by the FCC suggests that at least some of these strengths carry over to the local program distribution market as well.

¹⁷ The markets served by CTCN and Paul Bunyan are extremely rural. In fact, Paul Bunyan's DSL-based video and high speed data services are the only terrestrial services of the kind available in the majority of its service area.

national distribution outlets serving approximately 15 percent of the MVPD market, there are no such constraints to protect emerging local and regional MVPDs.¹⁸ Accordingly, even if one were to accept for argument's sake the premise that DBS, as a national outlet, represented "effective competition" to cable in the program acquisition and production market, this would not justify eliminating the exclusivity prohibition for local competitors such as OVS, private cable, SMATV and other competitive MVPDs.¹⁹ Such local MVPDs are as much in need of the protection afforded by the exclusivity prohibition today as they were in 1992 when section 628 was enacted.²⁰

Third, just as the Commission uses different attribution standards depending on the policy goals underlying the rules to which the attribution standards apply, it should judge the presence of competition for purposes of the sunset provision of section 628 based on the Congress' clearly articulated policies in adopting the exclusivity prohibition. To this end, the Commission should not, as suggested in the *NPRM*, judge whether or not to retain the exclusivity prohibition based upon a mechanical application of the definition of "effective competition" used for rate regulation purposes contained in section 623 of the Act. The goals and policies of section 623 and section 628 are quite different and are not interchangeable.

The purpose of section 623 was to rein in cable rates and protect consumers from rate gouging by incumbent monopolies. It was believed that a credible threat of competition in a

¹⁸ 7th Annual Report at ¶61.

¹⁹ CBC does not believe that DBS has yet reached competitive parity with the cable industry despite its national reach. This is born out by a recent Government Accounting Office ("GAO") study, which reviewed 1998 cable rates, found that greater DBS penetration was correlated with somewhat higher cable rates and that the presence of a nonsatellite competitor, such as another cable company or a wireless cable operator, was more likely to result in lower cable rates. GAO Report to Congressional Requestors, *The Effect of Competition from Satellite Providers on Cable Rates*, July 2000 at 7 ("GAO Study").

²⁰ The greatly increased horizontal concentration of the cable industry over the last ten years in and of itself represents a far greater impediment today to the deployment of small and medium sized competitive networks and their ability to obtain programming of all types than when the exclusivity prohibition was first enacted.

given community would act as a sufficient marketplace check on cable rates, even without a substantial erosion of the cable operator's market share.²¹ The mechanics are simple. Faced with the threat of competition, the cable operator will aggressively respond to protect its market share by cutting rates or restraining rate increases and, in some cases, by adding services as well.²² Such a response is entirely consistent with the goals of section 623 to lower rates and improve service.

In contrast, as stated above, the goals of section 628 of the Act are to encourage the development of competition and diversity in video distribution; to expand the availability of video programming in rural areas; and to foster the development of new communication technologies. Use of the section 623 effective competition standard to determine whether to retain the prohibition on exclusive contracts between cable operators and vertically integrated satellite programming services would actually undermine, rather than further, this purpose. When faced with the threat of competition, cable operators would act aggressively to protect their existing market share. If allowed to do so, there can be little doubt that horizontally concentrated cable companies would employ their leverage over vertically integrated programming services to protect that market share by denying video product to their competitors.²³ Without access to popular video programming services, existing competitors

²¹ Under two of the three effective competition tests, the cable operator need not lose any market share. Under the LEC test, effective competition exists as long as comparable service is available in the community from a LEC and the LEC begins to market its service. Under the low penetration test there need not even be a competing MVPD in the community. Only the head to head test requires competing MVPDs to capture a specific share of the market to establish the presence of effective competition.

²² See 7th Annual Report at ¶¶213-236.

²³ Paul Bunyan operates an OVS facility that currently competes head-to-head with Charter in a number of communities in Minnesota. Paul Bunyan has been unable to offer the Disney Channel, a service which is not vertically integrated, to its customers in those communities due to an exclusive contract between Disney and Charter. Charter affirmatively markets itself as the exclusive source of the Disney Channel in competing with Paul Bunyan for customers. The Commission should not exacerbate the competitive difficulties already faced by

would be crippled, nascent competitors will not emerge, and the statutory goals would be thwarted.

4. SECTION 628(c)(2)(D) HAS A CONTINUING ROLE TO PLAY IN THE DEPLOYMENT OF ADVANCED BROADBAND NETWORKS

The *NPRM* requests comment on whether “the prohibition against exclusive contracts has been effective during the period of its existence as a deterrent to anticompetitive behavior and whether it has a continuing role in preventing such behavior.”²⁴ Both of these propositions are true. Competition has been able to gain a foothold in the MVPD market in significant part because section 628 has allowed competitors to gain access to vertically integrated video programming services. It is equally true that such access remains essential for the survival and continued growth of such competition, not only for video entertainment programming but for the full panoply of advanced services to be offered over advanced broadband networks.

The exclusivity prohibition has also helped to increase the availability of satellite-delivered programming and the deployment of new communication technologies to rural and underserved areas, the other two purposes for which it was enacted. The ubiquity of DBS services throughout the country has played an important role in reducing the disparity between urban and rural areas with respect to the availability of video programming. Without the exclusivity prohibition, this could not have occurred. However, DBS is only one of several technologies now being deployed to provide video programming and other advanced communications services in rural as well as urban areas. Over the last few years, advances in

alternative MVPDs by allowing cable operators to withhold vertically integrated programming from their competitors.

²⁴ *NPRM* at ¶8.

technology and changes in the regulatory landscape have made it possible for telephone companies to provide video programming to their customers within their telephone service areas. CTCN and Paul Bunyan are two of an increasing number of rural independent telephone companies which are taking advantage of advances in video compression and xDSL technology to offer secure, high quality digital video programming services within their telephone service areas in competition with local cable companies.²⁵ The same platform investment also supports the simultaneous provision of high speed Internet access and improvements to existing voice service, all over the same twisted copper pair that until recently could be used to provide only analog voice and 56k dial up service. These advanced services are provided in extremely rural areas and actually exceed the level of service which is available in parts of the Baltimore, MD-Washington, DC metropolitan corridor.

Additionally, private companies, public and private utilities, RBOCs and even some municipalities are now in the process of deploying direct to home optical fiber networks that are viewed by many as the next generation digital infrastructure that will provide limitless bandwidth and communications capacity to the home.²⁶ Some of these networks, such as the network operated by the Grant County Public Utility District in Grant County, Oregon have been constructed in very low density rural areas.

Regardless of the technology employed, it is universally acknowledged that the provision of video entertainment programming over these networks is essential to ensure their

²⁵ Although both companies employ xDSL over copper telephone plant, CT Communications Networks, Inc. has chosen to operate as a registered and franchised cable system while Paul Bunyan is currently operating as a certified OVS provider.

²⁶ See, e.g., Ann E. Marimow, *Palo Alto, Calif., to Try Out Fiber-Optics Service in Homes, Schools*, San Jose Mercury News (August 27, 2001); Clint Swett, *Sacramento County, Calif., Residents Get Cable, TV, Telephone Choices*, Sacramento Bee (November 8, 2001).

