

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

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

**To the Commission:**

**COMMENTS OF THE  
AMERICAN PUBLIC POWER ASSOCIATION**

The American Public Power Association (APPA) urges the Commission to retain and expand the prohibition on exclusive contracts in Section 628(c)(2)(D) of the Communications Act. That provision has contributed greatly to the development of competition in the distribution of video programming in communities served by members of APPA. Allowing it to expire on October 5, 2002, would seriously jeopardize competition in these and potentially hundreds of other communities.

**INTEREST OF APPA**

APPA is a national service organization that represents the interests of more than 2,000 consumer-owned, not-for-profit electric utilities. Approximately one of every seven Americans receives electricity from one of these utilities, which are operated by municipalities, counties, authorities, states and public utility districts in all states except Hawaii. Although some of APPA's members are located in large cities – including Cleveland, Jacksonville, Los Angeles,

Memphis, Nashville, San Antonio, Seattle and Tacoma – three-quarters serve communities with less than 10,000 residents.

In the late 1980s, long before the advent of private-sector “overbuilders,” the City of Glasgow, Kentucky, showed that a small, rural community of 14,000 residents can obtain the benefits of competition and diversity in video programming by establishing its own public communications system through its publicly-owned electric utility. Since then, scores of other members of APPA have followed Glasgow’s example and begun to provide communications services, and many additional systems are under development or study today. Thus, if concerns about anti-competitive practices by incumbent providers can be overcome, public communications systems could become major sources of competition for incumbent cable operators during the next few years, alone or in strategic partnerships with entities in the private sector. APPA’s goal in this proceeding is to encourage the Commission to do everything possible to facilitate this result.

## **DISCUSSION**

### **1. The Commission Should Find That the General Prohibition on Exclusive Contracts in Section 628(c)(2)(D) Continues to Be Necessary**

The general prohibition on exclusive contracts set forth in Section 628(c)(2)(D) will expire on October 5, 2002, unless the Commission finds, pursuant to Section 628(c)(5), that such prohibition continues to be necessary to preserve competition and diversity in the distribution of video programming. APPA strongly urges the Commission to make such a finding.

APPA and its members have had substantial first-hand experience with exclusive contracts of the kind at issue. In fact, APPA played a significant role in Congress’s enactment of Section 628(c)(2)(D) and in the Commission’s promulgation of its implementing rules.

As indicated, Glasgow, Kentucky, was a pioneer in bringing competitive video programming services to its community. Unfortunately, to achieve this result, Glasgow had to run a gauntlet of anti-competitive practices by the cable industry, including the use of exclusive contracts to make Glasgow's program offerings less attractive to the public than those of the incumbent cable operator. APPA and Glasgow called these practices to Congress's attention in 1992, and Congress responded forcefully by enacting numerous provisions of the Cable Television Consumer Protection and Competition Act of 1992 to deal with the problems that Glasgow had encountered.

Specifically, on April 19, 1990, William J. Ray, Superintendent of the Glasgow Electric Plant Board, presented oral and written testimony on behalf of Glasgow and APPA to House Energy Committee's Subcommittee on Telecommunications and Finance. With respect to exclusive contracts, Mr. Ray stated:

In order for a significant number of other municipalities to compete, Congress needs to address the intimidating and anticompetitive acts engaged in by the private cable industry. Such anticompetitive acts include denying access to desirable programming. For instance, Turner Broadcasting has refused to sell the Turner Network Television (TNT) channel to us and ESPN refuses to allow us to buy the rights to NFL football games from them. This year, that means that around 18 NFL games that will be vigorously advertised on ESPN, CNN, CNN Headline, and SuperstationTBS will not be available to customers of our municipally owned system. How can a cable operator carry out such policies and still not claim to be a monopoly?

Ray Statement at 6. Congress remedied this problem for Glasgow and other potential entrants enacting Section 628(c)(2)(D), and the Commission followed suit in promulgating 47 C.F.R. § 76.1002(c).<sup>1</sup>

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<sup>1</sup> In its *First Report & Order* in the matter of *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity In Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 1993 WL 756291 (rel. April 30, 1993), the Commission cited APPA's comments more than 50 times.

Over the last decade, the prohibition on exclusive contracts has indeed had the pro-competitive effects that Congress and the FCC intended. In 1992, only a small handful of communities operated public communications systems. Today, at least 91 members of APPA provide cable television service, and at least 108 provide Internet service.<sup>2</sup> APPA is certain that far fewer, if any, public communications systems would now be operating if cable operators had been free to use exclusive contracts to withhold essential video programming. In this regard, such use of exclusive contracts need not have been extensive, as denial of even a handful of “must have” channels can destroy a new provider’s ability to compete effectively against an entrenched incumbent.

APPA also submits that allowing Section 628(c)(2)(D) to lapse would have serious adverse consequences for both existing and potential providers of competitive video programming services. As the Commission notes in the Notice of Proposed Rulemaking, in providing for the potential sunset of 628(c)(2)(D), Congress “envisioned a time in which that remedial measure would be unnecessary.” *Notice*, ¶ 7. The Commission also observes that “[t]he restrictions on exclusive contracts for this ten-year period were intended to foster development of emerging competitors to cable, allowing a transition to a competitive market for the distribution of programming” (citations omitted). Unfortunately, no such “transition” has occurred. *Id.*, ¶ 5.

To be sure, the cable industry’s share of the market for subscribers of video programming services has decreased from 95.5 percent to 80 percent during the last decade. At the same time, however, the cable industry has become increasingly concentrated, and the largest operators are now even more dominant than they were in 1992. Furthermore, there is every reason to believe

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<sup>2</sup> A list of APPA’s current providers of cable and/or Internet services is appended as Attachment A.

that some or all of these dominant providers will behave as monopolists do, using every tool at their disposal to destroy competition. For chilling evidence of this, we refer the Commission the filings of Scottsboro Electric Power Board and Knology Inc. in Docket Number 01-129, which graphically document the predatory practices of Charter Communications.

In Docket 01-129, in which the Commission also requested comments on the sunset of Section 628(c)(2)(D), virtually all entities that compete with incumbent cable operators noted that the cable industry continues to be unacceptably concentrated, and they uniformly urged the Commission to retain Section 628(c)(2)(D). APPA associates itself with their comments on this issue. Specifically, APPA agrees with RCN that access to essential programming is the “keystone” to a competitor’s success. RCN Opening Comments in 01-129 at 9. APPA also believes, as the Wireless Communications Association International stated, that “[n]othing less than the economic survival” of competitors is involved. WCAI Opening Comments at 2.

## **2. The Commission should expand rather than limit Section 628(c)(2)(D)**

In paragraph 14 of the Notice of Proposed Rulemaking, the Commission seeks comments on whether it should consider “an approach that narrows the scope of, rather than completely eliminates, the exclusivity restriction.” For example, the Commission notes that it has “recognized that certain programming services may be more essential than others to the viability and success of competing program distributors.” APPA strongly opposes any narrowing of the exemption. To the contrary, APPA urges the Commission to expand it.

As the Commission notes, “Congress and the Commission have recognized the benefits of exclusivity in certain circumstances, [but] the 1992 Cable Act placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that may impede that entry.” *Notice*, ¶ 8. This principle should continue to guide the Commission. Furthermore, to the extent that the public interest may warrant special relief in particular cases, the Act and the

Commission's rules provide amply for an exception to the general prohibition. Section 628(c)(4); 47 C.F.R. § 76.1000(c)(4).

At the same time, in its present form, the general prohibition does not reach exclusive contracts in certain circumstances in which a cable operator's action has the purpose and effect of thwarting competition. For example, a cable operator and a distributor of programming can circumvent the prohibition by delivering the programming through terrestrial means rather than by satellite. Also, a major cable operator can exercise substantial influence over a distributor of satellite programming without necessarily having an "attributable interest" in the distributor. These limitations and others are discussed at length by various commenters in Docket 01-129.<sup>3</sup> APPA supports the suggestions of these commenters and urges the Commission to extend the prohibition as they propose.

### **CONCLUSION**

For the last decade, the general prohibition on exclusive contracts has served the public interest well. The small number of exception cases that the Commission has faced suggest that the rule has not caused significant harm in past and will not do so in the future if extended. By contrast, if the Commission allows the prohibition to sunset and the cable industry returns to its practice of using exclusive contracts for anti-competitive purposes, the public interest may suffer incalculable harm until Congress reinstates the prohibition. APPA submits that the Commission should not take this risk but should make the findings necessary to extend the prohibition.

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<sup>3</sup> See, e.g., Comments of the National Rural Telecommunications Cooperative at 9; Comments of RCN at 9-15; Comments of DirectTV at 8-10; Comments of EchoStar at 10-13; Comments of National Association of Broadcasters at 6-7.

Respectfully submitted,

/James Baller/

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