Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 ECHOSTAR SATELLITE CORPORATION

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SUMMARY

EchoStar strongly urges the Commission to extend the prohibition on exclusive video programming contracts enacted by Congress in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), a prohibition that will sunset on October 5, 2002 if the Commission fails to act. The exclusivity rule is of paramount importance to preserving the increasing competition in the multichannel video programming distributor ("MVPD") market that Congress and the Commission have gone to great lengths to foster over the past decade. Failure to extend this critical provision of the current regulatory scheme would threaten much of what has been accomplished since 1992 in starting to bring new competitive vigor to the marketplace, while inevitably delaying and perhaps defeating the ultimate objective of a fully competitive MVPD market.

As the Commission is aware, even after almost ten years' experience under the 1992 Cable Act, cable remains the dominant technology for delivery of multichannel video programming to consumers, with almost 80% of the market. The existence of MVPD competitors—and particularly Direct Broadcast Satellite ("DBS") competition—is the primary check on the ability of cable operators to continue the pattern of spiraling price increases that has characterized the cable industry for many years. The exclusivity rule, in turn, is a key factor in maintaining the viability of MVPD competition by assuring that DBS providers and other MVPD competitors have access to the full slate of video programming. Without that access, cable operators will be able to erect an even greater barrier protecting their dominant position in the marketplace, which they can translate into continued price increases, while access to programming by DBS customers will be curtailed.

Extending the current prohibition on exclusive contracts will not harm competition, nor will it decrease the incentives for creation of new and more diverse programming. Because of the extensive vertical integration between cable operators and video programmers (not to mention the increasing horizontal consolidation of the cable industry), economic incentives exist for the cable industry to "lock up" desirable programming through exclusive contracts that contribute little or nothing to innovation in programming. To the extent there may be particular exclusive arrangements that would be desirable from a public interest standpoint, those can be accommodated through the Commission's power to waive the prohibition on a case-by-case basis, using the factors enumerated in Section 628(c)(4) of the Communications Act. Alternatives to the existing rule that have been suggested are inadequate to protect competition and to further the nascent development of a fully competitive MVPD market.

The consumers of video programming services will be vitally affected by the choice the Commission makes in this proceeding. After ten years of experience under the 1992 Cable Act, strides have been made toward realizing Congress's vision of a fully competitive marketplace for video programming services. Under the system of fair and equitable rules set forth in the Act, DBS has grown from a mere concept in 1992 into a vigorous competitor today, offering consumers a choice and helping to limit the ability of the dominant cable operators to exert their market power over rates and services. But the full benefits of competition have yet to be realized by most consumers of multichannel video programming. Now, more than ever, it is critical that the Commission ensure that the conditions that have permitted competition to obtain a foothold in the market not be fatally undermined by an ill-considered change in the rules of the game.

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COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its Comments in response to the Notice of Proposed Rulemaking ("NPRM") issued in the above-captioned docket on October 18, 2001. The NPRM seeks comments on whether the Commission should extend the prohibition on exclusive video programming contracts enacted by Congress in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), a prohibition that will sunset on October 5, 2002 if the Commission fails to act. For the reasons set forth below, EchoStar strongly urges the Commission to extend the exclusivity rule, which is of paramount importance to preserving the increasing competition in the multichannel video programming distributor ("MVPD") market that Congress and the Commission have gone to great lengths to foster over the past decade. Failure to extend this critical provision of the current regulatory scheme would threaten much of what has been accomplished since 1992 in starting to bring new competitive vigor to the marketplace, while inevitably delaying and perhaps defeating the ultimate objective of a fully competitive MVPD market.

As an MVPD providing Direct Broadcast Satellite ("DBS") service to roughly 6.4 million subscribers,[1] EchoStar has a substantial interest in the Commission's decision whether to extend the existing exclusivity rules beyond October 5, 2002.

More important, the consumers of video programming services will be vitally affected by the choice the Commission makes. After ten years of experience under the 1992 Cable Act, some initial strides have been made toward realizing Congress's vision of a fully competitive marketplace for video programming services. Under the system of fair and equitable rules set forth in the Act, DBS has grown from a mere concept in 1992 into a vigorous competitor today, offering consumers a choice and helping to limit the ability of dominant cable operators to exert their market power over rates and services. But the full benefits of competition have yet to be realized by most consumers of multichannel video programming. Now, more than ever, it is critical that the Commission ensure that the conditions that have permitted competition to obtain a foothold in the market not be fatally undermined by an ill-considered change in the rules of the game.

DISCUSSION

I. Cable Continues to Dominate the MVPD Market

The fully competitive market that Congress envisioned stemming from the program access rules has not yet materialized.[2] Cable remains the dominant technology for

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[1] On October 29, 2001, EchoStar announced a merger agreement under which it would combine with Hughes Electronics Corporation—which includes among its principal assets, DIRECTV, the other leading DBS service provider in the United States—to form a company to be called EchoStar Communications Corporation.

[2] Congress' statutory policy stated in the 1992 Cable Act was "to ensure cable television operators do not have undue market power vis-a-vis video programmers and consumers." Pub. L. No. 102-385, § 2(b)(5), 106 Stat. 1460, 1462 (1992).

delivery of multichannel video programming to consumers.[3] The Commission reported last June that cable had 80 percent of the distribution market,[4] and the cable industry itself concedes that its market share exceeds 77%.[5] Without a viable DBS alternative, cable operators would have virtually no constraint on their power to set prices. Indeed, even in the presence of growing DBS competition, cable prices have continued to rise at a pace that significantly exceeds inflation.[6] This pattern of perpetual price increases graphically demonstrates the cable industry's continued exercise of substantial market power.

In enacting the 1992 Cable Act, Congress foresaw that, in the long run, heavy-handed rate regulation of the cable industry could be avoided only if effective competition were allowed to take hold and flourish. To further that goal, Congress, among other things, enacted a ban on exclusive programming contracts by vertically integrated video program providers.[7] This

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[3] *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Seventh Annual Report, CS Docket No. 00-132 (rel. Jan. 8, 2001), at ¶ 5 ("2000 Report").

[4] Notice of Inquiry, *In the Matter of Annual Assessment of the Status of Competition in Markets for Delivery of Video Programming*, CS Docket No. 01-129 (rel. June 25, 2001) ("2001 Notice of Inquiry") at ¶ 15.

[5] *See* Comments of National Cable & Telecommunications Association in response to 2001 Notice of Inquiry, at 7 (dated Aug. 2, 2001) (hereinafter "NCTA Notice of Inquiry Comments").

[6] *See State of Competition in the Video Marketplace: Hearing on Cable and Video: Competitive Choices, Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Business Rights and Competition*, 107th Cong. (Apr. 4, 2001) (prepared testimony of the Cable Services Bureau, FCC) (citing the Commission's 2000 Annual Report on Cable Industry Prices, 16 FCC Rcd. 4346 (2001)); *see also* "Senate Antitrust Panel Faults Cable on Rates, Program Access," *Warren's Cable Regulation Monitor* (Apr. 9, 2001) (noting question by Sen. Mike DeWine (R-OH) "why cable prices were still climbing at 3 times general inflation rate").

[7] Specifically, Congress directed the Commission to promulgate rules to prohibit:

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ban was—and remains—essential to the growth and viability of cable alternatives such as DBS. Without the ban, EchoStar believes that in the early stages of its development, it would have been unable to secure key programming services that consumers consider "must-have," rendering DBS a non-substitutable service to cable. The exclusivity ban brought vertically integrated programmers, who otherwise saw no benefit to entering reasonable contracts with EchoStar, to the table.

While DBS has matured as an industry in the last ten years, cable's dominant position, together with its incentives and ability to leverage that position, remains. The statutory findings and legislative history of the 1992 Cable Act clearly demonstrate that Congress was concerned about the power of cable operators to foreclose competition from DBS and other competitors by preventing them from having access to desirable programming.[8] In the ensuing ten years, neither those incentives nor the ability of cable operators to act on those incentives has changed at all.

> with respect to distribution to persons in areas served by a cable operator . . . 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 regulations promulgated in response to this directive are found at 47 C.F.R. § 76.1002(c)(2).

[8] *See* Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460, 1462 (1992) ("cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for non-cable affiliated programmers to secure carriage on cable systems."); *see also* S. Rep. No. 102-92, at 23, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1156 ("[t]hrough greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors. The [Congressional Conference] committee was sufficiently concerned about this problem that it adopted five provisions [addressing programming access, discrimination and cable's market power]."); *see id*. ("[T]he Committee received testimony that vertically integrated cable programmers have the incentive and ability to favor cable operators

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Nothing better illustrates the cable industry's desire and ability to withhold key programming than in the area of vertically integrated regional sports networks, where cable operators have been willing to forgo substantial potential revenue in an effort to hobble a competitor. For example, because of the loophole created by the Commission's interpretation of the exclusivity rule, at least two cable systems have been able to evade the prohibition on exclusive contracts to deny MVPD competitors access to video programming produced by an affiliated programmer.[9] In the *Comcast* case, the effect has been to permit Comcast to refuse to provide its Philadelphia sports programming to EchoStar and DIRECTV, to the detriment of Philadelphia subscribers who cannot get their sports programming from a DBS company. Indeed, if anything, the clamor among cable operators to be permitted to enter into exclusive contracts for video programming[10] suggests that they are eager to resume the very practices Congress found to be strong impediments to a properly functioning competitive market.

By directing the Commission to re-examine the exclusivity rule in the final year before the scheduled sunset date,[11] and emphasizing in a statutory standard of review the twin

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over other video distribution technologies through more favorable prices and terms. These cable programmers also may simply refuse to sell to potential competitors.").

[9] *See In the Matter of DIRECTV, Inc. and EchoStar Communications Corp. v. Comcast Corp.,* Memorandum Opinion and Order, 15 FCC Rcd. 22802 (2000), *petition for review pending sub nom., EchoStar Communications Corp. v. FCC*, No. 01-1032 (D.C. Cir. scheduled for argument February 5, 2002); *RCN Telecom Services of New York, Inc. v. Cablevision System Corp.*, 14 FCC Rcd 17093 (Cable Service Bureau 1999), *aff'd*, Memorandum Opinion and Order, 16 FCC Rcd. 12048 (rel. May 20, 2001).

[10] *See, e.g.,* NCTA Notice of Inquiry Comments at 36-39; Reply Comments of Comcast Corporation in response to 2001 Notice of Inquiry, at 17 (dated Sept. 5, 2001).

[11] Section 628(c)(5) of the Communications Act provides:

> The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of this section, unless

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goals of competition and diversity, Congress plainly intended the Commission to look at any changes in the market over the ten-year period to see whether the circumstances that led to the exclusivity rule had changed to such a degree that the exclusivity ban is no longer necessary. To be more specific, the fundamental question the Commission must ask is whether the fully competitive market for multichannel video programming services that Congress was seeking in the 1992 Cable Act has been achieved. The short answer is that it has not. While there are currently more—and more effective—competitors to the cable industry than there were in 1992, effective competition does not yet exist in the vast majority of markets in this country. This is evident from the relatively few findings of "effective competition" that the Commission has made for cable franchises throughout the United States. Given these circumstances, it would be foolhardy to give the incumbent cable operators a weapon as powerful as exclusive contracting rights with which to undermine the most meaningful competitors they have.

II. Extending the Exclusivity Rule Is Critical to Preserving Competition in the MVPD Market, Given the Dominant Role Played by Cable

The Commission should not underestimate the critical importance of the current ban on exclusive contracts between cable systems and vertically integrated video programmers. As the Commission has long recognized, the market for multichannel video programming services is characterized by strong price competition to the extent the product itself is relatively undifferentiated. In other words, so long as each of the competing platforms is able to offer roughly the same menu of program offerings, consumers can choose the provider they want

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> 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).

based primarily on price (as well as quality of service). Such a market limits the flexibility of cable operators to continually raise prices as they have historically done.[12] The Commission has encouraged this model—competing over price with an undifferentiated product[13]—and the industry has in fact evolved in the direction that the Commission has been steering it.[14] Recent evidence suggest that where a DBS operator is allowed to offer programming akin to cable's, that DBS operator becomes a more formidable competitor to the incumbent MVPD.[15] Any move back from that paradigm would endanger the future prospects for price competition by undermining the structure the Commission has worked hard to build.

This threat to competition is by no means an academic concern. Recent history demonstrates that vertically integrated cable operators will seize on any opportunity to use

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[12] *See* note 6, *supra*.

[13] The Commission has specifically been concerned that product differentiation might push DBS providers to become niche players. For example, the Commission has discouraged DBS systems from developing specialized products that could only be complements to, instead of substitutes for, cable television. *See, e.g., Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd. 9712, 9727-31 ¶¶ 39-49 (rel. Dec. 15, 1995).

[14] An important factor in this evolution was the enactment by Congress of the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106, 113, § 1000(i), 113 Stat. 1501 (1999), which permitted DBS providers to offer "local-on-local" programming to match the capabilities of traditional cable providers. Although this Act created its own issues, including the imposition of a "carry-one, carry-all" policy with respect to local broadcast channels that is both constitutionally flawed and highly problematic from a spectrum usage standpoint, *see, e.g., Satellite Broadcasting and Communications Assn. v. FCC*, Nos. 01-1151 *et al*. (4th Cir., docketed Feb. 1, 2001), it did go a long step in the direction of creating greater comparability of programming availability as between cable and DBS, hastening the growth of the DBS industry by virtually everyone's estimation. *See* NCTA Notice of Inquiry Comments at 6; Comments of the Satellite Broadcasting and Communications Association in response to 2001 Notice of Inquiry at 16 (dated Aug. 3, 2001). This evolution clearly demonstrates the vital importance of comparable program services to the maintenance of effective competition in the MVPD market.

[15] For example, after introducing local network affiliates to its channel lineup in Austin, Texas and Birmingham, Alabama, EchoStar experienced a 44% and 39% increase, respectively, in average weekly subscriber additions, the vast majority of whom came from cable.

exclusive programming contracts as a way to exclude competition.[16] The Commission itself has recognized that "[n]oncable MVPDs . . . continue to experience some difficulties in obtaining programming from both vertically integrated cable programmers and unaffiliated programmers who continue to make exclusive agreements with cable operators."[17] Moreover, the *Comcast* and *Cablevision* cases illustrate an increasing and disconcerting migration of cable programming to terrestrial transmission and the exclusion of DBS from key programming services.[18] Given this track record, the likelihood is overwhelming that, if the prohibition on exclusive contracts is lifted, cable system operators will re-introduce the very exclusive contracting practices that led to imposition of the ban in the first place.

The market situation is relatively simple: Where cable companies control approximately 80% of a programmer's potential audience, and particularly where many cable operators and video programmers are vertically integrated, the cable companies have tremendous leverage to convince programmers to accept exclusive deals, even though the exclusive deals reduce the programmers' potential audience. Depriving smaller competitors of important programming makes the competitors' offerings unattractive to consumers and reinforces the dominant firms' market power, enabling them to charge supracompetitive prices to consumers.

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[16] *See*, *e.g.*, 2000 Report at ¶ 90 (citing comments of BellSouth that program access difficulties present a continuing barrier to market entry for MMDS operators); *id.* at ¶ 181 (citing comments of open video system operator RCN Corporation).

[17] *Commission Adopts Sixth Annual Report on Competition in Video Markets*, News Release, CS Docket No. 99-230 (rel. Jan. 14, 2000).

[18] The Commission itself has recognized that lower costs for terrestrial transmission would become commonplace, affording an easy pretext for evasion of the rules. *Third Annual Report*, 12 FCC Rcd. 4358, 4435 ¶ 154 (rel. Jan. 2, 1997).

The emergence of a new industry model in which substantial portions of cable programming are locked up through exclusive vertical contracts would deal DBS competition a severe blow. First, the ability of MVPD competitors such as EchoStar to maintain and attract subscribers would be seriously undermined by an exclusive deal covering any one or more of the most popular cable networks whether pay or basic. There is no question that without a full package of the usual channel offerings, most consumers would not consider DBS an acceptable substitute for traditional cable.[19] Second, the competitiveness of EchoStar and other cable alternatives would be equally compromised by a number of exclusive arrangements covering a range of relatively minor networks. In accordance with the undifferentiated product model the Commission has pursued, MVPD consumers have come to expect both the "must-have" programs and the variety and diversity of programming that is the hallmark of MVPD services. Absence of that "full package" of programming can severely constrain an MVPD competitor.

Finally, the emergence of spot-beam satellites (a development not anticipated by Congress in 1992), has empowered DBS for the first time to introduce meaningful competition to cable on a regional as well as national basis. This effort would be thwarted, and the investment in spot-beam facilities might well be frustrated, by a market strategy of locking up the increasingly popular regional cable programming (especially sports programming) through exclusive vertical contracts.

EchoStar is not vertically integrated with any program producer, leaving the company totally dependent on an open and competitive programming market. Even after EchoStar and Hughes were permitted to merge, despite a sizable subscriber base, the cable

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[19] This was, of course, a key premise of the Satellite Home Viewer Improvement Act of 1999, which sought to put the program offerings of cable and satellite providers on a more even

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industry's continued dominance would enable it collectively to invest in programming much more heavily than could the combined DBS entity. Such programming, if allowed to be a cable exclusive, would be leveraged to the disadvantage of DBS. Moreover, as the recent comments of a non-vertically integrated programmer suggest, regardless of how many consumers subscribe to DBS, the cable industry leverages its dominance in the distribution market in ways other than ownership, such as the industry practice of charging DBS providers more than cable operators for the same programming,[20] heightening the importance of keeping the exclusivity ban in place as a necessary check against such power.

III. Extending the Prohibition on Exclusive Contracts Will Not Harm Competition or the Public Interest in Diversity of Programming

The principal argument put forward by the advocates of terminating the existing exclusivity rule seems to be that exclusive contracts are necessary to promote creation of new programming, on the theory that the availability of exclusivity will encourage investment in programming alternatives.[21] The Commission should be highly skeptical of this assertion for at least two key reasons.

First, as Congress and the Commission have long recognized, the danger here is not exclusivity per se, but the risk that exclusive contracts will be used as a form of unfair

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footing.

[20] L.A. TIMES, *Q&A—Redstone Sees More Growth for Viacom*, Nov. 18, 2001, at C1 ("[W]hat a lot of people don't know is that satellite broadcasters pay us more for the same programming than cable operators.") (statement of Sumner Redstone), *available in* 2001 WL 28929748.

[21] *See, e.g.*, NCTA Notice of Inquiry Comments at 37-39; *see also* NPRM at ¶ 10 (seeking comment on "whether and how exclusivity has been significant in the development, promotion and launch of new programming services").

competition. Imagine, for example, an unaffiliated video programmer seeking an outlet for its newly created video channel. In most cases, the principal interest of the programmer will be in reaching as many viewers as possible through as many outlets as possible. Deliberately cutting off a major distribution channel covering a significant number of viewers would not typically be in the programmer's economic interest. In the case of vertically integrated programmers, by contrast, an additional factor enters the equation. By funneling the programming to a single outlet (in this case, traditional cable providers) and excluding all other MVPD competitors, particularly DBS, any loss of revenue from forgoing the DBS subscribers for that programming can be more than made up by excluding DBS competition and maintaining or raising cable's supracompetitive prices, without the threat of DBS competition. In other words, the integrated cable providers have shown that they are more than willing to forgo the short-term revenues from the larger audience that licensing their programming to other MVPD competitors would bring, in favor of the long term benefits of protecting their entrenched market power, *i.e.*, their ability to charge consumers what they choose without concern that consumers will switch to a competitor. In such a situation, any putative benefits to the video programmer from exclusivity are typically far outweighed by the competitive harm to other MVPD providers and, more importantly, video consumers. That is the fundamental basis for the carefully tailored prohibition Congress imposed.

Second, to the extent there may theoretically be exclusive contract arrangements that are not competitively harmful and that do have significant public interest benefits, the existing rules already provide an effective mechanism for approval of such contracts. Under section 628 (c)(4) of the Communications Act, the Commission can waive the prohibition on the basis of the following enumerated factors:

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

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

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

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

(v) The duration of the exclusive contract.[22]

Thus, it is not necessary to terminate the existing exclusivity rule in order to promote creation of new programming offerings where the proponent of an exclusive arrangement can show that the benefits of that arrangement outweigh the potential competitive harm. By comparison, throwing out the existing rule with no provision for Commission review of these arrangements would do little, if anything, to promote new programming, while ensuring that the competitive harm from exclusive contracts would vastly increase.

IV. Alternatives to the Existing Rule Are Inadequate to Protect Competition

The Commission should not rely either on a modified version of the exclusivity prohibition or on other alternatives to accomplish the central objective of preserving and promoting competition and diversity in the MVPD market. The existing prohibition has stood

[22] 47 U.S.C. § 548(c)(4); *see also* 47 C.F.R. § 76.1002(c)(4). The Commission has exercised this authority to permit, for example, a 7-year period of exclusivity for a startup regional news programmer. *See New England Cable News*, 9 FCC Rcd. 3231 (rel. June 1, 1994).

the test of time.[23] Untested tinkering with its provisions—or reliance on other rules that were not designed for the specific circumstances of this industry—are not alternatives the Commission should be considering at this time.

One alternative suggested in the NPRM is that the Commission might apply the exclusivity prohibition only to certain core (*i.e.*, "essential") programming, or only in particular local or regional markets.[24] An "essential programming" test is not an effective alternative to the existing rule.[25] First, instituting such a test would put the Commission in the position of having to make constant judgments about which programs or channels are "essential" and which are not, in an industry that is both dynamic and ever-changing, posing significant practicability concerns. A simple ratings-based test applied to a single channel, for example, would not accurately reflect the importance to consumers of having available a complete complement of channels. Moreover, the kinds of judgments the Commission would be called upon to make under such a scheme may well be deemed to turn on the content of the programming itself, raising troubling

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[23] EchoStar has not, of course, been entirely satisfied with the vigor with which the Commission has enforced the existing rules. *See* Comments of EchoStar Satellite Corporation in response to 2001 Notice of Inquiry at 2-3 (dated Aug. 3, 2001). Nonetheless, the alternative of virtually unlimited exclusive contracts between vertically integrated video programmers and cable providers would clearly have hampered—if not prevented—the emergence of DBS as a viable cable alternative. Moreover, imposition of such a regime for the future would clearly pose a far greater danger to competition than mere inadequate enforcement of the existing rules.

[24] NPRM at ¶ 14.

[25] In enacting the existing rule, Congress made a statutory finding that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media," including the "distribution of unique non-commercial, educational programming services." Pub. L. No. 102-385, §§ 2(a)(7), (8), 106 Stat. 1460, 1462 (1992).

First Amendment issues.[26] Even if the Commission were to overcome the difficulties in determining which programming is "essential," the Supreme Court and D.C. Circuit Court of Appeals have seen through regulatory schemes designed to discern popular from unpopular speech and unequivocally rejected them.[27]

Similarly, any attempt to limit the exclusivity prohibition to particular regional or local markets would create serious practical difficulties. Under such a scenario, a programmer could contractually demand exclusivity in some markets but not others, forcing DBS operators to configure blackout procedures. While individual cable systems find it relatively easy to tailor their program offerings to particular markets, the same is not true of DBS providers, which face more severe spectrum limitations.[28] Forcing DBS providers to offer programs in some local

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[26] *See Arkansas Educational Television Commission v. Forbes,* 523 U.S. 666, 674 (1998) (**"**When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."); *Greenberg v. Bolger*, 497 F. Supp. 756, 775-76 (E.D.N.Y. 1980) ("To suggest that a regulation that confers benefits on the basis of popularity is not content-based would require the court to draw an artificial distinction between the popularity and the substance of an idea.") (Weinstein, J.); *see also Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394 (1993) ("The principle that has emerged from our cases is that the First Amendment forbids the Government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (citation and quotations omitted); *CBS v. FCC*, 453 U.S. 367, 395 (1981) ("the broadcasting industry is entitled under the First Amendment to exercise the widest journalistic freedom consistent with its public [duties].") (citation and quotation omitted); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

[27] *See, e.g., Regan v. Time, Inc*., 468 U.S. 641, 648-49 (1984) ("A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers . . . Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

[28] These limitations and their implications are described in detail in the Consolidated Application for Authority to Transfer Control filed by EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (dated Dec. 3, 2001).

markets but not others would strain the already limited spectrum availability, and could well result in a decrease in program offerings far beyond the particular market in which exclusivity was permitted.[29] Moreover, like the core/non-core distinction, a revision to the prohibition to limit its geographic scope would likely embroil the Commission in endless litigation over individual local markets.

Another alternative suggested in the NPRM is that the Commission simply rely on the existing anti-discrimination rules that are not subject to the sunset provision.[30] These rules prohibit, for example, offering video programming on discriminatory terms to competitors of vertically integrated cable providers.[31] The notion seems to be that these rules would be adequate to protect competition, even without the ban on exclusive contracts. There are two key defects in this suggestion, however. First, if the other anti-discrimination rules were adequate by themselves, it never would have been necessary to enact the outright ban on exclusive contracts in the first place. Second, if the exclusivity rule is allowed to lapse, the perverse effect is that vertically integrated programmers may be given even more of an incentive to enter into exclusive contracts with cable providers precisely in order to avoid the anti-discrimination rules. In other words, if the choice is between an exclusive contract—which by its nature is not subject to being applied to any other provider—and an open contracting regime in which all contracting parties

[29] For example, assume that a particular channel is exclusively available on cable in several key East Coast cable markets (but cannot be made exclusive in other markets). Because of spectrum availability issues, a DBS operator might find it economically inefficient to show that channel in *any* East Coast market if it had to be blacked out in enough of the key market areas.

[30] NPRM at ¶ 12.

[31] 47 C.F.R. § 1002(b).

must be treated on equal terms, some programmers would likely choose the safe harbor of an exclusive contract, thereby making the situation worse, not better.

Finally, by citing to antitrust authorities in the Notice, the Commission seems to suggest that the exclusivity prohibition should be analyzed under an antitrust rubric. The antitrust laws, however, cannot be relied upon consistently to protect MVPD competitors against any serious anti-competitive conduct and therefore should not prejudice the Commission's analysis of the exclusivity provision. First, entirely apart from the substantive antitrust rules, litigation under the general antitrust laws is an expensive and burdensome tool for seeking to preserve competition in a dynamic market such as this one. By the time an antitrust suit wends its way to judgment, events in the marketplace may well have long since mooted the controversy. By comparison, the Commission's rules provide for an efficient and timely complaint mechanism that can lead to an effective remedy while the issue is still meaningful in the competitive marketplace.[32]

Second, the exercise of establishing and proving an antitrust violation in areas such as exclusive dealing, or a unilateral or concerted refusal to deal, is a highly complex and uncertain one. For example, as one court has commented, determining whether a firm with monopoly power that has refused to deal has violated the antitrust laws "is one of the most unsettled and vexatious [issues] in the antitrust field."[33] Similarly, where a number of companies

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[32] *In re Cable Television Consumer and Competition Act of 1992*, 8 FCC Rcd. 3359, 3416 ¶¶ 71-75 (rel. Apr. 30, 1993); *see also* 47 U.S.C. § 548(f) ("The Commission's regulations shall * * * provide for an expedited review of any complaints made pursuant to this section.").

[33] *Byars v. Bluff City News Co.*, 609 F.2d 843, 846 (6^{th} Cir. 1980); *see also* Antitrust Law Developments (Fourth) at 271 (1997).

refuse to deal with a competitor, such conduct generally would only be considered a "group boycott" upon a showing of actual conspiracy among the firms, even when the effect of the conduct, exclusion of the competitor from the marketplace, is established. Indeed, the U.S. Supreme Court has noted that "there is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine."[34] In short, analyzing and proving the extent to which any particular exclusive video programming contract (whether unilateral on the part of a fully integrated firm or concerted on the part of more than one cable provider or video programmer) would violate the relevant antitrust doctrines is an exercise that is not only expensive, time-consuming, and complex, but fraught with uncertainty.[35] This uncertainty, in turn, is likely to embolden cable operators and affiliated video programmers to test the limits, while greatly complicating the task of enforcing the rules in appropriate cases. Further, the large amounts of time lost in seeking a remedy on a case by case basis would permit cable to further lock-in its dominant position, making eventual remedies less effective or meaningful.

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[34] *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (quoting L. Sullivan, Handbook of the Law of Antitrust § 83, at 229-30 (1977)).

[35] Illustrating this uncertainty, prior to the time the Commission's exclusivity rule took effect, courts were sharply divided over whether exclusive contracts between video programmers and cable system operators violated the antitrust laws in particular circumstances. *Compare, e.g., Storer Cable Communications, Inc. v. City of Montgomery, Ala.,* 826 F. Supp. 1338 (M.D. Ala. 1993) (denying motion to dismiss antitrust claims involving exclusive programming contracts between cable operator and video programmers), *with Futurevision Cable Systems of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760 (S.D. Miss. 1992) (granting motion to dismiss antitrust claims under similar circumstances). Notably, the *Storer* case contains a perceptive analysis of the reasons why exclusive contracts between video programmers and cable operators with a dominant position in the market constitute a threat to consumer welfare. *Storer*, 826 F. Supp. at 1354-64.

Finally, as a substantive matter, the antitrust rules on unilateral and concerted refusals to deal were developed to apply in a wide variety of contexts, many far removed from the particular circumstances of the MVPD market. The exclusivity rule on cable programming, by comparison, was tailored to the characteristics of this particular market, including its distinctive focus on price competition with an undifferentiated product, with the aim of eventually fostering a fully competitive MVPD marketplace. This rule is both precisely tailored and manifestly necessary in the marketplace that exists today: in the absence of the rule dominant firms will use exclusive deals and refusals to deal to exclude competitors and reinforce their market power, all to the detriment of consumers. Reliance on the generic antitrust rules is therefore an inadequate substitute for the clear, bright-line rule that currently exists and that has contributed in a significant way to creating the first meaningful competitive constraints on the cable industry. The Commission should not now depart from the course it has successfully steered for the past decade.

V. The Commission Should Close the Terrestrial Loophole

The *Comcast* and *Cablevision* cases cited above illustrate a significant means by which cable operators already evade the exclusivity provision, to the detriment of competing MVPDs and consumers. EchoStar repeatedly has argued to the Commission the damaging nature of this behavior and the Commission's authority to change it.[36] While charged

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[36] *See, e.g.*, Comments of EchoStar Satellite Corporation in response to 2001 Notice of Inquiry at iii, 4, 11-13 (dated Aug. 3, 2001); Reply Comments of EchoStar Satellite Corporation in response to 2001 Notice Inquiry at 4-5 (dated Sept. 5, 2001); Application for Review by EchoStar Communications Corp. filed in *EchoStar v. Comcast et al.*, No. CSR-5244-P (dated Feb. 25, 1999). EchoStar hereby incorporates by reference its previous recommendations to the Commission to invoke the general anti-discriminatory program access provision against cable operators' evasive use of terrestrial programming delivery.

in this proceeding with examining the exclusivity sunset, the Commission has wisely cast its questions in light of the statute as a whole, and therefore should consider the deleterious effects of exclusivity wherever it arises. To the extent the Commission in this proceeding examines changes in the MVPD marketplace since 1992, it should consider the twin evolutions in cable and DBS technology. On the cable side, terrestrial fiber has proliferated and fiber link costs have dropped,[37] allowing cable to deliver programming to its headends via fiber more efficiently than Congress could have predicted in 1992. On the DBS side, spot beam technology never envisioned in 1992 now allows DBS operators to deliver economically the regional and local programming, especially sports programming, that the cable industry deliberately keeps away from DBS providers. Both developments in technology weigh in favor of an updated view of the MVPD marketplace and action by the Commission to close the terrestrial loophole.

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[37] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* CC Docket 98-146, Second Report, 15 FCC Rcd. 20913, 20987 (rel Aug. 21, 2000) ("fiber deployment has increased annually each of the past 10 years, including a 14.7% increase in 1998 . . . [and] annual spending on fiber optic equipment has tripled in the past ten years.").

CONCLUSION

For the reasons set forth above, the Commission should exercise its authority to extend the existing prohibition on exclusive contracts for affiliated video programming.

Respectfully submitted,

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