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 iN DEMAND

iN DEMAND L.L.C.
345 Hudson Street
17th Floor
New York, NY 10014
(646) 638-8209

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384
(202) 328-8000

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COMMENTS OF iN DEMAND

iN DEMAND L.L.C. ("iN DEMAND"), by its attorneys, hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

A. Overview of iN DEMAND

iN DEMAND is a provider of pay-per-view ("PPV") services.[2] It began operation as Viewer's Choice in 1985 and, since that time, has evolved from a single analog channel service

[1] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, CS Docket No. 01-290, FCC 01-307 (rel. Oct. 18, 2001) ("*Notice*").

[2] Pay-per-view programming is video programming such as movies and events (*e.g.*, sporting events and concerts) that an MVPD makes available to its customers (for a per-movie or per-event fee, or, in the case of sports packages, a flat package price) at predetermined start times. The customer can order particular movies or events either using a remote control and set-top box or by calling a defined telephone number to have the cable operator authorize the customer's set-top box. Depending on the available channel capacity, MVPDs may increase the (footnote continued …)

to a 65-channel digital network (providing a package of 35 channels for PPV movies and events) offering movies from all of the major Hollywood and independent studios, a variety of sports packages (including season subscriptions to the NBA, NHL, and Major League Baseball), one-time sports events (such as championship boxing, wrestling, and college sports events), and a variety of other original entertainment events (including concerts by top recording artists). iN DEMAND serves numerous MVPDs in more than 1,750 systems, with over 29 million addressable homes nationwide.

B. Summary of Position

The exclusivity prohibition should be allowed to sunset as Congress intended. In enacting the prohibition,[3] Congress sought to address perceived concerns that vertically integrated program suppliers would favor affiliated cable operators over other MVPDs, thereby inhibiting the development of competition among distributors.[4] However, Congress also recognized that exclusive contracts might benefit consumers by attracting capital investment in the production and distribution of new programming.[5] Therefore, Congress required that the prohibition sunset after ten years "unless the Commission finds . . . that such prohibition

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(… footnote continued)
frequency of start times for popular movies or events so as to give customers more opportunities to watch the programming from the beginning. iN DEMAND refers to these services collectively as PPV services.

3 *See* 47 U.S.C. §§ 548(b)-(c) (2000).

4 *See* S. Rep. No. 102-92, at 28 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161 ("To encourage competition to cable, the bill bars vertically integrated, national and regional cable programmers from unreasonably refusing to deal with any multichannel video distributor or from discriminating in the price, terms, and conditions in the sale of programming if such action would have the effect of impeding retail competition.").

5 *See id.* at 27 (noting that "vertical integration has been the means by which we have stimulated the development of programming that was necessary to flesh out the promise of cable . . . when nobody else was really willing to step up and put up the money").

continues to be *necessary* to preserve and protect competition and diversity in the distribution of video programming."[6]

In today's marketplace, the exclusivity prohibition is not necessary to protect competition and diversity. Since Congress adopted the prohibition in 1992, the video programming distribution market has undergone dramatic changes. Most notably, DBS, which had not even launched in 1992, has become a formidable competitor which the Commission recently characterized as a full substitute for cable.[7] Indeed, the two principal DBS providers -- EchoStar and DirecTV -- are larger than all but a few cable operators. Likewise, the number and diversity of video programming networks and program suppliers has steadily increased, while the percentage that are affiliated with cable operators has substantially declined. The increased competition in the video distribution and programming markets eliminates the underlying rationale for prohibiting exclusive cable contracts. The Commission should therefore allow the prohibition to sunset, as Congress intended.

The justification for allowing the exclusivity prohibition to sunset is particularly compelling with respect to PPV programming. DBS operators have developed their own sophisticated PPV businesses that in many ways *exceed*, and are more successful than, the PPV offerings of cable operators. In fact, DBS operators use PPV as a central element of their marketing strategy against cable. There can be no serious argument that DBS operators need "protection" in the area of PPV programming. Moreover, there are substantial existing and

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6 47 U.S.C. § 548(c)(5) (emphasis added); *see also* 47 C.F.R. § 76.1002(c)(6) (2000). Unless the Commission makes its required finding, the ten-year prohibition on exclusive contracts ceases to be effective on October 5, 2002.

7 *See In re Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment*, Report on Cable Industry Prices, 16 FCC Rcd. 4346 at ¶ 53 (2001) ("Our finding suggests that DBS is a substitute for cable services.").

emerging competitors in the PPV arena so that all MVPDs, not just DBS operators, have a variety of PPV options to offer their customers. Consequently, there is no basis to find that the exclusivity prohibition "continues to be necessary to preserve and protect competition and diversity" in the distribution of PPV programming. Accordingly, at a minimum, the Commission should allow the exclusivity prohibition to sunset with respect to PPV services.

II. CURRENT MARKETPLACE CONDITIONS DEMONSTRATE THAT THE ORIGINAL PREDICATE FOR THE EXCLUSIVITY PROHIBITION IS NO LONGER VALID AND THE PROHIBITION MUST BE ALLOWED TO SUNSET.

Since Congress adopted the program access provisions in 1992, the MVPD market has undergone a dramatic transformation, as non-cable MVPDs, particularly DBS operators, have experienced expansive growth and emerged as significant competitors to cable. Non-cable MVPDs now serve approximately 20.7 million U.S. households, accounting for 23% of multichannel video customers nationwide, up from 20% only a year ago.[8]

In 1992, DBS did not even exist. Now it is a formidable nationwide competitor in the video distribution marketplace. In less than ten years, DBS has grown from serving no multichannel video subscribers to serving over 17 million subscribers.[9] Last year alone, DBS

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8 *See Media Index Database*, Kagan Media Money, June 26, 2001, at 11 (indicating a total of 88.7 million MVPD subscribers); Press Release, EchoStar Communications Corp., *EchoStar Reports Over $1 Billion of Revenue, Record EBITDA and Net Income in Third Quarter* (Oct. 23, 2001) ("EchoStar Press Release"), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=400; Press Release, Hughes Elecs. Corp., *Hughes Reports Third Quarter 2001 Financial Results: Hughes Revenue Grows by 25%; Strong DIRECTV U.S. Subscriber Growth Beats Expectations* (Oct. 17, 2001) ("DirecTV Press Release"), *available at* http://www.hughes.com/ir/pr/01_10_17_3rd_quarter.xml.

9 *See* SkyREPORT, *National DTH Counts October 2000 - October 2001* (reporting 17.02 million DBS subscribers), *at* http://www.skyreport.com/dth_us.htm (last visited Nov. 27, 2001); EchoStar Press Release, *supra* note 8 (reporting approximately 360,000 net new subscribers in the third quarter of this year and exceeding 6.43 million subscribers); DirecTV Press Release, *supra* note 8 (reporting that it added "a record 953,000 gross subscribers and, after accounting

(footnote continued …)

grew twenty times faster than cable, with both DirecTV and EchoStar experiencing significant subscriber growth.[10] DirecTV and EchoStar are the third and sixth largest MVPDs in the United States, respectively.[11] Industry analysts project that DBS will add another 2.4 million subscribers next year and grow to approximately 28.5 million subscribers by 2007.[12] Perhaps most significantly, four out of five new multichannel video customers now are choosing DBS over cable,[13] and, according to a recent J.D. Power and Associates' study, almost one-half of satellite subscribers today are former cable customers.[14] If their proposed merger is approved, EchoStar/DirecTV would become the largest MVPD in the United States in terms of wholly-owned and controlled subscribers.[15]

(… footnote continued)
for churn, 425,000 net subscribers" bringing its total subscribers to 10.3 million). *See also* Marc E. Nabi et al., Merrill Lynch, *Eye in the Sky 3Q01 Preview* at 15 (Oct. 8, 2001) (noting that "the mass market has [] embraced DBS").

[10] *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005, 6007 at ¶ 14 (2001) ("*2000 Video Competition Report*") (comparing 1.5% growth rate for cable with 29% growth rate for DBS). DBS now serves MVPD subscribers in all fifty states and, in over thirty states, has reached penetration levels above 20% with the highest state having 41.27% penetration. *See* SkyTRENDS SkyMAP, Apr. 1, 2001, *cited in* NCTA Comments filed in CS Docket No. 01-129, at 10 (Aug. 2, 2001) ("*NCTA 2001 Video Competition Comments*").

[11] *Compare* SkyREPORT, *supra* note 9, *with* National Telecom. Cable Ass'n, *Top 25 MSOs*, *at* http://www.ncta.com/industry_overview/top50mso.cfm (last visited Dec. 3, 2001).

[12] *See* Karim Zia et al., Deutsche Banc Alex. Brown, *DBS Signals 3Q01 Preview: Turnaround Underway* at 7 (Oct. 11, 2001).

[13] *See NCTA 2001 Video Competition Comments* at 8.

[14] *See* J.D. Power & Assocs., *2001 Syndicated Cable/Satellite TV Customer Satisfaction Study* at 79 (Sept. 2001).

[15] *See* Sam Ames, *EchoStar-Hughes Deal Faces FCC Scrutiny*, CNET News.Com, Nov. 1, 2001, at 1, *at* http://news.cnet.com/news/0-1004-200-7751741.html. EchoStar "estimates that the [merger] would result in an incremental 9.4 million DBS subscribers by 2005." Zia et al., *supra* note 12, at 5.

The rapid growth in DBS's subscriber base has been fueled by aggressive marketing campaigns aimed specifically at converting cable subscribers, using a variety of promotional tactics, including advertising campaigns emphasizing various DBS program offerings, *e.g.*, DirecTV's NFL Sunday Ticket, that are not available on cable.[16] In its recent Fall promotion, DirecTV attracted numerous new subscribers by allowing them to receive free programming for four months, in addition to equipment discounts they received from retailers, when they subscribed to DirecTV's Total Choice Platinum/Family Pack and its exclusive NFL Sunday Ticket.[17]

Moreover, Congress recently gave DBS the right to retransmit local broadcast signals, removing what many considered to be the last hurdle to full competition with cable. DBS now provides local broadcast signals to over forty-four different cities with approximately fifty-three million households, or over 60% of the total multichannel households nationwide.[18] EchoStar and DirecTV plan to further expand their local-to-local offerings by launching four new spot-beam satellites in the next year.[19]

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16 *See* Armand Musey & Todd Mitchell, Solomon Smith Barney, *Satellite Communications & Towers* at 4, 7 (Oct. 9, 2001) (noting that there is "strong demand for [DirecTV's] NFL Sunday Ticket promotional plan").

17 *See* Nabi et al., *supra* note 9, at 18.

18 *See id.* at 20-21; Adam Simon & Barry A. Kaplan, Goldman Sachs, *Satellite Communications: DBS Operators* at 27 (Dec. 18, 2000). If the DirecTV-EchoStar merger is approved, EchoStar "will be able to offer local signals in 100 markets, representing 86% of the nation's 105 million TV homes." John M. Higgins, *It Could Be Worse; Cable Operators Say Better Ergen in Charge of DirecTV Than Murdoch*, Broad. & Cable, Nov. 5, 2001, at 18, *available at* http://www.tvinsite.com/broadcastingcable/index.asp?layout=toc&pubdate=11/05/2001.

19 *See* Nabi et al., *supra* note 9, at 17. DirecTV recently announced the launch of DIRECTV 4S, "a powerful new spot beam satellite that will enable DIRECTV to provide hundreds of additional local channels to television households across the country." Press

(footnote continued …)

MMDS, SMATV, and C-band operators place additional constraints on cable operators. These MVPDs account for approximately 3.1 million subscribers or 3.5% of all multichannel customers.[20] Broadband overbuilders such as RCN, Knology, WideOpenWest, and others also are emerging as viable competitors, and incumbent local exchange carriers, such as Qwest, and leading electric and gas utilities are poised to provide and/or market competitive alternatives to cable service.[21]

Marketplace changes have not only affected video distributors -- video programmers face vibrant competition as well. The Commission recently reported to Congress that there were 281 national satellite-delivered programming networks in 2000.[22] In comparison, when the exclusivity rules were adopted, there were only 106 networks.[23] There also has been a significant *decline* in vertical integration of programming interests with cable operators. Last year, cable operators had an attributable interest in only 35% of the 281 national networks.[24] When the rules were adopted, 53% of national programming networks were vertically integrated

(… footnote continued)
Release, DirecTV, Inc., *DIRECTV Successfully Launches Spot Beam Satellite* (Nov. 26, 2001), *available at* http://www.directv.com/press/presscurrent/1,1133,1,00.html.

20 *See* SkyREPORT, *supra* note 9 (reporting 893,882 C-band subscribers as of October 2001); *Media Index Database*, *supra* note 8, at 11 (estimating that, as of June 2001, there were 700,000 MMDS subscribers and 1.5 million SMATV subscribers).

21 *See 2000 Video Competition Report* at ¶¶ 119-120 (describing several methods that common carriers can use to enter the video programming market, and further noting that a number of ILECs are actively involved in marketing DBS service to their customers).

22 *See id.* at ¶ 173.

23 *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442 at ¶ 161 n.434 ("*1994 Video Competition Report*").

24 *See 2000 Video Competition Report* at ¶ 173.

with cable operators.[25] The pure number of programming services today, as well as the downward trend of vertical integration with cable, ensures that MVPD competitors will have an ample supply of programming alternatives after the sunset of the exclusivity prohibition.

In short, the MVPD distribution and programming businesses today are fundamentally different than a decade ago when the exclusivity prohibition was adopted. The concern that cable will use its size and programming affiliations to run roughshod over its competitors can no longer stand in light of the emergence and growth of those competitors. As a result, the basis for the exclusivity prohibition is evaporated and the Commission should allow it to sunset.

III. THE JUSTIFICATION FOR ALLOWING THE EXCLUSIVITY PROHIBITION TO SUNSET FOR PPV PROGRAMMING IS ESPECIALLY STRONG BECAUSE THE PPV BUSINESS IS HIGHLY COMPETITIVE, AND THE PROHIBITION REDUCES PROGRAM DIVERSITY AND CONSUMER CHOICE.

While it is clear that the evolution of the MVPD market has obviated the need for the exclusivity prohibition for *any* type of programming, at the very least, the Commission should allow the prohibition to sunset with respect to PPV programming.[26]

A. DBS Providers Have Developed Their Own Sophisticated PPV Businesses that in Many Ways Exceed the PPV Offerings on Cable Systems.

Since its inception in 1994, DBS has been at the forefront of the PPV business. DBS operators have developed their own robust PPV businesses that in many ways *exceed* cable's PPV offerings. Two primary factors account for DBS's success in the PPV business -- greater channel capacity and inherent marketing advantages.

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[25] *See 1994 Video Competition Report* at ¶ 161.

[26] It is not even clear to what extent PPV services are covered by the program access rules. When Congress enacted the program access statute in 1992, the PPV business was in the embryonic stage. To the extent Congress saw a problem in the video programming market, this concern could not have extended to PPV.

The fact that DBS systems are entirely digital has allowed them to offer a significantly greater number of PPV movies and events, and with more frequent start times, than cable operators.[27] DirecTV devotes approximately 60 channels to PPV and sports packages, and its subscribers can choose from a wide variety of hit movies, sports programming, and popular events. EchoStar has over 20 channels of PPV and offers a similarly large variety of movies, events, and sports programming. By contrast, a typical analog cable system has one to three PPV channels, and even cable systems which have been upgraded to digital typically have fewer PPV channels than DBS, especially compared to DirecTV.

This channel capacity advantage is important. Consumer research demonstrates that a significant percentage of individuals switch from cable to DBS because of DBS's superior PPV offerings. According to a recent survey, 40% of the cable customers who said they were likely to subscribe to DBS in the next six months cited the large number of DBS PPV offerings as a significant factor in their decision.[28]

In addition, DBS has several distinct marketing advantages over cable operators offering PPV services. First, because DBS serves customers on a national level, it can provide all of its subscribers consistent content offerings and a single integrated marketing message for its PPV

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[27] *See* Simon & Kaplan, *supra* note 18, at 22-23 (noting that DBS offers "[a]pproximately 15-20 titles on ~50 channels" and that "through its plethora . . . of programming packages can attract many different types of customers ranging from avid sports fans to people looking for foreign language programming").

[28] *See* Horowitz Assocs., Inc. & S. Liebmann & Assocs., Inc., *Digital TV VII: A Survey of Consumers in Digital Cable Markets* at 56 (2001). *See also* R. Thomas Umstead, *Another View*, Multichannel News, July 12, 1999 (noting that DBS operators have used their expanded PPV offerings to lure subscribers away from other MVPDs), *available at* http://www.tvinsite.com/multichannelnews/index.asp?layout=toc&pubdate=07/12/1999.

programming across its entire network.[29] In contrast, the specific content offerings and marketing of PPV programming to cable subscribers depends on each local cable operator's program choices and promotional efforts, which may vary widely in their nature and effectiveness from system to system. As a result, unlike DBS, cable operators are unable to create consistent PPV content offerings across their systems or a uniform national marketing message to promote these offerings. DBS operators have used this advantage to obtain unique promotional support from PPV content providers. For example, under an agreement between DirecTV and Blockbuster, Blockbuster promotes DirecTV's PPV service in its 4,971 retail stores and also provides DirecTV with access to films not available to competing PPV providers.[30]

Second, because DBS PPV programming is not subject to the program access rules, DBS operators are able to market their PPV services as exclusively available on DBS. For example, DirecTV's PPV movie service is titled "BLOCKBUSTER TICKET *only* on DIRECTV."[31]

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29 *See* R. Thomas Umstead, *DBS' Success on Events May Haunt Cable*, Multichannel News, June 29, 1998, *available at* http://www.tvinsite.com/multichannelnews/index.asp?layout=toc&pubdate=06/29/1998.

30 *See* Monica Hogan, *Blockbuster Co-Brands DirecTV PPV Films*, Multichannel News, June 4, 2001 (quoting Blockbuster Senior Vice President Nick Shepherd as saying, "We believe we can double DirecTV's pay-per-view buy rates over the next two years" and noting that "Blockbuster will give DirecTV access to content such as independent films not available on competing PPV services"), *available at* http://www.tvinsite.com/multichannelnews/index.asp?layout=toc&pubdate=06/04/2001. Both DirecTV and EchoStar believe that their proposed merger will allow the combined entities to offer subscribers even more PPV content and generate an additional .5 buys per subscriber per month. *See* EchoStar Communications Corp., *EchoStar Hughes A Powerful Combination* at 22 (Echostar/GM/Hughes Webcast Slide Presentation), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=2100 (last visited Nov. 27, 2001).

31 *See* DirecTV, Inc., *Pay Per View Movies* (emphasis added) (stating that "BLOCKBUSTER® TICKET only on DIRECTV brings you the best pay per view movies at an unbeatable price. They're only $3.99 each when you order with your remote control or online."), *at* http://www.directv.com/programming/programmingpages/0,1093,136,00.html (last visited Nov. 21, 2001).

DirecTV also offers "DIRECTV FREEVIEW," which delivers free "select exclusive events" to DirecTV customers each month, and markets its NFL Sunday Ticket (through which DirecTV subscribers can view up to 13 NFL games every Sunday and more than 200 games throughout the regular season) as "not available on cable."[32]

Given these competitive advantages, it is not surprising that DBS subscribers on average order PPV movies/events much more frequently than do cable subscribers:

- DBS's PPV buy-rate per month is 1.0-1.1 (customers purchase PPV services once every 3-4 weeks).
- Cable's PPV buy-rate per month is 0.2-0.3 (customers purchase PPV services once every 3-5 months) for *analog* cable and 0.8-0.9 (customers purchase PPV services once every 5-6 weeks) for *digital* cable.[33]

In other words, DBS's average PPV buy rate is 233%-450% higher than cable's average analog PPV buy rate and 11%-38% higher than cable's average digital PPV buy rate. Indeed, while DBS serves approximately 19% of all MVPD subscribers, it captures 66% of total PPV movie revenues and 34% of total PPV event revenues.[34]

It is uncontroverted that DBS providers have a huge PPV advantage over the typical cable system. DBS operators no longer need the protection of the exclusivity prohibition and, indeed, they generally are not interested in carrying iN DEMAND's PPV products. It

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32 *See* DirecTV, Inc., *DIRECTV FREEVIEW EVENTS, at* http://www.directv.com/programming/programmingpages/0,1093,501,00.html; Press Release, DirecTV, Inc., *DirecTV Unveils Fall National Promotion and Advertising Campaign* (July 30, 2001), *available at* http://www.directv.com/press/pressdel/0,1112,423,00.html.

33 *See* Nabi et al., *supra* note 9, at 22. According to an iN DEMAND cable system survey, from January 2001 to September 2001, the average buy rate per month for analog cable customers was .05 (customers purchased PPV services once every 20 months) while the average buy rate for digital cable customers was .4 (customers purchased PPV services once every 2½ months).

34 *See PPV/NVOD/VOD Snapshot*, Kagan Media Money, June 19, 2001, at 6.

necessarily follows that the prohibition should be allowed to sunset with respect to PPV programming.

Moreover, because PPV providers like iN DEMAND face stiff competition from existing and emerging alternatives, cable competitors other than DBS, including cable overbuilders, MMDS providers, and SMATV operators, have various PPV options and, therefore, they also do not need the exclusivity prohibition. For example, iN DEMAND faces competition in the PPV business from TVN Entertainment ("TVN"). TVN provides a PPV package similar to that of iN DEMAND, consisting of hit movies, concerts, boxing, wrestling, football, and other sporting events.[35] According to TVN's press releases, TVN serves over 600 cable systems reaching more than 50 million households.[36] TVN also owns the industry's only all-Spanish PPV network, TeleNuestros, and, in March 2001, acquired another PPV service, Action PPV, from BET.[37] In addition, PPV providers will face increased competition from video-on-demand ("VOD") services, such as Intertainer, Inc. and Diva Systems Corp. ("Diva").[38] Intertainer offers current movies, television shows, concerts, music, and other services from a library of more than 70,000

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35 *See* TVN Entertainment Corp., *NVOD PPV, at* http://www.tvn.com/tvnfinaltmp/nvod.html (last visited Nov. 21, 2001).

36 *See, e.g.*, Press Release, TVN Entertainment Corp, *Adelphia Taps TVN for VOD* (Sept. 28, 2001), *available at* http://www.tvn.com/tvnfinaltmp/pressrel21.html. Cablevision reports that TVN's digital offerings serve 40 affiliates with 5 million subscribers. *See Database*, Cablevision, Sept. 17, 2001, *available at* http://www.tvinsite.com/cablevision/index.asp?layout=toc&pubdate=09/17/2001.

37 *See* Press Release, TVN Entertainment Corp., *TVN Launches the U.S. Market's First 24 Hour Hispanic Direct Response Channel: TVN Directo* (July 10, 2001), *available at* http://www.tvn.com/tvnfinaltmp/pressrel18.html; Press Release, TVN Entertainment Corp., *TVN Entertainment Acquires BET Action Pay-Per-View Channel from Avalon Pictures, Inc.* (Apr. 10, 2001), *available at* http://www.tvn.com/tvnfinaltmp/pressrel12.html.

38 VOD service makes available a substantial library of programming which allows customers to order a particular movie or event, using a remote control and set-top box, at whatever time the customer wants.

hours of content from more than 70 content providers.[39] Intertainer currently supplies content to cable operators and cable overbuilders, and has partnered with DirecTV and WINfirst, a fiber-to-home provider with regulatory approval to build networks servicing more than 3.7 million homes in five states, to provide VOD to subscribers nationwide.[40] Similarly, Diva provides VOD content that gives its distributors an alternative to the traditional PPV offerings provided by iN DEMAND and others.[41] Diva's current agreements with Charter, Insight, and AT&T will bring VOD services to 22 systems and 3.2 million homes.[42]

Finally, only in very rare circumstances is iN DEMAND granted exclusive rights to any of the content in its PPV offerings. Rather, because studios and other content producers tend to

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39 *See* Press Release, Intertainer, Inc., *Intertainer Launches First Widely Available Video-On-Demand Service with Thousands of Hit Movies, TV Shows, Music Videos and More* (Oct. 17, 2001) *available at* http://www.intertainer.com/news/36.html.

40 *See* Intertainer, Inc., *Timeline, at* http://www.intertainer.com/set_timeline.html (last visited Nov. 21, 2001). Intertainer's content is currently available to all 60,000 of Cincinnati Bell's Zoomtown ADSL service, and it is discussing commercial VOD deployment over DSL with Verizon and Qwest. *See* Michelle Abraham, Cahners In-Stat Group, *Where is Video From the Telco?* at 31 (July 2001). Intertainer will provide its VOD services to 1.8 million digital cable customers and 300,000 cable modem customers on Adelphia's cable systems. *See* Matt Stump, *Three Middlemen Vie for VOD Share*, Multichannel News, Nov. 5, 2001, at 16A.

41 *See* Adi Kishore, Yankee Group, *Video-On-Demand: How Soon is Now?*, Media & Entertm't Strategies Vol. 5, No. 8, at 4 (July 2001). Content creators themselves have announced plans to provide VOD content directly to subscribers beginning in early 2002. For example, Sony, Warner Brothers, Universal, Paramount, and MGM have formed a partnership to provide their movies on demand via the Internet. *See* Scott Hettrick, *Five Align for Internet Movie Service*, Video Business Online, Aug. 16, 2001, *available at* http://www.videobusiness.com/news/081601_moviefly.asp. These movie studios plan to release their new movies through the partnership during the current 45-60 day window for PPV at prices similar to PPV. *See id.* Similarly, 20th Century Fox and Disney recently announced a VOD joint venture, in which they will shorten the current PPV window to approximately thirty days, and provide their movies to consumers on an exclusive basis during the shortened window via digital cable and the Internet. *See* Scott Hettrick, *Disney and Fox to Launch Rival VOD Service in Early 02*, Video Business Online, Sept. 5, 2001, *available at* http://www.videobusiness.com/news/090501_disney_fox_VOD.asp.

42 *See* Stump, *supra* note 40, at 16A.

seek the widest distribution of their content, any entity, including existing or new PPV providers, is granted access to such content. Indeed, it is cost prohibitive for iN DEMAND to enter into exclusive content deals with content providers whose content is widely demanded. Thus, even if the exclusivity prohibition is allowed to sunset at the distribution level, the Commission need not be concerned because, except in rare circumstances, studios and content producers will provide their content to packagers who can create additional PPV alternatives for a cable operator's competitors.

B. Continuation of the Exclusivity Prohibition in the PPV Area Is Particularly Unjustified Because the Prohibition Actually Reduces the Availability of Diverse New PPV Programming to Consumers.

Prohibiting cable-affiliated PPV providers from entering into exclusive agreements can reduce diversity and competition. Exclusivity allows a distributor to distinguish its product from its rivals. For this reason, a distributor might be willing to pay more for the right to distribute programming exclusively. This, in turn, provides greater incentives for investment by program producers. It is well-known that exclusive arrangements promote efficiency, competition, and diversity in programming, and that these effects benefit consumers.[43]

Conversely, a prohibition on exclusivity can *reduce* program diversity and consumer choice. This has certainly been the case with respect to the exclusivity prohibition in the PPV arena. For example, iN DEMAND recently declined the opportunity to provide a Dave Mathews concert as part of its service. The producers of the concert sought substantial upfront monies and significant marketing commitments, which iN DEMAND could not justify undertaking because

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[43] *See generally* Herbert Hovenkamp, *XI Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1811 (1998).

of the uncertainty that it would be able to recover its costs, either from higher distributor license fees or otherwise, absent its ability to provide the content to its distributors on an exclusive basis.

Similarly, iN DEMAND is currently considering offering a NASCAR sports package. However, launch of the package will require a substantial investment in production and promotion by iN DEMAND. iN DEMAND must weigh these sizeable costs against the uncertain return on its investment. Ultimately, iN DEMAND may not offer this programming, in part because iN DEMAND's distributors are concerned that their competitors will gain access to the programming, and this "free riding" significantly reduces the value of the programming to the distributors. Stated another way, the exclusivity prohibition provides a serious impediment to the distributors' willingness to engage in the level of promotion necessary to generate sufficient revenues for iN DEMAND to justify production of this high-cost programming. Alternatively, iN DEMAND could attempt to limit certain aspects of the production or promotion of the programming and thereby lower its costs. Either way, the exclusivity prohibition will have unnecessarily skewed the business decisions, so that the programming will not be provided or will be provided in a substantially diminished form, thus reducing the amount and diversity of programming available to consumers.

C. The Commission Clearly Has the Authority to Exempt PPV Offerings from the Exclusivity Prohibition.

In Section 628(c)(5) of the Communications Act, Congress authorized the Commission to allow the exclusivity prohibition to sunset next year for *all* vertically integrated satellite cable programming services. *A fortiori*, the Commission may do something *less* than what Congress authorized, *i.e.*, it may narrow the scope of the exclusivity prohibition by exempting *certain* video programming services such as PPV. Indeed, the Commission in the *Notice* specifically asks whether it should exempt certain types of programming from the exclusivity prohibition should it determine it necessary to retain the prohibition.[44]

In light of the competitive state of the PPV business, it is clear that the purposes for which Congress adopted the prohibition on exclusivity have been achieved. Indeed, with respect to PPV, the Commission cannot find that maintaining the prohibition on exclusivity is necessary to promote competition and diversity in the distribution of video programming. Accordingly, the Commission should allow the prohibition on exclusivity to sunset, if not for all video programming, at least for PPV services.[45]

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[44] *See Notice* at ¶ 14 (seeking comment on whether it "should consider an approach that narrows the scope" of the exclusivity prohibition potentially by limiting it to only certain programming).

[45] iN DEMAND recognizes that it could seek Commission approval for such exclusive arrangements under the existing rules. However, the current pre-approval process itself is a costly proposition that complicates the already costly and risky business of developing, launching, and marketing high-quality, national programming. The process takes an inordinate amount of time to complete, generates considerable costs in legal fees (drafting the waiver request, defending against any oppositions, possible petitions for reconsideration and court appeals), and provides little assurance that at the end of this extensive process exclusivity will be granted. Indeed, such delay, uncertainty, and expense have discouraged iN DEMAND and others from seeking approval for exclusivity in the first place. In many cases, the lead time for producing PPV programming is very short (often 2-3 months but sometimes less than a week), which makes filing a petition for exclusivity pointless where the filing process and FCC review alone takes several months. Notably, only six petitions for exclusivity have been filed by programmers in the seven years that the Commission's program access rules have been in place.

IV. CONCLUSION

For the foregoing reasons, the Commission should eliminate the exclusivity prohibition entirely. At the very least, the Commission should exempt PPV services from the exclusivity prohibition.

Respectfully submitted,

/s/ Michael H. Hammer
Michael H. Hammer
Francis Buono
Ryan Wallach
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384
(202) 328-8000

Attorneys for iN DEMAND

Susan P. Barnabeo
iN DEMAND L.L.C.
345 Hudson Street
17th Floor
New York, NY 10014
(646) 638-8209

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