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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
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)

CS Docket No. 01-290 /

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COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV")¹ hereby offers the following comments in connection with the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding ("Notice").

As a part of its enactment of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress added Section 628(c)(2)(D) to the Communications Act. This important statutory provision generally prohibits "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" in areas

¹ DIRECTV is a wholly owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation ("Hughes"). On October 29, 2001, Hughes announced that it would combine with EchoStar Communications Corporation, the United States' other leading DBS operator, to form a DBS company that will assume the name of EchoStar Communications Corporation.

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served by a cable operator.² The provision is scheduled to sunset on October 5, 2002, unless the Commission "finds . . . that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."³ DIRECTV believes that Section 628(c)(2)(D)'s prohibition on exclusive agreements between cable operators and vertically integrated programmers in cabled areas continues to be critically important to the survival and growth of alternative technological competitors to incumbent cable television systems in the Multichannel Video Programming Distribution ("MVPD") market. It should be preserved.

I. SECTION 628(c)(2)(D)'s CABLE EXCLUSIVITY PROHIBITION REMAINS AN IMPORTANT PROTECTION FOR DBS AND OTHER ALTERNATIVE MVPDs

Since the program access law was enacted by Congress in 1992, its provisions, including Section 628(c)(2)(D), have been critical safeguards to address the "competitive imbalance involving access to programming between incumbent cable operators and new entrants."⁴ DIRECTV has stated its strong belief on many occasions that the enactment and implementation of the program access law was the event that first prompted cable-affiliated programmers generally to "come to the table" and deal meaningfully with alternative MVPDs such as DBS providers. Those rules, including Section 628(c)(2)(D) and its implementing regulations, remain critical protections for alternative providers in the MVPD marketplace today.

² 47 U.S.C. § 548(c)(2)(D); *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, FCC 01-307 (rel. October 18, 2001) ("Notice"), at ¶ 1.

³ 47 U.S.C. § 548(c)(5).

⁴ *Notice* at ¶ 7.

Specifically, the *Notice* itself observes that cable operators continue to serve some 80% of all MVPD subscribers.⁵ In addition, in its most recent assessment of the status of competition in the MVPD market,⁶ the Commission found, among other things, that:

- cable television remains the "dominant technology for the delivery of video programming to consumers in the MVPD marketplace";⁷
- the ten largest cable multiple system operators ("MSOs") have increased their share of MVPD subscribers;⁸
- cable operators continue to be "the primary purchasers in the national market for the purchase of multichannel video programming";⁹ and
- cable companies continue to expand their power in the media and entertainment industry, as vertical integration of programming grew in absolute terms, with more than half of the top 20 video programming networks ranked by subscribership vertically integrated with a cable MSO.¹⁰

In light of such findings, it is plain that incumbent cable operators and their vertically integrated programmer affiliates continue to possess both the incentive and ability to leverage their market power at the expense of alternative MVPDs. As shown by the chart attached as Exhibit A, reflecting the content ownership of the nation's seven largest cable MSOs, DIRECTV

⁵ *Id.* at ¶ 8.

⁶ *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Doc. 00-132 (rel. Jan. 2, 2001) ("*2000 Competition Report*").

⁷ *Id.* at ¶ 5.

⁸ *Id.* at ¶ 171.

⁹ *Id.* at ¶ 168.

¹⁰ *Id.* at ¶ 175.

would stand to lose access to at least *45 programming networks* carried on DIRECTV that are vertically integrated with these MSOs in the event that such entities were permitted to lock up their programming in exclusive arrangements. It is precisely this combination of cable's market power and control of programming networks that led to the enactment of Section 628(c)(2)'s prohibitions on exclusive contracting arrangements in both cabled and uncabled areas. That concern clearly remains valid today. Congress understood that an alternative MVPD cannot compete with incumbent cable systems if it cannot offer subscribers popular programming such as CNN, HBO and Discovery Channel. The current state of the MVPD market simply does not warrant the sunset of Section 628(c)(2)(D)'s protection at this time.

The *Notice* also asks what impact, if any, the sunset of Section 628(c)(2)(D) would have on the function of the remaining program access provisions, including Section 628(c)(2)(C)'s absolute ban on exclusive agreements in areas not served by a cable operator.¹¹ The simple answer is none. The *Notice* correctly recognizes that "Section 628(c)(5) permits the sunset only of the exclusivity provision of Section 628(c)(2)(D) while preserving the overall structure of program access and Section 628."¹² There is no indication in the provision that Congress intended to disturb in any other respect Section 628's overall objective of "making available programming to the existing or potential competitors of traditional cable systems."¹³

Furthermore, in response to the Commission's question in paragraph 13 of the *Notice*, the presence or absence of Section 628(c)(2)(d) would effect no change on the geography covered by Section 628(c)(2)(C)'s absolute prohibition on cable exclusives in unserved areas. The text of the statute is clear that this provision applies to "areas not served by a cable operator *as of the*

¹¹ *Notice* at ¶¶ 12-13.

¹² *Id.* at ¶ 12.

¹³ *Id.*

date of enactment of this section."¹⁴ The term "areas not served by a cable operator" was thus given a fixed definition by Congress, defined by reference to unserved areas as they existed when the 1992 Cable Act was enacted. There is no indication anywhere in Section 628 that Congress empowered or intended for the Commission to contract that definition to cover areas where cable service may have commenced in the intervening years since passage of the statute.¹⁵ Certainly Section 628(c)(5), the statutory provision that this proceeding has been commenced to implement, does not speak to the point at all.

II. SECTION 628(C)(2)(D) HAS NOT DETERRED THE DEVELOPMENT OF NEW PROGRAMMING NETWORKS

Contrary to the dire predictions of incumbent cable operators in 1992, Section 628(c)(2)(D) plainly has neither impacted adversely the diversity of programming in the MVPD market nor chilled investment in new programming. In part, this has to do with how Section 628(c)(2)(D) is constructed. As the Commission observed in 1993, "exclusivity under this provision is not prohibited."¹⁶ However, given the value that Congress has placed on new competitive entry relative to exclusive distribution practices that impede that entry, "exclusivity is not favored."¹⁷ The law therefore requires the party seeking exclusivity to overcome this negative presumption and affirmatively demonstrate that a desired exclusive arrangement is in

¹⁴ 47 U.S.C. § 548(c)(2)(C) (emphasis added).

¹⁵ *Notice* at ¶ 13.

¹⁶ *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Competition Act of 1992*, 8 FCC Rcd 3359 (1993) ("Program Access Report and Order"), at ¶ 63.

¹⁷ *Id.*

the public interest.¹⁸ The Commission has made such findings over the years in appropriate cases.¹⁹

That Section 628(c)(2)(D) has had no negative effect on the expanding diversity of programming is supported by the data: At the time that the program access rules were implemented in 1993, there were approximately 29 national programming networks carried on most cable television systems;²⁰ today, there are *well over 250* national basic and premium television programming networks carried on MVPD systems,²¹ more than 70 regional programming services,²² as well as cable modem, interactive/video-on-demand, and audio services, and other new networks and services are constantly being introduced.

Indeed, to the extent that new MVPD entrants such as DBS providers have been able to grow their businesses under the Congressional mandate of Section 628(c)(2)(D) and other program access provisions, they have emerged as significant new non-cable platforms from which programmers can launch new services. More than a dozen programming channels have been launched on DIRECTV, for example,²³ and more are on the way. Provisions such as Section 628(c)(2)(D) have aided this pro-competitive creation and distribution of new programming.

¹⁸ *Id.*; see 47 U.S.C. § 548(c)(2)(D) (enumerating factors Commission is to apply in making this public interest finding).

¹⁹ See, e.g., *New England Cable News*, 9 FCC Rcd 3231 (1994).

²⁰ See Kagan World Media, *U.S. Cable TV Network Start-Up Penetration, By Launch Date* (2001), attached as Exhibit B.

²¹ See, e.g., 2000 Competition Report at ¶ 173.

²² See *id.* at Table D-3.

²³ These include: Channel J; Word; Worldlink; NBA.com; Phoenix; Trio; Newsworld International; Clara+Vision; EWTN Red Global Catolica; Puma TV; Telefe International; Utilisima; and El Canal del Tiempo.

III. EXCLUSIVITY BETWEEN NON-CABLE MVPDS AND NON-VERTICALLY INTEGRATED PROGRAMMERS HAS BEEN A BOON TO NEW MVPD ENTRANTS

In response to the Commission's question in paragraph 10 of the *Notice*, it is certainly true that exclusivity can have and has had beneficial effects in the MVPD marketplace. Even when the Commission first implemented the exclusivity prohibitions of Section 628(c)(2), the agency noted that "[a]s a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized," and that elsewhere in the 1992 Cable Act, "in the context of the broadcast station-cable system relationship, specific steps have been taken to protect exclusive rights."²⁴ Thus, the Commission has specifically recognized that a DBS distributor's exclusive contract with a programmer *that is not owned by a cable operator* may allow a distributor to establish a "distinctive competing service" that furthers the Congressional objective of fostering "diversity in programming for the consumer."²⁵

In this regard, the *Notice* correctly cites DIRECTV's exclusive arrangement with the National Football League as an example of an exclusive agreement that has been "credited with attracting significant numbers of subscribers to DIRECTV's service."²⁶ Specifically, the NFL is a non-vertically integrated program provider with whom DIRECTV has an agreement to be the exclusive small satellite dish distributor of the NFL Sunday TicketTM,²⁷ and the agreement has been an important way for DIRECTV to distinguish itself in the MVPD market.

²⁴ *Program Access Report and Order*, ¶ 63.

²⁵ *Program Access Reconsideration Order*, 10 FCC Rcd at 3126, ¶ 39 (1994).

²⁶ *Notice* at ¶ 10.

²⁷ The agreement is not exclusive as against cable providers or C band satellite distributors.

IV. THERE IS NO LEGAL OR POLICY BASIS FOR THE COMMISSION TO "NARROW THE SCOPE" OF THE EXCLUSIVITY RESTRICTION

Finally, the Commission has sought comment on whether it should consider an approach that "narrows the scope of" the Section 628(c)(2)(D) exclusivity restriction, rather than eliminate it. The Commission states that it could, for example, identify, or set a standard for identifying, "essential" programming services that would still be covered by the exclusivity ban.²⁸ The Commission posits that such "essential" services could then be defined by their degree of success or popularity. Similarly, the Commission questions whether it could tie the limitation on exclusivity to "the specific geographic or competitive circumstances of the area in question,"²⁹ or whether the exclusivity restriction should be applied "when the programming service in question is vertically integrated with cable television systems in some locations but is not vertically integrated with those in the area where exclusivity is sought."³⁰

Such proposals are highly problematic. As a threshold matter, there is no statutory basis for the Commission to consider narrowing the scope of Section 628(c)(2)(D). Section 628(c)(5) states that the "*prohibition required by paragraph 2(D)*" -- *i.e.*, the exclusivity ban in its entirety -- shall cease to be effective on October 5, 2002 "unless the Commission finds that *such prohibition*" -- in its entirety -- "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."³¹ The Commission's inquiry in this matter has been clearly delineated by Congress, and the Commission has no authority to re-draft the language that Congress has enacted.

²⁸ Notice at ¶ 14.

²⁹ *Id.*

³⁰ *Id.*

³¹ See 47 U.S.C. § 548(c)(5).

It also is unlikely that the Commission could craft a workable regime in setting itself up as the arbiter of which programming is "essential" and which programming is not for purposes of administering the exclusivity ban in cabled areas. In the dynamic programming marketplace of today, the popularity and success of particular programming networks ebbs and flows; it is doubtful that the "essential" nature of such programming can or should be determined by the fluctuations of audience ratings from month to month or year to year. Moreover, the Commission properly recognizes the First Amendment issues raised if it attempts to distinguish "essential" programs from "non-essential" ones based on their content.

It is also unclear how the Commission would administer a regime based on its assessment of the competitive circumstances or the vertically integrated status of programmers in particular geographic areas, or that such assessments would indeed be directed to the concerns of Congress in enacting program access protections such as Section 628(c)(2)(D). The provision already contains the relevant geographic limitation mandated by Congress: it presumptively bans exclusive agreements between cable operators and vertically integrated programmers in "areas served by a cable operator."³² Furthermore, the Commission's suggestions on this point fly directly in the face of the Commission's *own interpretation* of Congress' concern that the vertical relationships between programmers and cable operators could transcend the particular competitive circumstances in individual geographic locations:

Regarding the geographic considerations for vertical integration, we believe that the scope of the rules should not be limited to situations where a satellite cable programming vendor is vertically integrated with a distributor in a particular market. . . Although some parties claim that programming vendors would not have the incentive to engage in prohibited practices in markets where they are not vertically integrated, we believe that the legislative history demonstrates Congress' concern that vertically integrated vendors

³² 47 U.S.C. § 548(c)(2)(D).

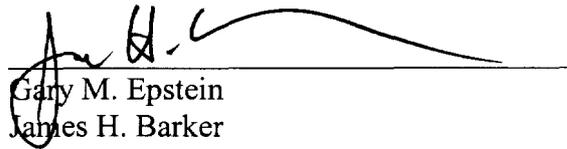
may control programming access without a commonly owned distributor.³³

The Commission's reasoning and interpretation of the statute in 1993 was correct, and remains so today.

V. CONCLUSION

For the foregoing reasons, the Commission should maintain Section 628(c)(2)(D). It remains a relevant and important provision that will promote competition and diversity in today's MVPD market.

Respectfully submitted,



Gary M. Epstein
James H. Barker
LATHAM & WATKINS
555 11th Street, N.W.,
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for DIRECTV, Inc.

Dated: December 3, 2001

³³ *Program Access Report and Order*, ¶ 30 (citation omitted).

EXHIBIT A

MSO Content Ownership

American Movie Classics				80%			
AOL	100%						
Atlanta Braves	100%						
Atlanta Hawks	100%						
Atlanta Thashers	100%						
Bravo				80%			
Buffalo Sabres			100%				
Cartoon Network	100%						
CN8						100%	
CNN	100%						
Comcast Sports Southeast						72%	
Comcast SportsNet						53%	
Court TV	50%						
Discovery							25%
E!						40%	
Empire Sports Network			100%				
Fox Sports Net Bay Area				30%			
Fox Sports Net Chicago				30%			
Fox Sports Net Florida				60%			
Fox Sports Net New England				30%			
Fox Sports Net Ohio				60%			
HBO	100%						
Home Team Sports						100%	
In-Demand (PPV)						11%	11%
Independent Film Channel				80%			
Liberty Media		<i>Spun off 8/10/01</i>					
MuchMusic USA				100%			
MusicChoice							14%
New Line Cinema	100%						
NY Knicks						100%	
NY Rangers						100%	
Outdoor Life Network						100%	
Oxygen Media							Minority stake by Vulcan Ventures

EXHIBIT B

[INSIDE]

U.S. CABLE TV NETWORK START-UP PENETRATION, BY LAUNCH DATE [03/01]-A

U.S. CABLE TV NETWORK START-UP
PENETRATION, BY LAUNCH DATE
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Network	Launch Date	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
		----- (8) -----					
TBS	12/76	n/a	n/a	n/a	50.2	77.5	82.8
FAM	04/77	6.3	9.3	22.1	42.6	56.9	59.6
WGN/C	11/78	8.4	11.4	25.3	31.4	35.3	39.2
C/SPAN	03/79	2.5	28.4	33.5	36.4	46.4	53.2
NICK	04/79	3.2	15.1	24.5	33.1	37.7	61.2
ESPN	09/79	1.4	34.5	53.7	67.2	84.9	92.6
USA	04/80	29.3	37.5	49.7	60.9	74.5	76.5
CNN	06/80	21.3	42.2	57.9	69.9	83.5	82.9
MTV	08/81	9.9	28.5	53.3	64.4	68.8	74.6
Headline News	01/82	7.9	28.4	38.3	42.6	51.9	61.6
TWC	05/82	23.5	31.9	41.8	48.8	54.9	69.4
CMT	03/83	8.7	11.2	14.9	14.2	14.8	16.7
TNN	03/83	33.0	51.9	61.1	66.4	81.1	84.9
A&E	02/84	31.9	42.8	50.3	69.0	73.1	77.5
Lifetime	02/84	*61.4	59.7	65.9	76.8	82.1	84.4
VH1	01/85	27.2	39.6	49.7	59.9	63.0	76.0
DSC	06/85	10.4	31.4	59.7	75.0	85.5	90.2
Good TV	05/86	5.7	5.6	8.1	14.5	23.7	22.2
C/SPAN II	06/86	16.0	27.8	32.7	35.5	39.4	43.3
Movietime/E!	07/87	8.9	22.7	25.7	30.4	31.4	34.7
TNT	10/88	39.2	68.2	88.8	91.8	94.0	95.8
CNBC@	04/89	24.0	29.4	74.1	76.9	79.4	82.9
International	07/90	1.7	5.2	6.5	8.6	10.9	10.5
COM	04/91	*34.8	43.5	47.5	48.7	55.4	60.9
Court TV	07/91	9.4	12.7	22.6	25.2	35.1	38.2
Sci/Fi	09/92	17.7	24.5	27.2	40.0	53.0	61.9
Cartoon	10/92	6.5	14.2	19.5	34.4	44.4	62.1
ESPN2	10/93	15.0	27.0	41.2	57.9	71.3	79.2
Food	11/93	8.9	15.6	22.3	26.6	39.3	46.9