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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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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 and Distribution: Section 628(c)(5) of the Communications Act	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

To: The Commission

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SUMMARY

The temporary rule prohibiting exclusive arrangements between cable-affiliated programmers and cable system operators should sunset in accordance with the schedule Congress established because: (1) as Congress expected, vibrant competition in today's MVPD marketplace has made the prohibition unnecessary; (2) MVPDs will have continued access to an abundance of programming sources after the prohibition sunsets; and (3) the prohibition has caused and is causing distortions to the programming market that are contrary to the public interest.

In 1992, Congress designed Section 628(c)(2)(D) of the Communications Act as a temporary measure to ensure that then-emerging competitors to cable would be guaranteed access to sufficient programming until a competitive market for video program distribution took hold. Congress specifically directed that this prohibition would cease to be effective as of October 5, 2002 unless the Commission finds it necessary to keep the rule in place to preserve competition and diversity in the distribution of video programming. The burden of justifying any extension of the prohibition consequently must fall on those advocating against the congressional directive. Given the competition flourishing in the programming distribution market today and the harm the rule causes, however, that burden cannot be met.

Today's market is in fact characterized by large and rapidly growing facilities-based MVPDs operating in a market that is more robust and fully competitive than anything Congress could have anticipated in 1992. These MVPD competitors have asserted repeatedly that their access to programming is more than adequate and that they do not have nearly the capacity to distribute all the programming available to them. Indeed, while the number of programming networks has increased more than four-fold since 1992, the percentage of programmers vertically

integrated with a cable operator has declined substantially. Sunset of the prohibition obviously will not deprive MVPD competitors of abundant sources of programming.

Moreover, operation of the existing program access rules has distorted, and is distorting, the programming market by, among other things, providing these competitors with an enormous disincentive to invest in the creation of new and diverse programming. Indeed, neither of the two largest beneficiaries of the program access rules has invested in any substantial way to create new programming and have instead relied complacently on programming created by others. These competitors, with government assistance, therefore have been able to allocate their funds in other ways, such as the proposed $25.8 billion acquisition of DirecTV by EchoStar. While DBS operators continue to argue that cable operators should be denied the use of exclusivity for competitive purposes, the DBS operators themselves use exclusivity aggressively for third-party sports and entertainment programming when it suits their interests. Although these distortions may benefit large DBS operators, they do not benefit the viewing public. The rule has become an anachronism that represents protectionist regulation for competitors that are among the very largest — and are the fastest growing — MVPDs in the nation.

Given these circumstances, the prohibition on exclusive arrangements in areas served by a cable operator should sunset in accordance with the schedule established by Congress.

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COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast"), by its attorneys, hereby submits these Comments pursuant to the Commission's Notice of Proposed Rulemaking (the "*Notice*")[1] in the above-captioned proceeding.

INTRODUCTION AND BACKGROUND

Congress enacted the various program access provisions of the 1992 Cable Act[2] to foster the development of facilities-based competition in the multichannel video market[3] and to pave

[1] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming and Distribution: Section 628(c)(5) of the Communications Act Sunset of Exclusive Contract Prohibition, *Notice of Proposed Rulemaking*, __ FCC Rcd __, FCC 01-307 (released Oct. 18, 2001) (the "*Notice*"). Comcast hereby incorporates by reference its Comments and Reply Comments filed in the Commission's annual video competition proceeding. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 01-129, Comments of Comcast Corporation, filed August 3, 2001, Reply Comments of Comcast Corporation, filed September 5, 2001.

[2] The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order*, 8 FCC Rcd 3359, 3384 n.79 (1993) ("*First Program Access Order*"); H.R. REP. NO. 102-862, at 93 ("*Conference Report*"), *reprinted in*

(continued . . .)

the way for a transition to a competitive market in the distribution of programming.[4]

One provision of the program access rules, Section 628(c)(2)(D) of the Communications Act, temporarily prohibits certain exclusive contracts between cable operators and satellite programming vendors affiliated with a cable operator, unless the Commission determines such a contract to be in the public interest.[5] Although Congress recognized the public interest in exclusive arrangements for the sale of entertainment programming,[6] it decided a temporary prohibition on exclusive arrangements was justified to support development of competition to local cable operators that was beginning to emerge in 1992. The Commission found in 1993 that "the public interest in developing competition to the local cable operator justifie[d] temporary, limited and targeted intervention."[7]

Given the vibrant competition that characterizes today's multichannel video market — which is reflected by the substantial and rapidly growing market share now held by facilities-based competitors to cable and many other relevant indicia — and the harm that the rule causes to the programming marketplace, the temporary prohibition on exclusive contracts must be permitted to sunset as Congress intended. The rule is now plainly an anachronism: it constitutes protectionist regulation for DBS operators that are among the very largest — and are the fastest growing — multichannel video programming distributors ("MVPDs") in the nation. Indeed, the proposed merger of EchoStar and DirecTV would create one of the two largest MVPDs in the nation. Such large and powerful competitors obviously are in no need of government assistance

(. . . continued)
1992 U.S.C.C.A.N. 1231, 1275, 138 Cong. Rec. H8308 (daily ed. Sept. 14, 1992) ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable . . . ."); H.R. REP. NO. 102-628, at 44 ("*House Report*") ("National communications policy has promoted the growth and development of alternative delivery systems for [video programming] services, such as DBS . . . . However, for a number of reasons, such competition has not emerged on a widespread basis.").

4 *Notice* at para. 5.

5 47 U.S.C. § 548(c)(2)(D).

6 S. REP. NO. 102-92, at 28 ("*Senate Report*") (the program access provision "is limited . . . to allow nascent programmers to gain a foothold through exclusive arrangements. . . . .The bill does not make exclusive contracts per se illegal. . . . The Committee believes that exclusivity can be a legitimate business strategy . . . .").

7 *First Program Access Order*, 8 FCC Rcd at 3384 para. 63.

designed for fledgling facilities-based MVPDs. Instead, public policy should encourage these large and powerful MVPDs to develop new and original programming, which would promote the interests of consumers but which the existing program access rules have discouraged.

DISCUSSION

I. The Burden of Justifying any Continuation of the Section 628(c)(2)(D) Prohibition, Which Congress Specifically Designed as a Temporary Measure, Rests Squarely on Those Advocating its Extension.

Congress specifically directed that Section 628(c)(2)(D) "shall cease to be effective" on October 5, 2002, absent a Commission finding that the prohibition remains "*necessary* to preserve and protect competition and diversity in the distribution of video programming."[8] To upset the congressionally mandated sunset schedule, the Commission must find substantial evidence to support a conclusion that the rule remains necessary to preserve and protect competition. The burden of demonstrating a continued need for the rule therefore must rest with those advocating against implementation of the congressional directive that Section 628(c)(2)(D) sunset as scheduled. Indeed, the policies underlying the 1992 Cable Act and its legislative history confirm that the Commission may only extend the prohibition temporarily, if at all, until competition takes hold. "Passage of the Cable Act was predicated on the belief that emerging competition in the video marketplace would eliminate the need for substantial government regulation of the cable industry . . . ."[9]

In its *First Program Access* Order, the Commission recognized both the established benefits of exclusivity and the limited nature of Section 628(c)(2)(D).

> As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized. Indeed, 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. In the unique situation presented here, however . . . Congress has clearly placed a higher value on new

[8] 47 U.S.C. § 548(c)(5) (emphasis added).

[9] *House Report*, at 43. *See also Conference Report*, at 93 ("Under the conference agreement, the limitations on exclusive contracts and other arrangements regarding programming distributed within an area served by a cable operator *shall* expire after 10 years, except that the FCC may extend the limitation if it determines that such limitations are necessary to preserve and protect competition and diversity in the distribution of video programming.") (emphasis added).

> competitive entry than on the continuation of exclusive distribution practices that impede this entry. In its 1990 Cable Report, the Commission itself articulated this balance as follows: 'While we agree with the cable commenters that the Commission should and does generally support exclusivity rights, we believe that the public interest in developing competition to the local cable operator justifies *temporary, limited and targeted intervention* to ensure that alternative multichannel program providers have fair and equitable access to programming.'[10]

As demonstrated in detail below, the empirical evidence already before the Commission regarding current competition in the programming distribution market confirms both that MVPD competition and the supply of diverse programming are strong and that vertical integration between programmers and cable operators continues to decrease. Under these circumstances, and as explained more fully below, the burden on those who would seek to extend Section 628(c)(2)(D) is insurmountable.

II. The Burden of Justifying any Further Extension of the Section 628(c)(2)(D) Prohibition Cannot be Met.

A. The Prohibition is No Longer Necessary to Preserve and Protect Competition and Diversity Because Both Supply And Distribution in the MVPD Markets are Flourishing and Have Surpassed the Level of Competitiveness Congress Could Have Envisioned in 1992.

As Congress anticipated, the robust state of competition and diversity in the MVPD market demonstrates that Section 628(c)(2)(D) is now unnecessary and should sunset as Congress intended. As noted above, the temporary Section 628(c)(2)(D) prohibition was premised upon the perceived state of MVPD competition in 1992, prior to the launch of DBS services and, as the Commission has noted, was "intended to foster development of emerging competitors to cable, allowing a transition to a competitive market for distribution of programming."[11]

The rule no longer makes sense in today's marketplace, which is characterized by large, powerful, and rapidly growing national MVPD competitors, by local MVPD competitors (such as

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[10] *First Program Access Order*, 8 FCC Rcd at 3384, para. 63 (emphasis added).

[11] *Notice*, at para. 5 (footnote omitted) (citing *First Program Access Order*, 8 FCC Rcd at 3376, 3378; *Time Warner Cable*, 9 FCC Rcd 3221, 3225 (1994); *New England Cable News*, 9 FCC Rcd 3231, 3234 (1994)).

RCN, Western Integrated Networks (WIN), and Wide Open West (WOW), among others), by ample independent sources of programming, and by declining vertical integration between programmers and cable operators. The number of Direct Broadcast Satellite ("DBS") subscribers has grown from zero at the time the program access provisions were enacted in 1992 to a mere 40,000 at the time of the Commission's first Video Competition Report in 1994[12] to almost 13,000,000 at the time of the most recent (seventh) Report released earlier this year[13] to more than 17,000,000 as of October 1, 2001.[14] DBS competitors DirecTV and EchoStar alone now account for 20% of the MVPD market,[15] which is remarkable considering that five years ago that figure stood at only 5.92%.[16] Even prior to enactment of the Satellite Home Viewer Improvement Act in 1999,[17] which provided DBS operators with the legal authority to distribute local broadcast signals back into local markets, Congress itself observed that satellite television had become a "key competitor" that had "made substantial inroads into incumbent cable's historically dominant position in the MVPD market."[18]

According to the Commission's *Seventh Competition Report*, as of June 2000, DirecTV and EchoStar were the third and seventh largest MVPDs in the nation, and together were sustaining a 31% annual growth rate compared to the cable industry's annual growth rate of only

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[12] 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, *First Report*, 9 FCC Rcd 7442, 7475 (1994).

[13] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Seventh Annual Report*, 16 FCC Rcd 6005, 6110-11 at Appendix C, Table C1 (2001) ("*Seventh Competition Report*").

[14] *See* http://skyreport.com/dth_us.htm.

[15] John M. Higgins, *It Could Have Been Worse*, BROADCASTING & CABLE, Nov. 5, 2001, at 19.

[16] *Seventh Competition Report*, 16 FCC Rcd 6005, 6110-11 at Appendix C, Table C1 (2001) ("*Seventh Competition Report*") (During the period from December 1996 to June 2000, DBS subscribers increased from 4,285,000 (5.92% of total MVPD subscribers) to 12,987,000 (15.38% of MVPD subscribers), which represents an increase of nearly 300% over less than four years. According to SkyTrends, DTH subscribers totaled 17,914,882 as of October 2001. *See* http://skyreport.com/dth_us.htm.

[17] Satellite Home Viewer Improvement Act of 1999, Pub. Law. No. 106-113, 113 Stat. 1501, Appendix I (1999).

[18] H.R. REP. NO. 106-79 (Part I), at 12 (1999).

1% to 1.5%.[19] The growth of DBS competition has continued strongly in the nearly eighteen months following the period covered by the *Seventh Competition Report*. EchoStar reported a record-breaking third quarter in 2001, adding 325,000 net new subscribers and serving 6.43 million subscribers, which represents an increase of 35% from 4.76 million only one year earlier.[20] In addition, EchoStar reported total revenue of $1.023 billion, which represents a 46% increase from the $698 million it reported for the third quarter last year, and EBITDA increased to $155 million, compared to a loss of $26 million one year ago.[21] By October 1, 2001, DirecTV reportedly served approximately 10.47 million customers.[22] Government assistance for powerful and rapidly growing competitors such as EchoStar and DirecTV is unjustifiable.

Moreover, the planned combination of DirecTV and EchoStar would create a nationwide MVPD serving more than 17,000,000 customers (as of October 1, 2001).[23] This proposed merger confirms that Congress's determination to nurture MVPD competition in 1992 has resulted today in a fully competitive market and formidable facilities-based competitors. "As

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[19] *Seventh Annual Report*, 16 FCC Rcd at 6037-38, paras. 62, 63, and 65. As of June 30, 2000, DBS served 12,987,000 subscribers, an increase of 3,000,000 in one year; as of that date DBS held approximately a 15% share of the national MVPD market. *Id.* at para. 61. DirecTV reported revenues of $2.1 billion for the first six months of 2000 and had 8.7 million subscribers in June 2000 compared to 7.6 million in June 2000, an increase of almost fifteen percent in one year. *Id.* at para. 62. As of June 30, 2000, EchoStar reported a 65% increase in subscribers over the previous year, from 2.6 million to 4.3 million. *Id. at* para. 63. According to SkyTrends, DirecTV served 10,471,000 subscribers and EchoStar served 6,550,000 subscribers as of October 2001. *See* http://skyreport.com/dth_us.htm.

[20] COMMUNICATIONS DAILY, October 24, 2001 at 7.

[21] *Id.* These growth rates have become common for the DBS industry in recent years. According to SkyTrends, the satellite industry's reporting arm, EchoStar added 350,000 subscribers in the second quarter of 2001 and revenue increased from $646 million in the second quarter of 2000 to $966 million in the second quarter of 2001, an increase of approximately 50%. SkyREPORT.com, July 20, 2001. In the first quarter of 2001, EchoStar added 460,000 subscribers, which significantly exceeded analysts expectations of 350,000, and EchoStar stated that it expected to add 1.5 to 2 million subscribers in 2001. SkyREPORT.com, May 4, 2001. According to SkyTrends, total DTH subscribers increased to 17,414,076 in August 2001 from 14,914,564 in August 2000, which reflects an annual growth rate of 16.8%, and DirecTV increased its subscriber base from 8,864,000 in August 2000 to 10,209,000 in August 2001, which reflects an annual growth rate of 15.2%. *See* http://www.skyreport.com/dth_us.htm.

[22] *See* http://skyreport.com/dth_us.htm.

[23] *See id.*; Mike Farrell, *Ergen Gets the Prize, EchoStar Wins the DirecTV Auction*, MULTICHANNEL NEWS, November 5, 2001, at 1, 66; *see also* Ted Hearn, *FCC Turns a Skeptic's Eye To EchoStar-DirecTV Deal*, MULTICHANNEL NEWS, November 12, 2001, at 1.

satellite TV rivals, EchoStar and DirecTV grabbed 20% of the multichannel video market and virtually halted cable's subscriber growth. Now EchoStar Chairman Charlie Ergen is threatening to cut more deeply into cable with his deal to combine with DirecTV."[24] Indeed, EchoStar's ability to pay $25.8 *billion* for DirecTV[25] demonstrates the strength of today's MVPD competitors and the current competitive marketplace. Obviously, MVPD competition is thriving.

B. Sunset of the Prohibition Will Not Deprive MVPD Competitors of Adequate Programming Sources.

The foregoing demonstrates that the congressional predicate for extending the sunset date for Section 628(c)(2)(D) — *i.e.*, lack of competition in the MVPD market — simply does not exist. At the same time, the amount of programming available to all MVPDs continues to increase while vertical integration between cable operators and programmers continues to decrease. "The total number of programming networks has grown . . . . The proportion of vertically integrated channels, however, continues to decline."[26] As of June 2000, 35% of the 281 satellite delivered national programming networks were vertically integrated with at least one cable MSO.[27]

By comparison, in 1992 Congress noted the existence of only sixty-eight (68) "nationally delivered cable video networks, 39 of which, or 57 percent, have some ownership affiliation with the operating side of the cable industry."[28] During the period from 1992 to 2000, while the number of programmers increased more than four-fold, from sixty-eight (68) to 281, the percentage of programmers vertically integrated with a cable operator decreased substantially, from 57% to 35%. These facts demonstrate that the current competitive marketplace provides

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[24] John M. Higgins, *It Could Have Been Worse*, BROADCASTING & CABLE, Nov. 5, 2001, at 19. EchoStar's Charlie Ergen commented on the proposed combination with DirecTV: "We're excited now that we can compete [with cable] on an equal, level playing field." *Id.* at 20. This presumably was intended as a wry remark; at 14.9 million "owned and operated" subscribers and over 2 million more affiliated subscribers, EchoStar will have grown larger than all its competitors and will be almost twice as large as Comcast is today.

[25] Mike Farrell, *Ergen Gets the Prize, EchoStar Wins the DirecTV Auction*, MULTICHANNEL NEWS, November 5, 2001, at 1.

[26] *Seventh Competition Report*, 16 FCC Rcd at 6078-79 para.173.

[27] *Id.*

[28] *House Report*, H.R. REP. NO. 102-628, at 41.

ample unaffiliated programming for all MVPDs, which Congress expected and intended to be the result of the 1992 Cable Act.

The DBS industry itself has confirmed this conclusion by vigorously and repeatedly asserting that the sources of video programming available to it are plentiful and that it does not have the capacity to carry all of the programming currently available to it.

> Satellite carriers must choose from among approximately 300 national cable channels, numerous specialty, sports, and regional video channels, pay-per-view offerings, music channels, and other programming services. There are also more than 1500 local television broadcast stations in the United States. In addition, new forms of programming (such as High Definition Television) and interactive television are being developed every day. In sum, satellite carriers do not currently have the channel capacity to carry all of the video programming, music programming, and other programming services that are currently available.[29]

In 1992, Congress designed Section 628(c)(2)(D) in particular as a temporary measure to ensure that then-emerging cable competitors would have access to sufficient programming until a competitive market for program distribution was established. Plainly, that goal has been met. Moreover, as noted above and as the Commission has observed, vertical integration between cable operators and programmers continues to decrease and more independent programming is available to MVPDs than ever before.[30] This has produced an environment in which there are ample sources of independent programming available, and no MVPD will be harmed by the congressionally directed sunset of Section 628(c)(2)(D). Inasmuch as the DBS industry has acknowledged that its access to programming is more than sufficient, continuing to provide

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[29] *Satellite Broadcasting and Communications Association v. FCC*, No. 00-1571, Memorandum in Support of Plaintiffs' Motion for Summary Judgment as to First Amendment Issues, at 2, __ F. Supp. 2d __ (E.D. Va. June 19, 2001, *appeal pending*); *see also id.* at 4. ("There is more programming, music programming, and other programming services presently available than either DIRECTV or Echostar presently has the capacity to deliver to DBS subscribers in the United States.") (*see also* Declaration Under Penalty of Perjury of Stephanie Campbell [DirecTV Senior Vice President of Programming] Pursuant to 28 U.S.C. § 1746(2) (Ex. A, paras 13-15); Declaration Under Penalty of Perjury of Michael S. Schwimmer [EchoStar Vice President of Programming] Pursuant to 28 U.S.C. § 1746(2) (Ex. A, paras 14-16)). *See also Satellite Broadcasting and Communications Association v. FCC*, Nos. 01-1151, 01-1271, 01-1272, Brief of Petitioners at 9 (4th Cir.) (DBS operators "must choose from among hundreds [of] national cable channels, numerous specialty, sports, and regional video channels, pay-per-view offerings, music channels, internet services, and other programming services").

[30] *Seventh Competition Report*, 16 FCC Rcd at 6078-79, para. 173.

government-mandated access to certain programs is unnecessary.[31]

C. Allowing Exclusive Programming Arrangements Will Stimulate Rather Than Impede Competition, but Extending the Prohibition Will Continue to Distort the Programming Market and Harm the Viewing Public.

The current prohibition on exclusivity is not only demonstrably unnecessary, but also affirmatively harms the public by artificially suppressing investment in program production. Thus, government intervention has distorted, and continues to distort, the natural development of the supply side of the programming market.

In a free market, product and service providers generally are free to choose their distributors, subject to the antitrust laws.[32] As the Commission itself has observed, "the public interest in exclusivity in the sale of entertainment programming is widely recognized."[33] The right to use exclusivity is so valued that the Commission's rules specifically bar competitors from distributing certain network, syndicated, and sports programming to the same market for which exclusive distribution rights have been purchased, and the Commission affirmatively enforces such exclusive rights.[34] Government generally does not require that the content distributed by media and entertainment entities be made available to competitors; rather, competitors in these markets are expected either to negotiate for it in the open market or, better yet, to develop or support the development of new content. This benefits the public by encouraging the creation of

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[31] As the DBS industry's resistance to the imposition of mandatory carriage for broadcast television stations confirms, the non-broadcast programming available to it apparently is much more attractive than over-the-air television programming.

[32] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (manufacturer has right to deal, or refuse to deal, with whomever it chooses); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir., 1996), *cert. denied*, 529 U.S. 1012 (2000) (upholding film distributor's grant of exclusive license for exhibition of certain first-run films); *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 908 (6th Cir. 1989) (manufacturers are entitled to the benefits of maintaining a "monopoly" over the products it has developed and produced, otherwise the incentives for innovation and development of beneficial products would be stifled); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1226 (10th Cir. 1986) ("Sound economic theory supports the cases that have allowed suppliers wide latitude in selecting their distributors."); *Futurevision Cable Systems of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760 (S.D.Miss. 1992) (cable operator's exclusive programming agreements were not a restraint of trade under the Sherman Act).

[33] *First Program Access Order*, 8 FCC Rcd at 3384, para. 63.

[34] *See, e.g.*, 47 C.F.R. §§ 76.92-76.227 (network non-duplication, syndicated exclusivity, and sports blackout rules); *KCST-TV*, 103 F.C.C.2d 407 (1986).

a diverse marketplace of ideas and expression. Government does not, for example, require WRC-TV to make its news reports available to WJLA-TV, or require the Washington Post to make David Broder's columns available to the Washington Times, or require the Fox Network to provide "The Simpsons" to the CBS Network or CBS affiliates. Instead, these competitors distinguish themselves in their respective markets by investing in exclusive content. Exclusivity consequently is common to distribution models in almost all other media — including newspapers and magazines, radio, broadcast television, motion pictures, and new media — and stimulates competition by encouraging the investment in, and creation of, competing original content.

In contrast, the current program access rule distorts the programming market by discouraging DBS investment and competition in the production of programming content. The current rule therefore frustrates the statutory goal of promoting programming diversity and harms the public. Because DBS operators have developed a heavy dependence on quality programming created by their competitors, they have had little incentive to invest in programming despite their significant and increasing importance in multichannel video distribution. The rule therefore has stunted the contribution by DBS operators to the diversity and vibrancy of the programming marketplace. No policy goal is achieved by granting government handouts to giant MVPD competitors, unless it is to ensure that competitors such as EchoStar have the wherewithal to allocate \$25.8 *billion* to acquire DirecTV[35] rather than invest in the creation of new programming.

To see how the prohibition has distorted the programming marketplace, recall the cable industry's contribution to programming content when it was at the same stage as DBS is today. At a corollary point in the development of the cable television industry, cable invested in the creation of its own unique programming, expanding the diversity of programming available to the public and moving television from an era of programming scarcity to the current era of relative programming abundance. By around 1980, when the entire cable television industry

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[35] Mike Farrell, *Ergen Gets the Prize, EchoStar Wins the DirecTV Auction*, MULTICHANNEL NEWS, November 5, 2001, at 1.

served approximately 15 million subscribers, cable investment in programming had already resulted in the launch of a wide variety of diverse programming services, including HBO (1972), The Movie Channel (1973), Showtime (1976), Superstation TBS (1976), C-Span (1979), Nickelodeon (1979), TLC (1980), USA Network (1980), BET (1980), Bravo (1980), Cinemax (1980), CNN (1980), and MTV (1981).[36]

In contrast, although the DBS industry currently serves more than 17 million subscribers, both DirecTV and EchoStar have failed to invest in the creation of *any* programming services and have complacently relied almost entirely on programming created by others. EchoStar's director of legal and business affairs recently reiterated that "[n]either DirecTV nor EchoStar are vertically integrated with a programmer"[37] and stated that "there aren't really plans" for a merged EchoStar-DirecTV entity to invest in the creation of programming.[38] EchoStar confirmed it would prefer to enjoy the fruits, but not the risks, of its competitors' substantial investment in the creation of programming content and expressed its "interest in [the] FCC's extending its rules prohibiting exclusive contracts between cable companies and affiliated programming."[39] Thus, the DBS industry has confirmed that extension of the 628(c)(2)(D) prohibition will obviate the need for it to invest in programming. Such a regulatory regime undoubtedly benefits large DBS operators, but it does not benefit the viewing public.

The rule also distorts the programming market by denying a valuable tool, *i.e.*, exclusivity, to new programming services attempting to secure distribution. Although the rule may not have entirely halted the development of new programming, it certainly has foreclosed the viability of programming services that would have depended on exclusivity to gain a foothold

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[36] *See, e.g.*, Paul Kagan Associates, The Cable TV Data Book 1982 at 36; Tony Schwartz, *ABC To Begin Cable Network On Arts*, THE NEW YORK TIMES, December 3, 1980 at 30, Section C; *2d Cable Movie Service From Home Box Office*, THE NEW YORK TIMES, July 31, 1980 at 19, Section C; Andrew Feinberg, *Back From Obscurity: Burned At CBS, Arthur Taylor Ventures Into Cable*, THE NEW YORK TIMES, December 21, 1980 at 4, Section D.

[37] CABLEFAX DAILY, Nov. 7, 2001 at 1. *See also Satellite Broadcasting and Communications Association v. FCC*, Nos. 01-1151, 01-1271, 01-1272, Reply Brief of Petitioners, at 32, n.13 (4th Cir.) ("satellite broadcasters are not vertically integrated with programmers").

[38] COMMUNICATIONS DAILY, November 7, 2001 at 5-6.

[39] *Id.*

in the market. The statute does permit the Commission to evaluate petitions for exclusive arrangements that petitioners might affirmatively demonstrate are "in the public interest,"[40] and the Commission has reviewed several such petitions since 1992; however, this limited mechanism for permitting exclusivity is inadequate in today's programming market. The Commission has granted only two of these petitions, both of which related to fledgling local/regional news services.[41] These very limited grants do represent an acknowledgement by the Commission that exclusive programming arrangements can produce increased programming diversity and can stimulate investment in, and creation and distribution of, local and regional news and public affairs programming that otherwise would not exist.

At the same time, the "public interest" petition device has proven to be very narrow and limited. The Commission's precedents demonstrate that the "public interest" petition is a realistic option for only one narrow type of programming — local news. As a practical matter, the Commission's procedures require a fledgling programming service to submit substantial, detailed business information to the government, hope that no opposition is filed (no petition that has been opposed has been granted), wait for a considerable period of time, and hope that the government will ultimately view its petition with favor. These limitations and hurdles make the petition approach an inadequate and unrealistic option for most fledgling services, which already face daunting marketplace obstacles to achieving viability.

Fledgling programming services now compete for scarce bandwidth with both video and non-video services and applications, and need the ability to offer value to distributors. Congress and the Commission have recognized that exclusive arrangements "are typically used by suppliers to create incentives for distributors to aggressively promote and sell a particular product. In this manner, exclusive distribution may be offered to engender distributor support for a fledgling service to help it gain a foothold in the market."[42] Allowing the prohibition to sunset

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[40] 47 U.S.C. § 548(c)(2)(D), 548(c)(4).

[41] *See New England Cable News*, 9 FCC Rcd 3231 (1994); *see also Newschannel*, 10 FCC Rcd 691 (Cab. Serv. Bur. 1994).

[42] *New England Cable News*, 9 FCC Rcd 3231 at para. 33.

as Congress intended will therefore encourage the carriage of new and diverse programming, which will achieve the ultimate goals of the 1992 Cable Act and the public interests underlying those goals.

Moreover, the general benefits of exclusivity in vertical relationships — *i.e.*, between manufacturer and distributor — have been widely recognized. The Supreme Court has observed that "manufacturers have an economic interest in maintaining as much intrabrand competition [*i.e.*, competition among distributors] as is consistent with the efficient distribution of their products."[43] Similarly, the Tenth Circuit has stated that:

> The only real incentive a manufacturer has to restrict distribution of its product is to make its product more competitive. . . . [L]imiting the number of outlets that distribute a product may encourage distributors to provide promotional activities, consumer information, and product service. These activities may in turn lead to increased interbrand competition.[44]

The Commission also has noted that exclusive arrangements can produce efficiency benefits for the parties involved, and may increase competition through product differentiation, which can produce lower prices and increased choice for consumers in programming and distribution markets.[45] Thus, the ability to create exclusive programming and product differentiation among competitors will spur investment, creativity, competition, responsiveness to emerging audience preferences, and diverse programming — one of the primary purposes of the Act.

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43 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 56 (1977) (citations omitted).

44 *Westman*, 796 F.2d at 1226-27.

45 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Fourth Annual Report*, 13 FCC Rcd 1034 at paras. 11, 230 (1998) ("As the Commission has consistently noted . . . . exclusive arrangements can often produce efficiency benefits for the parties involved, and may increase competition, which can produce lower prices and increased choice for consumers in programming and distribution markets."); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Third Annual Report*, 12 FCC Rcd 4358 at para. 150 (1997) (same).

D. While Large DBS Operators Do Not Create New Original Programming Services, They Do Use Exclusive Programming Agreements Aggressively for Competitive Purposes.

Like many distributors of various goods and services, DirecTV and EchoStar use exclusivity as a means to distinguish themselves in the market and to attract customers. For example, DirecTV offers at least five programming packages that are exclusive.[46] In addition, through its "DirecTV® Freeview®" event series, DirecTV has exclusively offered concerts by such diverse and popular recording artists as The Who, Yes, Sting, Paul McCartney, Barry Manilow, and Peter Frampton, David Gray, Neil Young, Journey, Randy Travis, the Go-Go's, Psychedelic Furs, Wynonna Judd, and Sugar Ray.[47] For example, last week DirecTV announced that "December is U2 Month Exclusively on DIRECTV," during which the company "will premiere an exclusive U2 television event . . . [that] will include a concert film of the band's sold-out Elevation Tour 2001, recorded live in Boston this past June."[48] DirecTV's senior vice president of programming acquisitions stated that "[t]he DIRECTV® FREEVIEW® event series is indicative of [the company's] mission to . . . deliver exclusive features not available on any other multi-channel service."[49] For its part, EchoStar offers at least three program packages exclusively.[50] EchoStar markets these programming packages as being available "exclusively on Dish Network"[51] and has taken court action to enforce its exclusive rights.[52]

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[46] According to DirecTV, NFL Sunday Ticket, NBA League Pass, MLB Extra Innings, NHL Center Ice, WNBA Season Pass, and DirecTV Freeview Events are not available on cable or any other digital television service. *See, e.g.*, http://www.directtv.com/programming; http://global.nba.com/ontheair/league_pass.html; http://www.nfl.com/ticket/subscription; http://www.nhl.com/nhlhq/centerice; http://www.directtv.com/press/pressdel/0,1112,409,00.html (MLB Extra Innings).

[47] *See* http://www.directtv.com/press/pressdel/.

[48] Press Release, *December is U2 Month Exclusively on DIRECTV, Sold-Out U2 Elevation Tour 2001, Plus Additional U2 Programming to be Broadcast Free of Charge*, November 28, 2001, *available at* http://biz.yahoo.com/prnews/011128/law049a_1.html.

[49] *Id.*

[50] EchoStar is the only DBS competitor offering Russian State Television (ORT), the Israeli Network, and South Asia Channels, which includes Zee TV, TV Asia, Sony Entertainment Television Asia, B4U, and Z Gold. *See* http:// www.dishnetwork.com/content/programming/packages/index.shtml.

[51] *See, e.g.*, http://www.kbs-tv.com/dev/israeli_main.html; http://www.kbs-tv.com/dev/main.html.

By contrast, in the cable television business, the amount of programming offered by cable operators through exclusive arrangements is very limited, even with respect to non-vertically integrated programmers. The only national satellite programming that is exclusive to Comcast in its local franchise areas, for example, is ESPN Classic and GoodLife TV, and even there the programming is only exclusive *vis à vis* terrestrial MVPDs, not DBS. Moreover, Comcast's exclusivity with regard to ESPN Classic terminates December 31, 2001, after which GoodLife TV will be the only national satellite programming that is exclusive to Comcast in its local franchise areas, and only with regard to terrestrial MVPDs operating in those areas.

Comcast has no objection to its competitors' use of exclusive programming to distinguish their services in the market. However, given the intense competition that has developed in the MVPD market, no justification exists for prohibiting exclusive programming only for cable operators while permitting it for DBS operators and all other media and entertainment entities. The cable industry should not be forced to compete with one arm tied behind its back while its largest competitors use exclusivity aggressively to their benefit. This is especially so given the pending merger of DirecTV and Echostar, which would eliminate one of two ubiquitous facilities-based competitors to cable and would create the largest single MVPD in the nation, measured either by customers or by number of homes passed.

CONCLUSION

The evidence before the Commission demonstrates that the basis for the temporary prohibition of exclusive distribution agreements has long since ceased to exist. MVPD competition and diversity of programming are flourishing beyond anything Congress could have anticipated when it enacted the temporary prohibition in 1992. Moreover, extending the prohibition can only distort the programming market by providing a huge disincentive for DBS investment in diverse and competitive programming. Such market distortions disserve the public

(. . . continued)

[52] *New Jersey Court Issues Injunctive Relief to EchoStar Subsidiary NRT America; Court Orders TV Russian Network, TVR, to Stop Use of ORT and TV-6 Russian Language Programming*, Business Wire, July 17, 2001, *available at* http://www.kbs-tv.com/dev/pressrelease2.html.

interest and congressional policy by artificially limiting the creation of new and diverse programming, which in turn limits the viewing options available to the American consumer. In addition, the two DBS operators are powerful MVPD competitors that command a substantial portion of the MVPD market and obviously are in no need of continued government assistance, whether or not they merge into a single competitor. For the foregoing reasons, the Commission should allow the prohibition to sunset as Congress intended.

Respectfully Submitted,

COMCAST CORPORATION

By: [signature]
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Of Counsel
December 3, 2001

CERTIFICATE OF SERVICE

I, Sandra Dallas, a secretary at the law firm of Dow, Lohnes & Albertson, PLLC, certify that on this third day of December 2001, I caused the foregoing Comments of Comcast Corporation to be served by first-class mail, except where hand delivery is indicated, on the following:

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Sandra Dallas

Sandra Dallas

By Hand Delivery

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	)	
	)	
Development of Competition and Diversity in Video Programming and Distribution: Section 628(c)(5) of the Communications Act	)	CS Docket No. 01-290
	)	
Sunset of Exclusive Contract Prohibition	)	

To: The Commission

DECLARATION OF JENNIFER TRYON

1. My name is Jennifer Tryon and I am Senior Director, Programming for Comcast Cable Communications, Inc. ("Comcast").

2. I declare under the penalty of perjury that the only national satellite programming exclusive to Comcast in its local franchise areas is ESPN Classic and GoodLife TV, such exclusivity existing only with regard to terrestrial MVPDs operating in Comcast's local franchise areas and not with regard to DBS operators; and that Comcast's exclusivity with regard to ESPN Classic terminates December 31, 2001, at which time GoodLife TV will be the only national satellite programming that is exclusive to Comcast in its local franchise areas and only with regard to terrestrial MVPDs operating in those areas.

Jennifer Tryon

Jennifer Tryon
Senior Director, Programming

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