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	)	

REPLY COMMENTS OF WORLD SATELLITE NETWORK, INC.

World Satellite Network, Inc. ("WSNet"), by its attorneys, hereby submits reply comments in the above-referenced proceeding.[1]

INTRODUCTION

Section 628(c)(2)(D), which generally prohibits exclusive contracts for cable programming between vertically integrated programming vendors and cable companies, is scheduled to sunset on October 5, 2002.[2] In this proceeding, small cable companies, incumbent and competitive local exchange carriers, Internet broadband providers, public utilities, rural cooperatives, and satellite companies, all urge the Commission to retain Section 628(c)(2)(D). In this reply, WSNet supports these parties because Section 628(c)(2)(D) remains vital to preserving and encouraging competition and diversity in the multichannel video programming distribution ("MVPD") market.

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[1] 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 No. 01-290 (rel. Oct. 18, 2001) [hereinafter the "*NPRM*"].
[2] 47 U.S.C. § 548(c)(2)(D).

In addition, WSNet agrees with those parties who urge the Commission to address in this proceeding other anti-competitive conduct by franchised cable operators, which substantially harms competitive MVPDs. Specifically, WSNet joins other parties in urging the Commission to use Section 628 to prohibit anticompetitive conduct by parties who are *de facto* vertically integrated and to close the regulatory loophole that allows vertically integrated operators to avoid providing access to programming simply because they use terrestrial means to deliver the programming rather than satellite.

Finally, WSNet's reply responds to arguments made by the vertically integrated, franchised cable companies and their interest group who, unsurprisingly, support the sunset of the law. Specifically, WSNet urges the Commission not to be misled either by claims that the MVPD market is competitive or by the misplaced argument that Section 628(c)(2)(D) is unconstitutional.

I. Section 628(c)(2)(D) Remains Necessary To Ensure Continued Competition and Diversity In The MVPD Market

A. Competition

1. Multiple System Operators Control The MVPD Market

In their comments, multiple system cable operators ("MSOs") focus on the national multichannel video programming distribution market and conclude that, since the franchised cable industry's national share in subscribers has fallen from 95 percent in 1992 to 80 percent in 2000, "[t]oday, the MVPD market is undeniably competitive."[3]

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[3] Comments of AT&T Corp., CS No. 01-290, at 16 (filed Dec. 3, 2001) [hereinafter "AT&T Comments"]. Other MSOs, and their lobbying arm, argue in incredibly similar fashion of a perceived competitive MVPD market. *See* Comments of AOL Time Warner, Inc., CS No. 01-290, at 7 (filed Dec. 3, 2001) [hereinafter "AOL Time Warner Comments"] ("competition in the distribution of video programming today is *vigorous* and *robust*"); Comments of Cablevision Systems Corp., CS No. 01-290, at 20 (filed Dec. 3, 2001) [hereinafter "Cablevision Comments"] ("The Video Programming Distribution Marketplace Is Now *Vigorous*ly Competitive"); Comments of Comcast Corp., CS No. 01-290, at 2 (filed Dec. 3, 2001) ("*vibrant* competition [ ] characterizes today's multichannel market"); Comments of the National Cable

For this reason, the MSOs believe, the Commission should allow the proscriptions of Section 628(c)(2)(D) to sunset. The Commission should not be misled. To demonstrate the falsity of the MSOs' claims of a competitive MVPD market, the Commission need look no further than its own *Seventh Annual Report* in which it concluded that: "the market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry which serve to increase the cost of potential entry into a rival's market."[4]

Moreover, the MSOs who possess this 80 percent market share continue to consolidate. Presently, the ten largest MSOs control 90 percent of franchised cable's share of the MVPD market.[5] Recently, the first and third largest MSOs, AT&T and Comcast, announced plans to narrow this number to nine, by agreeing to merge their cable entities to form a company that would serve some 22 million subscribers in 41 states.[6] This merger, if approved, should spark another round of consolidation in the already heavily consolidated MSO market.[7]

The 80 percent national market share figure, however, does not tell the whole story, since cable markets are inherently local. As several parties to this proceeding have pointed out, whatever national share of subscribers MSOs command, their control over the local MVPD markets, both in terms of market share and conduct, is considerable. For example, RCN notes that in each of the seven major markets in which it competes, the franchised cable companies command between 90-95 percent of all

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Telecommunications Association, CS No. 01-290, at 2 (filed Dec. 3, 2001) ("this *vigorous* state of competitive alternatives to cable…") (all emphasis added).

[4] *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Seventh Annual Report*, 16 FCC Rcd 6005, 6066 (2001) [hereinafter, the "*Seventh Annual Report*"].

[5] *See id.* at 6013-6014.

[6] *See* Brigitte Greenberg, "Agreement Merges Nation's First, 3rd Largest Cable Companies," *Comm. Daily*, Dec. 20, 2001.

[7] *See id.* (comments of market analyst Blair Levin).

subscribers.[8] Generally, possession of market share above 70 percent is strong evidence of monopoly power.[9] As the Commission itself has found, a scant one percent of all cable communities have "effective competition."[10]

As the record in this proceeding demonstrates, the MSOs have used their local market power to cripple actual and potential competitors by denying them vital programming. For example, Everest, the American Cable Association, and the Competitive Broadband Coalition, all recount problems various small cable operators encounter in gaining access to programming controlled by the MSOs.[11] Still other parties recount unsuccessful battles with Comcast and Cablevision for access to vertically integrated regional sports programming those MSOs withheld by delivering it terrestrially.[12] None of this anticompetitive conduct should surprise the Commission, which noted in the *Seventh Annual Report* that: "[n]oncable MVPDs also continue to experience some difficulties in obtaining programming from both vertically integrated cable programmers and unaffiliated programmers who continue to make exclusive agreements with cable operators."[13]

Further, the difficulties competitive MVPDs have experienced in obtaining programming from the MSOs are compounded by the fact that the franchised entities control most of the programming. As of 2000, MSOs controlled 35 percent of all cable programming.[14] More importantly, however, MSOs control the majority of popular

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[8] *See* Comments of RCN Telecom Services, Inc., CS No. 01-290, at iii (filed Dec. 3, 2001) [hereinafter "RCN Comments"].
[9] *See* Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122 (2d Cir. 1981).
[10] *See Seventh Annual Report* at 6066 (reporting that only 330, or one percent, of local cable markets have effective competition as defined by "consumers having a choice of more than one MVPD").
[11] *See* Comments of Everest Connections Corporation, CS No. 01-290, at 2 (filed Dec. 3, 2001); Comments of the American Cable Association, CS No. 01-290, at 15-16 (filed Dec. 3, 2001) [hereinafter "ACA Comments"]; Comments of Competitive Broadband Coalition, CS No. 01-290, at 10-11 (filed Dec. 3, 2001) [hereinafter "CBC Comments"].
[12] *See* DirecTV, Inc. v. Comcast Corp., 15 FCC Rcd 22802 (2000).
[13] *Seventh Annual Report* at 6010.
[14] *See id.* at 6078-6079 ("of the 281 networks, 99 networks, representing 35 percent, were vertically integrated with at least one cable MSO").

programming. Whether determined by total number of subscribers to the network or by primetime ratings, eleven of the top 20 video programming networks are vertically integrated with cable MSOs.[15] As several commenting parties have pointed out, were the MSOs allowed to enter exclusive contracts with their vertically integrated programming networks, competitive MVPDs could lose access to upwards of 40 percent of their channels.[16]

Given the national and local market share, and in many cases market power, of the MSOs, it makes little sense for the Commission to abandon Section 628(c)(2)(D). As the Rural Independent Competitive Alliance points out: "the level playing field envisioned by Congress is far from a reality."[17] As noted above, whether the share of the MSOs ranges in the 80 percent national range, or the 90 percent local range, the cable market is not competitive. Even with the provisions of Section 628(c)(2)(D), the MSOs continue to flex their anticompetitive muscle by frustrating attempts by their competitors to gain access to markets and programming essential to competitive survival and by raising prices to their customers at rates significantly higher than the rate of inflation.[18]

2. *Access To Programming Is Essential To The Survival of Competitive MVPDs*

Programming is the lifeblood of competitive MVPDs. As Qwest explains: "It is the product. It is the attraction. Competitive entrants to the landline MVPD business will not survive without reasonable access to quality programming."[19] Given the still considerable market power of the MSOs, as well as their enduring hold on popular

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[15] *See id.* at 6079-80.
[16] *See, e.g,* ACA Comments at 6-11.
[17] Comments of the Rural Independent Competitive Alliance, CS No. 01-290, at 3 (filed Dec. 3, 2001).
[18] *See Seventh Annual Report* at 6008-09 (noting that from June 1999 through June 2000, cable prices rose 4.8 percent compared to a 3.2 percent increase in the Consumer Price Index).
[19] *See* Comments of Qwest Broadband Services, Inc., CS No. 01-290, at 3 (filed Dec. 3, 2001).

programming, the proscriptions of Section 628(c)(2)(D) remain as necessary today as they did a decade ago.

The MSOs dispute the necessity of Section 628(c)(2)(D) by claiming that the law is both unfair and unconstitutional.

a. The Exclusivity Ban Is Fair

Primarily, the MSOs argue that Section 628(c)(2)(D) is unfair because it allows competitive MVPDs to get a "free ride" on their programming.[20] In their view, Section 628(c)(2)(D) should be allowed to sunset and competitive MVPDs should be forced either to develop or purchase their own programming affiliates.[21] To support this argument, the MSOs focus on the DBS operators who, in their estimation, have the financial wherewithal to take such action.[22] This approach ignores, however, the thousands of competitive MVPDs without such ability.

As a provider of analog television programming equipment to private cable operators in urban areas, WSNet knows first hand the difficulty non-franchised MVPDs face in trying to compete in the MVPD market. Similarly, WSNet's new satellite platform fills the need of small, rural cable operators who require a more cost-effective method of delivering programming to remain competitive. In both of these types of markets, WSNet is aware of how close to the margin most competitive MVPDs must remain in order to stay competitive with their franchised competitors. These companies simply cannot afford to develop their own programming or to purchase their own programming entities.

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[20] *See, e.g.,* Cablevision Comments at 9; AT&T Comments at 8.
[21] *See* Cablevision Comments at 16 ("removal of the exclusivity restriction will foster programming investment by DBS and other non-cable MVPDs").
[22] *See id.* at 16 ("clearly, these companies possess the resources to develop their own programming").

The MSOs also deny that they would have any incentive to withhold their programming from competitors if Section 628(c)(2)(D) were to sunset. Specifically, the MSOs ask the Commission to believe that the profits gained from having the exclusive right to a network would not compensate the advertising loss occasioned by a reduction in the total number of potential viewers.[23] History instructs otherwise. As mentioned above, the record is full of instances in which a franchised operator has kept vertically integrated programming from competitors. As one party notes, "depriving smaller competitors of important programming makes the competitors' offerings unattractive to consumers and reinforces the dominant firms' market power, enabling them to charge supracompetitive prices to consumers."[24]

Additionally, the MSOs urge the Commission to allow exclusive arrangements, since, in Cablevision's view, "in virtually every segment of the American economy other than vertically integrated programming, the opportunity to enter into exclusive distribution arrangements is the norm rather than the exception."[25] As AT&T notes, exclusive dealing arrangements are common throughout the economy—"in fast food franchises, tire stores, gas stations, and many other businesses."[26] The MSOs ignore, however, the fact that Congress determined their market to be unique in that the MSOs controlled not only the vast majority of subscribers, but also had attributable interests in the majority of programming.[27]

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[23] *See* AT&T Comments at 24 (calling such conduct "highly unlikely…since the profit to the overall enterprise must account for the opportunity cost of not having the programming more widely distributed").
[24] *See* Comments of Echostar Satellite Corporation, CS No. 01-290, at 8 (filed Dec. 3, 2001) [hereinafter "Echostar Comments"].
[25] Cablevision Comments at 2.
[26] AT&T Comments at 9.
[27] *See* Comments of Broadband Service Providers Association, CS No. 01-290, at 9 (filed Dec. 3, 2001) *citing* Examination of Cable Rates: Hearing Before the Senate Commerce, Transportation and Science Comm., 105th Cong. (July 28, 1998) (statement of Rep. W.J. Tauzin recalling the drafting of the 1992 Cable Act: "[w]e awakened to the sad realization that we had forgot one crucial element, and that was that cable controlled programming. And that controlling programming was a way of making sure that there would be no competitors. If a competitor couldn't get the programming, it certainly wasn't going to launch the [system]").

Finally, in appropriate circumstances, Section 628 already allows for exclusivity, even among vertically integrated operators, through the waiver mechanism in Section 628(c)(4). Under Section 628(c)(4), a cable operator can enter into an exclusive arrangement with its vertically integrated programming network if it can show the benefit to the public of the arrangement will outweigh the deal's competitive harm. MSOs complain that the standard for waiver is too high and point to the fact that only two applications for waiver have been accepted since the law was enacted.[28] This is both true and irrelevant. First, only six waivers appear to have been sought.[29] And the fact that the majority of these requests could not show that the competitive harm would not outweigh the benefits should be instructive to the Commission in the present proceeding as to the inherent danger in such arrangements.

b. The Exclusivity Ban Was Found To Be, And Remains, Constitutional

In their comments, various MSOs maintain that Section 628(c)(2)(D) limits their rights to free speech by limiting their ability to determine how to disseminate their programming.[30] Additionally, they urge that the law chills free speech by removing the incentive to create programming. The Commission should pay little heed to First Amendment claims that were rejected by the D.C. Circuit Court of Appeals five years ago.

In Time Warner Entertainment Co., L.P. v. FCC, Time Warner argued that the proscriptions of Section 628 violated the First Amendment since they limited speech and were not narrowly tailored to further any important or substantial government

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[28] *See* New England Cable News, 9 FCC Rcd 3231 (1994); NewsChannel, 10 FCC Rcd 691 (1994).
[29] *See id.; see also* Outdoor Life Network and SpeedVision Network, 13 FCC Rcd 12226 (1998); Cablevision Industries Corp. and Sci-Fi Channel, 10 FCC Rcd 9786 (1995); Time Warner Cable, 9 FCC Rcd 4029 (1994); Time Warner Cable, 9 FCC Rcd 3221 (1994).
[30] *See, e.g,* AOL Time Warner Comments at 4 ("[b]y mandating that cable-affiliated programmers must distribute their programming through parties not of the programmer's choosing, the restrictions on exclusivity effectively coerce speech").

interest.[31] The court disagreed, noting that Congress had determined that "[w]ithout these provisions, vertically integrated cable operators could favor their affiliates to the disadvantage of other programmers …."[32] Cablevision now claims, however, that the "market realities" have changed in such dramatic fashion since the *Time Warner* decision, that the Commission can ignore the findings of the D.C. Circuit court that the proscriptions of Section 628 remain appropriate. Specifically, Cablevision argues that Section 628 has "worked to stifle programming investment that otherwise would have occurred—thus placing a heavy burden on vertically integrated speech."[33]

There has, however, been no dearth of programming, given the fact that the number of programming networks has increased from 29 in 1993 to over 281 today.[34] Moreover, this argument explicitly was rejected by the court. While the *Time Warner* court agreed that the law limited speech to some extent, it found that such a limit was narrowly tailored by Congress to achieve its intended purpose.[35]

Cablevision also raises a constitutional objection, arguing that the law "forces cable operators to give up exclusive rights to their property and turn it over to unaffiliated MVPDs" in contravention of the Fifth Amendment.[36] In support of its takings argument, Cablevision cites Keystone Bituminous Coal Ass'n v. Duncan.[37] *Keystone* makes clear, however, that the government "may regulate the uses of property to promote the public good" without necessarily requiring compensation.[38] The court identified a three-pronged test to determine whether a regulation results in a taking: the extent to which the regulation resulted in an actual, physical invasion of property, the extent to which the regulation diminishes the value of the subject property, and the

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[31] 93 F.3d 957, 979 (1996) [hereinafter "*Time Warner*"].
[32] *Id.*
[33] Cablevision Comments at 41.
[34] *See Seventh Annual Report* at 6078.
[35] *See Time Warner*, 93 F.3d at 979.
[36] Cablevision Comments at 41.
[37] 771 F.2d 707 (3d Cir. 1985), *aff'd*, 480 U.S. 470 (1987) [hereinafter "*Keystone*"].

extent to which the regulation interfered with the investment-backed expectations of the company and its shareholders.

First, Section 628(c)(2)(D) does not involve a physical taking. Second, neither Cablevision nor any other MSO has offered any evidence as to what extent, if any, the exclusivity provisions diminish the value of their vertically integrated programming network. Moreover, courts have held that diminution of as much as 75 percent may not be sufficient for compensation to be appropriate.[39] Finally, the MSOs do not claim, nor could they, that they have any investment-backed expectation that they should be able to use their vertically integrated networks exclusively. These regulations have been in place since 1992. Any investor in existence prior to the adoption of the law should have made a claim then. Any subsequent investor should be expected to have knowledge of the regulations related to their investment.

B. Diversity

Section 628(c)(2)(D) also remains an essential tool in maintaining diverse programming options for MVPD consumers. At the time of the passage of Section 628, only 29 cable networks existed.[40] Since the passage of Section 628, the number of programming networks has grown exponentially. According to the *Seventh Annual Report*, today, more than 281 networks are available to consumers.[41] With the exceptions noted above, most of these networks are available to all subscribers of various MVPDs—even if their provider does not offer them in their lineup. The sunset of Section 628(c)(2)(D) would lessen the diverse programming available to customers of all MVPDs.

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[38] *See id.* at 712.
[39] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
[40] *See* Comments of DirecTV, Inc., CS No. 01-290, at 6 (filed Dec. 3, 2001), *citing* Kagan World Media, *U.S. Cable TV Network Start-up Penetration, By Launch Date* (2001).
[41] *See Seventh Annual Report* at 6078.

The MSOs, however, believe that without Section 628(c)(2)(D), competing MVPDs would be forced to develop or purchase programming networks; therefore, more networks would be deployed and diversity would increase. This argument, however, is fatally flawed.

First, and as noted above, the vast majority of competitive MVPDs are simply unable to develop or purchase developers of such programming. Diversity does not exist when a customer can choose only between an MSO and its vast, vertically integrated offerings, or a competitor, with 40 percent fewer channels.

Second, even where an MVPD could afford to purchase or develop its own networks, not all programming is replicable. If Cablevision holds the exclusive rights to broadcast the New York Yankees, as it does, it makes little difference that a competitor to Cablevision in New York can offer highlights of the game, or some other game, on its own sports network. Certain types of programming, especially regional sports programming, remain a vital part of any competitive MVPDs programming package.[42]

II. Alternative Protections Offered By The Commission Are Inadequate

While various parties offered some support for alternatives to retention of Section 628(c)(2)(D), none of these alternatives offers as much protection to competition in the MVPD market as Section 628(c)(2)(D). First, the Commission should not limit its exclusivity rules only to programming it has deemed to be "essential."[43] A determination of what is deemed essential programming would require either a determination by the Commission of a program's popularity, or, alternatively, an

[42] *See, e.g.,* RCN Comments, at 16, *citing* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Fifth Annual Report*, 13 FCC Rcd 24374 at ¶ 171 (1998) ("sports programming…warrants special mention because of its widespread appeal and strategic significance for MVPDs").
[43] *NPRM* at ¶14.

inquiry into its content, neither of which inquiry would lead to consistent and speedy resolution of program access disputes.

Second, the Commission should not hope to rely on its own anti-discrimination rules to enforce the anticompetitive exclusivity agreements that will develop should Section 628(c)(2)(D) sunset. As one party notes, such an action could result in the perverse outcome that: "vertically integrated programmers may be given more of an incentive to enter into exclusive contracts with cable providers precisely in order to avoid the anti-discrimination rules."[44] Moreover, Congress made a determination, in promulgating both general anti-discriminatory measures and the specific, exclusivity proscriptions of Section 628, that *both* sets of laws were required to maintain and encourage competition in the MVPD markets.

Finally, while it is not surprising that the MSOs support it, the Commission should not rely upon the antitrust laws to protect against anticompetitive behavior of vertically integrated operators.[45] Because antitrust litigation is lengthy and expensive, competitive MVPDs would have little incentive to fight the MSOs in antitrust fora, where programming and distribution relationships would remain uncertain for years.

III. The Commission Should Address All Anticompetitive Actions By MSOs

In its initial comments, WSNet urged the Commission to address two specific problems associated with Section 628. First, WSNet asked the Commission to use its authority under Section 628 to deal with anticompetitive actions by MSOs that amount to *de facto* vertical integration. Additionally, WSNet urged the Commission to close a loophole in Section 628(c)(2)(D) that allows vertically integrated cable companies to circumvent the purposes of the law by shifting their delivery of programming from

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[44] Echostar Comments at 15.

[45] *See, e.g.*, Cablevision Comments at 37 ("The Antitrust Laws Are Sufficient and Appropriate Means of Policing Anticompetitive Exclusivity Strategies").

satellite to terrestrial. Both of these positions received considerable support from other parties.

A. De Facto Vertical Integration

As the APPA points out, "a major cable operator can exercise substantial influence over a distributor of satellite programming without necessarily having an 'attributable interest' in the distributor."[46] Specifically, it has been WSNet's experience that MSOs have managed to form various relationships with programming networks that, while falling just short of the Commission's standards of *de jure* vertical integration, amount to *de facto* vertical integration. Thus, while not violating the precise terms of Section 628(c)(2)(D), these MSOs have managed nonetheless to enter into exclusive contracts and to engage in other anticompetitive practices.

The Commission, therefore, should apply the full force of Section 628 against such anticompetitive actions. While Commission precedent is clear that Section 628 will not be used against basic exclusive contracts between non-vertically integrated parties, that precedent is equally clear that other types of conduct, such as anticompetitive marketing activities and other restrictive contractual provisions, can and should be prohibited. Specifically, the Commission declared in 1999 that Section 628(b) may be used "to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."[47] WSNet joins other parties in calling upon the Commission to enforce Section 628 against *de facto* vertical integration.

B. Terrestrial Delivery Loophole

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[46] Comments of the American Public Power Association, CS No. 01-290, at 6 (filed Dec. 3, 2001).
[47] *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage,

Another method by which MSOs have attempted to avoid the exclusivity provisions of Section 628(c)(2)(D) has been to shift the delivery of programming from satellite to terrestrial means, particularly as terrestrial delivery has become more affordable.[48] In this way, terrestrial delivery has allowed MSOs to deny competitors access to all their "vertically integrated" programming. Congress did not intend this result. Rather, and as Carolina Broadband and other parties note, "the language of Section 628(c)(2)(D) merely reflects the reality at the time of its adoption that satellite transmission was required for the distribution of cable programming."[49]

The Commission should close the terrestrial loophole. As RCN instructs, "if section 628 as a whole is to have any continuing meaning apart from the exclusivity ban—[ ] it simply has to apply to cable programming however distributed."[50] If the Commission believes that it requires additional authority to do so, WSNet urges it to work with Congress to amend the statute to include terrestrial delivery within the proscriptions of Section 628(c)(2)(D).[51] Until the loophole is closed, WSNet urges the Commission to enforce its anti-discriminatory program access rules against the terrestrial delivery of cable programming where the purpose of that delivery is to evade the provisions of Section 628(c)(2)(D).

Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 3105, 3121-22 (1994).

[48] *See* CBC Comments at 10 ("the fact that Comcast, presently the third largest cable MSO, has chosen to use terrestrial fiber transport in place of satellite transport to distribute popular regional sports programming in which it has an ownership interest so as to avoid having to sell that programming to its competitors serves to highlight the desire and willingness of large and powerful cable MSOs to withhold programming product from their competitors if permitted to do so").

[49] Comments of Carolina Broadband, Inc., CS No. 01-290, at 8 (filed Dec. 3, 2001); RCN Comments at 32 ("Congress's reference to 'satellite cable programming,' therefore, does not carry the freight the Commission has loaded onto it. It conveys only the common understanding in 1992, when section 628 was adopted, that satellite transmission was required for the distribution of cable programming").

[50] RCN Comments at 30.

[51] *See, e.g,* Comments of Gemini Networks, Inc. at 5, (filed Dec. 3, 2001) ("[i]f the Commission determines that it does not have jurisdiction, legislative relief may be necessary and appropriate and Gemini urges the Commission to support that effort").

CONCLUSION

The Commission cannot retreat from its rules and watch as incumbent cable companies continue to consolidate, vertically integrate, and force their competitors out of the market by removing their access to vital programming. The Commission must not allow Section 628(c)(2)(D) to sunset.

Respectfully submitted,

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