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 Distribution: Section 628(c)(5) of the Communications Act Licensees and their Affiliates; and	)	CS Docket No. 01-290
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF VERIZON

The Verizon telephone companies[1] ("Verizon") submit the following reply comments on the Notice of Proposed Rulemaking[2] regarding the exclusive contract prohibition contained in Section 628(c)(2)(D) of the Communications Act of 1934, as amended.[3] The exclusive contract prohibition should be continued because today cable programmers vertically integrated with cable multiple systems operators (MSOs) still have the incentive and the ability to use control over program packages (i.e. channels) to stymie the development of competing multichannel video programming distributors

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1 The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc., and are listed in Attachment A.

2 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, CS Docket No. 01-290, FCC 01-307 (rel. Oct. 18, 2001). ("Notice of Proposed Rulemaking").

3 47 U.S.C. § 548(c)(2)(D).

("MVPDs"), just as they did when Congress enacted this restriction in 1992. Verizon therefore urges the Commission to extend the prohibition.

As the Commission recognized in the *Notice*, Congress adopted the program access provisions, including the prohibition on exclusive contracts between vertically integrated programming vendors and cable operators, based on its conclusion that the "use of exclusive contracts…served to inhibit the development of competition among distributors."[4] Congress concluded that "vertically integrated program suppliers have the incentive and ability to favor their own affiliate cable operators over other multichannel programming distributors…."[5] Congress also provided for expiration of the prohibition on October 5, 2002, unless the Commission finds that the prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[6]

The program access rules today remain necessary to preserve and protect competition and diversity in the distribution of video programming. As many commenters point out, the market for multichannel video program distribution is not so competitive that it has eliminated the ability of vertically integrated cable MSOs to use their control of key programming to stymie the development of competition. Carolina Broadband, a company building new MVPD facilities, points out, "It has consistently been demonstrated that programming is the single most important factor that viewers consider when selecting an MVPD provider, . . . and that absent access to programming,

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4 Notice of Proposed Rulemaking at 2.

5 *Id.*

6 47 U.S.C. § 548(c)(5).

particularly 'marquee' programming such as local sports, viewers will simply not switch to a competitor."[7] Qwest correctly observes, "Programming is the essence of the MVPD business. It is the product. It is the attraction. Competitive entrants . . . will not survive without reasonable access to quality programming."[8] Without program access, new entrants cannot get their service off the ground and existing competitors could lose their ability to compete.[9]

The cable industry would have the Commission believe that even without the protection provided by the exclusive contract prohibition, a new or emerging MVPD entrant would nevertheless be able to obtain access to essential MVPD programming. A review of the list of video programming services in which MSOs have significant ownership interests casts substantial doubt on that argument. It is difficult to imagine that a competing multichannel video distribution service could continue to attract customers without offerings such as HBO, Cinemax, CNN, Discovery, TBS or the regional sports networks owned by MSOs.[10] Indeed, MSOs own substantial interests in 9 of the top 20 programming services by prime time rating.[11] As EchoStar observes, "There is no question that without a full package of the usual channel offerings, most consumers would not consider DBS [direct broadcast satellite] an acceptable substitute

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7 Comments of Carolina Broadband, Inc., CS Docket No. 01-290 at 4 (filed Dec. 3, 2001).

8 Comments of Qwest Broadband Services, Inc., CS Docket No. 01-290 at 3 (filed Dec. 3, 2001).

9 *See, e.g., id.*; Comments of National Rural Telecommunications Cooperative, CS Docket No. 01-290 at 6 (filed Dec. 3, 2001); Comments of Carolina Broadband at 6.

10 *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005, 6118-20 (Appendix D, Table D-1) (2001) ("*Seventh Annual Report*").

11 *Id.* The nine vertically integrated services do not include AT&T interests that were spun-off to Liberty Media.

for traditional cable. . . . MVPD consumers have come to expect both the 'must-have' programs and the variety and diversity of programming that is the hallmark of MVPD services. Absence of that 'full package' of programming can severely constrain an MVPD competitor."[12]

The cable industry attempts to obscure the criticality of vertically integrated programming by pointing out that the overall percentage of vertically integrated channels has declined.[13] While it is true that the percentage of vertically integrated programming has declined, that is due largely to the growth of non-vertically integrated services over the last decade.[14] The only significant decrease in the number of vertically integrated service has occurred as a result of the AT&T spin-off of Liberty Media, which resulted from extrinsic factors (such as AT&T's debt burden) other than changes in the ability of MSOs to use vertically owned programming to stymie competition.

Perhaps because cable is still capable of controlling access to critical programming, cable would have the Commission revisit Congress' determination that the exclusive contract prohibition is good policy. Given that the conditions Congress intended to remedy with Section 628 still exist, this is an issue the Commission need not address. Nevertheless, the record demonstrates that Congress' finding still holds—the

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12 Comments of EchoStar Satellite Corp., CS Docket No. 01-290 at 14-15 (filed Dec. 6, 2001).

13 Comments of the National Cable & Telecommunications Association, CS Docket No. 01-290 at 13 (filed Dec. 3, 2001); *see also* Comments of Cablevision, CS Docket No. 01-290 at 30 (filed Dec. 3, 2001); Comments of AT&T, CS Docket No. 01-290 at 21-22 (filed Dec. 3, 2001).

14 *Compare 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, App. G, Table 7 (1994) ("*First Report*"), *with Seventh Annual Report,* App. D, Table D-6. The decline in the overall percentage of vertical integration appears to be the result of an increase in the number of programming networks, and not a cable industry retreat from the programming market.

harms that would be caused by exclusive program contracts in the cable-dominated MVPD market far outweigh any benefits exclusivity would provide.

Moreover, it is clear that the program access rules and other provisions of the 1992 Cable Act addressing vertical integration have also succeeded in promoting diversity, and have not hindered diversity. As cable system channel capacity has increased, the opportunity for both affiliated and unaffiliated programmers to find suitable carriage also increased, but without the ability to use that new programming to stifle competition. Rather than harming the programming market, the evidence indicates that the exclusivity ban has produced greater competition and diversity in both the distribution and production of programming.

Finally, to the extent that the benefits of exclusivity in any particular case outweigh the harms, the proponent of exclusivity is free to seek a statutorily-permitted finding that exclusivity is in the public interest. The Commission has made such findings in the past to aid fledgling programs,[15] and this process will allow the Commission to tailor the general ban on exclusive contracts for programmers vertically integrated with MSOs so that as a means of encouraging the creation of innovative programming in the future, where exclusivity will not be anticompetitive.

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[15] *See New England Cable News*, 9 FCC Rcd. 3231 (1994).

Conclusion

Cable continues to have the ability to use its control of popular programming to foreclose competitive entry if the exclusive contract prohibition sunsets. Verizon therefore asks the Commission to extend the exclusive contract prohibition.

Respectfully submitted,

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ATTACHMENT A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.