Before the
Federal Communications Commission
Washington, D.C. 20554

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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

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REPLY COMMENTS OF THE COMPETITIVE BROADBAND COALITION

CT Communications Network, Inc.
First Mile Technologies, LLC
Lexcom Cable Services, LLC
Next Level Communications
Paul Bunyan Rural Telephone Company
RTC Communications Corp.
TUT Systems, Inc.
VideoTele.com, Inc.

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REPLY COMMENTS OF THE COMPETITIVE BROADBAND COALITION

The Competitive Broadband Coalition ("CBC") hereby respectfully submits these reply comments in response to the above-captioned *Notice of Proposed Rulemaking* released by the Federal Communications Commission ("FCC" or "Commission") on October 18, 2001.[1] In its initial comments, CBC urged the Commission to extend the current prohibition against exclusive contracts for vertically integrated satellite cable programming and/or satellite broadcast programming, contained in section 628(c)(2)(D) of the Communications Act of 1934, as amended ("Communications Act" or "Act"), beyond the current October 5, 2002 sunset date.[2]

The overwhelming weight of the comments filed in this proceeding support retention of the exclusivity prohibition. Newly emerging MVPD competitors employing a variety of technologies and system architectures uniformly agree that access to video

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[1] *Notice of Proposed Rulemaking*, CS Docket No. 01-290, FCC 01-307, 66 FR 54972 (October 31, 2001) ("*NPRM*"). CBC has been joined in these reply comments by TUT Systems, Inc.

[2] 47 U.S.C. §548(c)(2)(D).

programming content on reasonable terms and conditions is absolutely essential to the development of facilities-based competition to incumbent cable operators. There is virtual unanimity among nearly all sectors that the presence of exclusivity prohibition is largely responsible for allowing such competition to establish a foothold in the MVPD market and continues to be necessary not only to foster the development a fully competitive MVPD market, but also to protect existing competition.

Only a handful of vertically integrated cable operators, who incidentally happen to be the largest, most horizontally concentrated cable companies, and their national trade association urge elimination of the prohibition. That is not surprising given that the very purpose of the prohibition was to stop such companies from using their control and influence over content to stifle the development of competitive distribution facilities that offer consumers the ability to choose their MVPD. What is simply astounding are these companies' assertions that elimination of the exclusivity prohibition not only will have no negative effect on the ability of MVPDs to compete with incumbent cable systems, it will actually enhance such competition.

Such Orwellian logic belongs appropriately to the realm of fiction. For despite the fanciful excursions into ivory tower economic theories propounded by those who favor elimination of the exclusivity prohibition, the reality of the situation, the facts on the ground so to speak, indicate that just the opposite is true. It doesn't take more than a small dose of common sense to figure out that if elimination of the exclusivity prohibition would enhance competition, all of the competing MVPDs would be supporting such elimination. The fact that 100 percent of the competition favors retention and even expansion of the prohibition speaks volumes to the credibility of this argument.

One only has to question why the parties to this proceeding favor either elimination or retention of the exclusivity prohibition. The parties seeking retention of the prohibition will answer that the prohibition should be retained because it enables them to compete with incumbent cable companies and gain market share. Self interest is evident and the answer is therefore credible. In contrast, the parties who seek to eliminate the prohibition, and who still control the lion's share of the MVPD market, would actually have the Commission believe that they are acting against their economic self interest to encourage competition that will further erode their MVPD market share. Infinitely more believable is that removal of the exclusivity prohibition would further the self interest of those proponents by allowing them to deny popular programming to their competitors and increase their market share.

Vertically integrated cable companies are quick to point to the growth of DBS services as proof that the market is "vibrantly competitive." The characterization of the presence of a single competitor as vibrant competition can be dismissed politely as hyperbole. As discussed in detail in CBC's initial comments, the Commission should not overemphasize the growth of DBS in assessing the state of the competitive landscape for several reasons. First, incumbent cable operators control a share of the MVPD market nearly five times the size of the share of their largest competitor, DBS, and more than 25 times the size of all terrestrial-based competitors taken as a whole. Second, many DBS subscribers reside in rural areas where terrestrial services are not available. Although the large MSOs would like to have the Commission believe that all DBS growth comes at the expense of incumbent cable operators, this is simply not the case. The cable industry retains a slightly smaller proportionate slice of a larger MVPD market pie. Third, DBS, as a national competitor, is unique and is therefore not representative in any way of terrestrially based local and regional competing MVPDs. Fourth, DBS is largely a one way mass media not suited to offering the plethora of individually discrete communications services that will characterize competition in the market for advanced broadband services, including video programming. While no one denies that DBS provides a degree of competition to incumbent cable operators, the Commission must recognize that there are many other sources of potential competition that can not compare with DBS (much less highly concentrated cable MSOs) in terms of size, reach or market power. And it is precisely these smaller terrestrial competitors that promise to provide facilities-based competition for convergent, interactive digital broadband services.

Likewise, short shrift should be given to the complaints vertically integrated companies are somehow disadvantaged by the fact that DirecTV has able to obtain exclusive contracts to carry certain professional sports packages. DirecTV's contracts are with non-vertically integrated programming services, exactly like the exclusive contracts that vertically integrated cable operators have been able to obtain from satellite programmers such as Disney and MSNBC. If the NFL or NBA are able to grant exclusive contracts, it is because these entities are not affiliated with any MVPD and thus do not have the same incentive that vertically integrated distributors have to use exclusivity to maintain or obtain a monopoly over program distribution.

A number of vertically integrated companies, citing various economic and antitrust theories, argue that the exclusivity prohibition harms program diversity, acts as a disincentive to investment in new programming services, and gives MVPD competitors a "free ride" since they are able to obtain the benefits of access to programming without undertaking any of the risks associated with program production. They further suggest that it is somehow unfair or undesirable for DirecTV and Echostar to purchase exclusive rights to certain sporting events even though these companies have not started up new programming ventures on their own. Apart from the fact that it is somewhat illuminating that these claims are being made not by the vertically integrated programmers themselves but by the vertically integrated cable operators that control them, these arguments simply do not coincide with actual practice.

From 1992 to the present, there has been an exponential growth in new programming services, and not a single shred of credible evidence exists to suggest that the exclusivity prohibition has harmed program diversity. The fact that an increasing number of programming services are available today from non-vertically integrated sources is a positive development, and is evidence that true diversity is flourishing. License fees paid by MVPD competitors (just like the fees paid by cable operators) are being used to develop new programming and launch new programming services. In fact, MVPD competitors routinely pay higher per subscriber programming license fees than their incumbent cable counterparts. It makes no difference that certain MVPDs do not choose to also become programmers. Within the cable industry itself few but the largest MSOs own any significant interest in satellite-delivered cable programming services. If investment by program distributors were a prerequisite for the development of new programming services, there would not be any non-vertically integrated programming services and the proportion of vertically integrated services would be growing instead of shrinking.

The exclusivity prohibition has not been a significant disincentive for program investment. The use of exclusive contracts by non-vertically integrated programmers, who do not have the same anticompetitive incentives to use exclusivity as a tool to increase their share of the distribution market, is relatively infrequent even though the number of non-vertically integrated services has continued to increase. Furthermore, large cable MSOs that remain subject to the prohibition continue to invest in new programming and, if they are not investing even higher amounts, it is only because in tight financial times their finite resources are also funding new system acquisitions, legacy system upgrades and rebuilds to support advanced two-way services, and the deployment of new high speed data, voice and interactive television applications. While these companies argue that exclusivity is crucial to support new services in their critical developmental stages, this argument conveniently ignores the fact that the Commission's rules, as required by the statute, provide for a waiver process that allows for vertically integrated programmers to enter into exclusive contracts in cases where such contracts are truly justified.

Theoretical arguments that competing MVPDs are somehow getting a free ride border on the disingenuous. In point of fact, competing MVPDs shoulder a disproportionate burden of program production costs. They are forced to pay higher license fees than their incumbent cable counterparts, even when volume discounting is factored out of the equation. They are subject to "full line forcing" conditions that require them to carry (and pay for) a programmer's full line of programming services in order to obtain a license to carry the one or two services that they want in situations where incumbent cable operators are not required to do so. Programmers often seek to impose technology limitations and other conditions on competing MVPDs that are not imposed on their incumbent counterparts. The term "free ride" would quickly disappear from the vocabulary of vertically integrated cable companies if they were forced to purchase programming on the same terms and conditions as their MVPD competitors.

As pointed out in CBC's initial comments, and echoed in the comments of other similarly situated parties, competing MVPDs face a number of impediments in gaining access to programming on fair and nondiscriminatory terms and conditions because of their relatively small size and lack of market power. These problems have been greatly exacerbated by the increased horizontal concentration within the cable industry, the related practice of regional clustering, and the vertical integration of many satellite programming services with the major television networks. An example of how these factors combine to disadvantage competing MVPDs can be found in the experience of one of CBC's members, CT Communications Network, Inc ("CTCN").

CTCN is rolling out a VDSL-based multichannel video programming offering as a franchised cable operator in a portion of a region served by one of the largest vertically integrated cable MSOs. In formulating its channel line-up, CTCN desired to carry four out-of-market television broadcast stations that were being carried by the incumbent cable operator and which appear on the Commission's list of significantly viewed stations for CTCN's franchise areas. CTCN was able to obtain retransmission consent from only one of those four stations. Of the three stations for which retransmission consent could not be obtained, the first station refused to even discuss retransmission consent terms until after it renewed its current retransmission consent agreement with the incumbent cable operator, even though the current agreement was not set to expire for approximately five months. CTCN's offer to accept a short term agreement under the same terms as the incumbent's existing agreement pending those renewal negotiations was rejected out of hand.

The second station, a national network affiliate, originally refused retransmission consent without giving a reason. When it was brought to its attention that FCC rules do not permit it to discriminate among competing cable systems in granting retransmission consent, its response was that it negotiated carriage with the incumbent cable operator on a national basis under a master agreement which was something CTCN, as a purely local company was not in a position to do. When asked whether there were any circumstances under which the station might grant consent, the station then indicated that it might consider a retransmission consent request if CTCN were willing to pay an exorbitant monthly per subscriber fee, a fee which CTCN does not believe is levied on the incumbent.

The third station, also a national network, actually proffered a retransmission consent agreement. The draft agreement required CTCN to carry three existing analog and one future digital satellite programming services owned by the network in addition to purchasing extended Olympics coverage for the term of the network's Olympics contract. When CTCN indicated a willingness to meet these terms, the network then indicated that CTCN would not be able to take advantage of the pricing for the existing satellite services offered by CTCN's buying group, but rather would have to pay a rate for those services that would have more than doubled CTCN's programming costs. It is highly unlikely that the incumbent cable operator was required to forego its favored pricing structure and program discounts for the satellite services (if it was even required to carry them in the first place) as a condition of obtaining retransmission consent.

These cases are merely illustrative of just a few of the problems that competing MVPDs face on a daily basis in getting access to programming. It is not insignificant that, in all three of the examples cited above, the first response that the station made to CTCN's retransmission consent request was to ask whether CTCN was planning to serve an area already served by an incumbent cable operator. The second response was to ask who the incumbent operator was. While CTCN is not privy to any discussions or agreements between the stations and the incumbent, these questions suggest, at the very least, that television stations are frequently taking into account the incumbent cable operastors' market power in their own and in surrounding DMAs in deciding whether to grant retransmission consent to MVPD competitors. Although these examples do not involve programming services affiliated with cable systems, they underscore the need for the Commission to consider taking steps, in addition to retaining the exclusivity prohibition, to redress the competitive imbalance that exists in the programming and distribution markets, as urged by a number of parties in this proceeding.

Similarly, as mentioned in CBC's original comments, CTCN is one of a number of DSL-based cable operators who have been unable to purchase digitized HITS programming services from AT&T. It would be very helpful if the Commission were to clarify that the exclusivity prohibition extends not only to satellite programming services that are vertically integrated with cable operators, but also to vertically integrated transport services that aggregate and/or deliver vertically integrated satellite programming services to incumbent cable operators and/or competing MVPDs.

WHEREFORE, the Competitive Broadband Coalition respectfully requests the Commission to extend the prohibition against exclusive contracts for vertically integrated satellite cable programming and/or satellite broadcast programming, contained in section 628(c)(2)(D) of the Communications Act of 1934, as amended, beyond the current October 5, 2002 sunset date, and to consider other measures to address the competitive imbalance which exists in the program acquisition and distribution markets stemming from increasing horizontal concentration within the cable industry and vertical integation of satellite programming services with the largest television networks.

Respectfully submitted,

The Competitive Broadband Coalition

By: _______/s/____________________

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