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:	)	CS Docket No. 01-290
	)	
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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INTRODUCTION AND SUMMARY

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding. NCTA's initial comments showed that the prohibition on exclusive contracts between satellite-delivered vertically-integrated program networks and cable operators should expire in 2002. The rapid and steady growth in competitive alternatives to cable, coupled with the sharp decline in the percentage of vertically-integrated program services, have undercut any continuing basis for this extraordinary interference in the programming arena.

The comments of proponents of continuing this artificial boost do not demonstrate to the contrary. While some competitors put forth a parade of horribles to support their assertion that they might be harmed if exclusivity were permitted, they fail to satisfy their burden of demonstrating that the rules are "necessary" to preserve and protect competition and diversity. Unsupported speculation from competitors who simply would like to retain this lop-sided regulatory advantage does not come close to satisfying this burden.

Finally, various commenters use this proceeding to yet again seek to significantly widen the ban's scope to sweep within it terrestrially-delivered and non-vertically integrated program services. The Commission has repeatedly rejected these entreaties – and was right to do so. Even if the FCC had authority to consider these proposals – which it does not – there is no reason to expand the ban on exclusivity and many good reasons to let it expire as Congress intended.

ARGUMENT

I. COMPETITION IN THE DISTRIBUTION OF MULTICHANNEL VIDEO PROGRAMMING IS FLOURISHING

NCTA's initial comments showed that cable today faces significant competition in the distribution of multichannel video programming. The sheer variety of commenting parties in this proceeding simply confirms that this is the case.

A. A Variety of Well-Financed Competitors Have Arisen in the Last Decade

Consumers can choose among a multiplicity of multichannel programming distributors today. DBS alone has dramatically – and irreversibly – changed the landscape. Even DirecTV, the third largest MVPD, concedes that DBS and other new MVPD entrants "have emerged as significant new non-cable platforms from which programmers can launch new services."[1] NRTC and its affiliates alone distribute DirecTV programming to more than 1,800,000 rural

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[1] Id. at 6.

households.[2] EchoStar, which self-servingly asserts that only "initial strides have been made toward realizing Congress's vision of a fully competitive marketplace for video programming services,"[3] serves roughly 6.4 million subscribers – up from none in 1992. DirecTV and EchoStar are each among the top 10 MSOs, and they seek to merge.

A variety of other MVPD distributors also compete throughout the nation. For example, the Competitive Broadband Coalition is comprised of telephone companies and others that use a "variety of technologies and network architectures, such as fiber to the curb, traditional hybrid fiber/coax, and xDSL over copper pair to provide consumers with a competitive alternative source for video programming and other services…."[4] Broadband service providers represented by the Broadband Service Providers Association operate in 25 states and offer service to over 22 million households.[5]

Wireline broadband, wireless cable and private cable operators that provide competitive multichannel video programming services also abound.[6] Altrio, for example, serves the Los Angeles market; BellSouth Entertainment, LLC competes in a variety of markets throughout the southeastern United States; the Independent Multi-Family Communications Council employs a variety of communications technologies to serve the 30 million household MDU market; Qwest Broadband Services, Inc. holds 13 franchises in a variety of metropolitan areas; and roughly

[2] NRTC Comments at 2.

[3] EchoStar Comments at 2.

[4] Comments of the Competitive Broadband Coalition at 2.

[5] Comments of the Broadband Service Providers Association at ii.

[6] Comments of Joint Parties at 1.

750,000 customers obtain service from the fixed wireless broadband industry in local markets throughout the country.[7]

Digital Broadcast Corporation boasts that "recent advances in digital compression technology significantly alter the environment of the delivery of telecommunications services and present new and exciting opportunities, not previously available to wireless cable operators, which dramatically increase their relevance in the market place."[8] Digital Broadcast Corporation operates a wireless cable system in Roanoke, Virginia and can provide service in a variety of other cities in the United States. Carolina BroadBand offers up to 250 digital television channels to North and South Carolina residents and businesses.[9] Gemini Networks "designs, constructs and operates hybrid fiber coaxial broadband networks in the Northeast."[10]

Various utility companies have also entered the video programming distribution business. For example, the American Public Power Association reports that "scores of members of APPA have followed [the city of] Glasgow's example and begun to provide communications services, and many additional systems are under development or study today."[11] Seren Innovations, a subsidiary of Xcel Energy, provides high-speed Internet, cable programming and telephone service in several franchised areas in Minnesota and San Francisco.[12] Everest Midwest Licensee, a subsidiary of UtiliCorp United, Inc., a gas and electric utility, provides service in seven

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7 Id. at Exhibit A.

8 Comments of Digital Broadcast Corporation at 1.

9 Comments of Carolina Broadband, Inc. at 1-2.

10 Comments of Gemini Networks, Inc. at 2.

11 Comments of the American Public Power Association at 2.

12 Comments of Seren Innovations, Inc. at 8.

Midwestern states.[13] Braintree Electric Light Department has more than 30 percent of the customers in Braintree, Massachusetts.[14]

Other well-financed overbuilders have also entered the picture since 1992. For example, RCN Telecom Services, a "multibillion dollar enterprise,"[15] is the "nation's largest terrestrial overbuilder of combined telecommunications and cable facilities with operations in 7 of the 10 largest urban markets.…"[16] Even RCN is forced to admit "there is no question that competition has taken root in the MVPD industry."[17]

In short, there can be no doubt that most cable customers in towns large and small have a range of viable multichannel alternatives to their local cable operator. And, as our initial comments show, they are choosing these alternatives in record numbers every year.

B. Commenters Fail to Establish that MVPD Competition is Limited

Some commenters nevertheless try to dispute the obvious, by claiming that competition has not really yet arrived. For example, some argue that there is little competition measured by the number of markets in which the FCC has determined that cable operators face "effective competition."[18] But the number of individual markets in which the Commission has ruled that "effective competition" exists for purposes of rate deregulation is irrelevant to this proceeding. The fact that operators for whatever reasons have chosen not to individually petition the FCC for a determination of effective competition in each franchise area they serve demonstrates nothing

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13 Comments of Everest Midwest Licensee LLC. dba Everest Connections Corporation at 1.

14 Comments of Braintree Electric Light Department at 2.

15 RCN Comments at 27.

16 Id. at 1.

17 Id. at 5.

18 See, e.g., Comments of EchoStar at 6; Comments of World Satellite Network at 3; Comments of Broadband Service Providers Association at 6 –7.

at all about the state of competition in that area or generally. But even if the effective competition test was at all relevant and applied nationwide, competing MVPDs already are available throughout the country and exceed the 15 percent penetration threshold – confirming that effective competition is already here.

Other commenters claim that even though cable's share of multichannel customers is well below 85 percent, it has not dropped enough to evidence competition. For example, RCN maintains that cable "remains the dominant element in the MVPD industry," and therefore has "market power by any realistic measure."[19] But the fact that cable operators have not lost the majority of their customers – and still maintain a higher share of MVPD subscribership than do their competitors – similarly proves nothing about whether the video distribution marketplace is competitive.

As Economists Incorporated explained in a paper NCTA previously submitted with its Comments in the FCC's Competition Report, market power cannot be inferred from the fact that cable still serves a relatively high (though steadily diminishing) percentage of multichannel subscribers:

> A high market share may, in some circumstances, be indicative of the absence of competition in a relevant market. But not here. A new, fully substitutable product is challenging an incumbent that formerly served almost 100 percent of the market. That the incumbent's market share, while steadily diminishing, remains high is hardly proof that it can continue to exercise any significant market power.
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> And this is especially true where, as in the unusual case of DBS, the new competitor has the capacity to add new subscribers throughout the geographic market at virtually no marginal cost. In these circumstances, the presence of a good substitute is likely to constrain the incumbent's market power long before the incumbent's market share is eroded. And, indeed, the incumbent's market

[19] RCN Comments at 19; see also Comments of Carolina Broadband, Inc. at 4.

> share may remain high only because it is responding to its new competitor in an effective competitive manner.[20]

The competitors filing in this proceeding combined have nearly 23 percent of multichannel video customers, as cable's share continues to decline from the more than 95 percent of multichannel subscribers served in 1992. Consumers can switch between these services with ease. The fact that many customers opt to stay with their cable operator or switch back to cable from other providers indicates not that cable has market power but that it is responding to its competition by providing a better product and better service.[21]

In short, commenters fail to show that cable lacks significant multichannel competition. And as we now show, they fail equally in their attempts to claim that the exclusivity ban is necessary to protect and to preserve these competitive gains.

II. COMPETITION WILL NOT BE THREATENED BY EXPIRATION OF THE EXCLUSIVITY BAN

The ban's proponents have not met their burden of showing that it is *necessary* to preserve or protect competition and diversity in the delivery of multichannel video programming.[22] Nor could they. As our initial comments show, cable operator control over programming has lessened at the same time that competitive alternatives to cable have gained ground. Competing MVPDs have hundreds of non-vertically integrated program services from

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20 Economists Incorporated, "Use and Limitations of Structural Indicia of Market Power," attached to NCTA Comments, CS Docket No. 99-230 at 8 (1999).

21 See, e.g., Cablevision System Comments at 26-28 (detailing competitive pressures on Cablevision and its response to competition).

22 See, e.g., Comments of AOL Time Warner, Inc. at 3-4 ("It is not sufficient to show that exclusivity restrictions are merely 'helpful' or 'beneficial' to some particular competitors. There must be substantial and specific evidence establishing that, without retention, competition and diversity in the distribution of video programming could not be preserved and protected."); Comments of AT&T Corp. at 5 ("the plain language of the provision mandates sunset unless the Commission finds the prohibition to be necessary to, and not merely helpful or consistent with, preserving and protecting competition and diversity.")

which to choose. The rise in these alternatives to cable-affiliated services means that competitors will continue to have a wide variety of popular services to offer their customers, even if some vertically-integrated services are exclusively offered on cable. Competitors provide no real evidence that elimination of the ban would threaten to undo the vigorous competition for MVPD customers that exists today.

Given that cable operators and vertically-integrated programmers lack both the incentive and the ability to "kill the competition"[23] through exclusive contracts, there is no justification – much less the demanding evidence required under the First Amendment[24] – for continuing this interference.

A. Competition Does Not Hinge on Whether Each Competitor Offers the Identical Program Line-up

Even though EchoStar is a multibillion-dollar corporation, it claims that it still needs the exclusivity ban's protection from the workings of the marketplace because of an alleged public policy interest in guaranteeing that all MVPDs provide virtually identical channel line-ups. EchoStar asserts that the Commission has "worked hard" to ensure a "market for multichannel video programming services [that is] characterized by strong price competition to the extent the product itself is relatively undifferentiated."[25] And the DBS provider claims, without any support, that any exclusive product would threaten its very existence – whether that exclusivity

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[23] NCTA Comments at 3 (citing statement of Congressman Tauzin, author of the exclusivity ban).

[24] The failure to show a real threat of harm to be remedied also would doom any continuation of these rules under standards set forth under First Amendment principles. This interference with speech rights of cable operators at the very least must be based on showing that the exclusivity ban furthers an "important or substantial government interest" and that the burden imposed is not "greater than essential to the furtherance of that interest." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662 (1994); see AOL Time Warner Comments at 4-5; Cablevision Comments at 40-41.

[25] EchoStar Comments at 6.

covers merely "one or more of the most popular cable networks, whether pay or basic" or "a range of relatively minor networks."[26]

Neither claim withstands scrutiny. First, EchoStar's underlying premise of the supposed governmental interest in its providing an undifferentiated program service is contradicted by Section 628 itself. Congress did not intend through the exclusivity ban to guarantee that every multichannel provider offered the identical programming. Rather, as NCTA's initial comments spell out, Congress purposely limited the reach of the exclusivity ban. Congress permitted exclusivity in a variety of cases – for non-vertically integrated services, services delivered by means other than satellite, and even for satellite-delivered vertically-integrated program services in particular cases.

EchoStar argues that it "is not vertically-integrated with any program producer, leaving the company totally dependent on an open and competitive programming market."[27] But EchoStar clearly has the financial muscle and the nationwide reach to invest in programming of its own. Its desire to "enjoy the fruits, but not the risks, of its competitor's substantial investment in the creation of programming"[28] provides no justification for continuing the exclusivity ban. Rather, it disserves the Commission's historical interest in program diversity by continuing to provide disincentives to the development of new programming, both by DBS and by the cable industry.[29]

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26 Id. at 9.

27 In fact, EchoStar's strategy seems to have shifted even since it filed its initial comments. Vivendi Universal has announced a $1.5 billion investment in EchoStar in exchange for a 10 percent stake and development of five interactive networks. Multichannel News, Dec. 17, 2001.

28 Comments of Comcast Corp. at 11.

29 DirecTV alleges that the ban on exclusivity "has neither impacted adversely the diversity of programming in the MVPD market nor chilled investment in new programming." DirecTV Comments at 5. But programming commenters show otherwise. For example, iNDEMAND's comments show how the lack of exclusivity affected its incentives or ability to enter into agreements to offer pay-per-view programming. iNDEMAND Comments at

Second, EchoStar provides no reason to believe that its position as the sixth largest MVPD, with over 6 million customers, would at all be threatened even if it did not provide a channel line-up that copied that available from the local cable operator. Indeed, even today there are some services that EchoStar chooses not to offer[30] – yet the absence of certain networks from among the hundreds available has not stopped EchoStar from attaining significant increases in subscribership every year.

B. Commenters Show Little Likelihood That Existing Satellite-Delivered Services Would Be Unavailable if the Ban Sunsets

Commenters also create exaggerated threats of massive withdrawals of vertically-integrated programming as a reason to maintain the ban. For example, DirecTV posits that it "would stand to lose access to at least 45 programming networks carried on DirecTV that are vertically integrated with these MSOs in the event that such entities were permitted to lock up their programming in exclusive arrangements."[31] EchoStar also alleges that "where cable companies control approximately 80% of a programmer's potential audience, and particularly where many cable operators and video programmers are vertically integrated, the cable companies have tremendous leverage to convince programmers to accept exclusive deals, even though the exclusive deals reduce the programmers' potential audience."[32]

14-15. Cablevision Systems' programming arm, Rainbow, "cannot use exclusivity to help fill geographic gaps in the carriage of its existing services to jump-start new services. Moreover, the ban constrains Rainbow throughout the country, even though Cablevision operates systems only in the New York City Metropolitan area." Cablevision System Comments at 3, 12-13. See also Comments of Comcast Corp. at 11-13 (detailing impact on fledgling services); Comments of AT&T Corp. at 10 (explaining how exclusive contracts will help expand program supply).

30 EchoStar, for example, recently announced plans to drop ESPN Classic from its line-up. "EchoStar dumps ESPN Classic from schedule," Rocky Mountain News, Jan. 1, 2002.

31 DirecTV Comments at 4.

32 Comments of EchoStar at 8. The American Cable Association also asserts that its members could lose access to "the core of the satellite programming offered in smaller markets," ACA Comments at 5, and posits the loss of between 30 percent and 42 percent of satellite programming on basic or expanded basic tiers. Id. at 11. But ACA fails to provide any real support for this far-fetched scenario. Nor does ACA provide any evidence to back

NCTA's initial comments showed why this theory fails to hold water. There is little likelihood that existing program services for anti-competitive reasons would forfeit carriage on DBS, and the cable comments in this proceeding support this view. AOL Time Warner explains that "even without an exclusivity restriction, there are powerful economic incentives for AOLTW to provide its popular cable networks to the widest possible audience."[33] Any strategy to deny affiliated programming in order to eliminate MVPD competition would be doomed to failure. As AT&T explains:

> Established or even new programmers will not agree to forego a significant portion of their possible audience reach unless they find it profit-maximizing to do so, e.g., to enhance the promotion of their programming. A programmer would require an MSO to pay for exclusive rights at levels that would reflect at least the programmers' opportunity costs. However, it would not be economically rational for any MSO to overpay programmers for exclusives as a means of excluding competing MVPD distributors since these rivals are established, are highly unlikely to exit the market, and are in some cases national distributors, all of which makes recoupment highly unlikely. This holds equally true where the programmer and the MSO are commonly owed, since the profit to the overall enterprise must account for the opportunity cost of not having the programming more widely distributed.[34]

Cablevision Systems, which owns a variety of programming networks, submits economic evidence to back this up:

> the size and strength of competing distributors to cable operators are simply too large for any programmer – vertically integrated or otherwise – to shun. As Economists Inc. notes: 'DTH [direct-to-home satellite] today is simply too attractive a market and has too many alternatives for program suppliers to profitably ignore.' Competing distributors account for over 20 million of the nation's multichannel video programming subscribers. A vertically-integrated programmer that attempts to use exclusivity to facilitate foreclosure of competition from rival MVPDs, 'sacrifices the potential profits' from the sale of

up its claim that an operator could profitably withhold affiliated programming in order "to gain price concessions in small system acquisitions." ACA Comments at 12.

33 AOLTW Comments at 10.

34 AT&T Comments at 23-24.

> its programming to those competitors. While those foregone revenues may have been of less consequence in 1992 when competing MVPDs accounted for only a small segment of the marketplace, '[t]he lost profits from foreclosure clearly grow larger as the size of the competing program buyer increases.' Entering into exclusive arrangements solely to thwart competition would be self-defeating.[35]

Other programming interests are at stake that increase the costs of withdrawing the most powerful network brands. Cablevision Systems points out that:

> any effort by [vertically-integrated cable companies] to pursue an anti-competitive exclusivity strategy with respect to one of its better-known or well-established networks would undoubtedly have ramifications with respect to distribution of its other newer or more niche-oriented networks. Not only do the costs to a programmer of a vertical foreclosure strategy rise as the size of the competing MVPD base expands, but those costs also multiply if other programming services owned by that programmer are rejected by the competing MVPD.[36]

DirecTV's and EchoStar's Comments contain no response to these obvious incentives to continue to provide service to DBS and other MVPDs.

This is not to say that exclusive arrangements might not develop.[37] But exclusivity in such circumstances would enable the growth and development of less-established program services, thereby increasing program diversity. And it would enhance, rather than reduce, competition between MVPDs.

Other competitors admit that "DBS' national reach and channel line up uniformity makes it an attractive distribution outlet for national and regional video programming services."[38] But they contend that competitors other than DBS – in particular, terrestrial competitors – would face

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[35] Cablevision Systems Corp. at 29.

[36] Id. at 30.

[37] See NCTA Comments at 15.

[38] Comments of the Competitive Broadband Coalition at 12.

difficulties gaining access to this programming.[39] One obvious problem with this allegation is that the behavior of satellite-delivered services that are not subject to the prohibition, and therefore are free to enter into exclusive deals, proves otherwise. In other words, if it made sense for cable operators to enter into exclusive arrangements with non-vertically integrated programmers for anti-competitive reasons, one would assume that the commenters in favor of retaining the ban would be able to show a pattern of this behavior. But, in fact, the opposite is true.

An examination of the comments of the ban's proponents instead shows that exclusive arrangements for nationally distributed, non-vertically integrated services are few and far between. Competing MVPDs provide evidence of only a small handful of satellite services – totaling about half a dozen – that at one point or another over this nine year period were cable-exclusive (in some cases pursuant to the Commission's express permission).[40] And their comments also demonstrate that many competitors currently provide more than a hundred channels of programming to their customers – in many cases surpassing the program offerings of a competing cable system.[41]

The fact that five or six non-vertically integrated satellite program services may have had exclusive contracts with some cable operators for a limited time period cannot overcome the fact

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[39] Id. at 11.

[40] See, e.g., Joint Comments at 9-10 (decrying exclusivity for MSNBC, Eye on People, and SoapNet); Comments of the Rural Independent Competitive Alliance at 6 (complaining that unspecified Warner Brothers, Fox, Midwest Sports, ESPN, TV Land and MSNBC were not available); Everest Connections Corp. at 7 (complaining about lack of access to Goodlife TV); Braintree Electric Light Department at 3 (arguing that it is denied access to New England Cable News); Comments of the American Cable Association (TV Land and New England Cable News.) The FCC, of course, expressly granted New England Cable News a waiver from the exclusivity ban in 1994. New England Cable News, 9 FCC Rcd. 3231 (1994).

[41] See, e.g., Comments of Qwest Broadband Services, Inc. at Exhibit A, p.2 (comparing Qwest's 140+ channel offering with a cable operator's 56-81 channels.); Comments of RCN at 11 (RCN offers 20 channels which are not available on Comcast's systems in suburban Philadelphia, and 105 channels, compared to the incumbent cable operator's 78 channels, in Brooklyn, New York).

that close to two hundred non-vertically integrated program services – all of the most popular as well as the most niche-oriented – are fully available to all MVPDs.

In any event, even as to these isolated services, commenters provide no evidence that their absence from the channel line-up has had the slightest impact on their ability to compete. They certainly fail to show the necessity of maintaining this wide-ranging prohibition in order to prevent damage to competition. Instead, exclusivity has provided incentives for cable operators to engage in the risk-taking attendant to the launch of any new program service. And it has provided wholly legitimate incentives for cable operators to engage in promotional and advertising activities to spur the development of these services without the potential for free riding by other competitors. These competitors in fact ultimately reap the benefits of others establishing a "brand name" program service without having had to make these initial investments.

In short, proponents of extending the exclusivity ban have failed to show that it continues to be necessary to preserve and protect competition.

III. THE FCC HAS NO AUTHORITY TO EXPAND THE PROGRAM ACCESS RULES

The exclusivity ban in Section 628 on its face applies to a limited class of program services – those that are satellite-delivered and vertically integrated. Some competitors argue that the Commission should use this proceeding to expand the program access rules to reach non-satellite delivered vertically integrated services and to non-vertically integrated programmers. These proposals are not novel. And they have no more merit now than on the numerous occasions on which the FCC has examined – and rejected – identical claims. If anything, the only differences between then and now are the acceleration in the number of customers subscribing to competitors to cable and the growth in the number of program networks competing for viewership on cable and competing MVPD systems. The absence of mandatory access to local, regional, or non-vertically integrated satellite-delivered services has not proven to be an impediment to competition. The comments in this proceeding certainly contain no evidence to the contrary.

A. Terrestrially-Delivered Programming is Outside the Scope of the Exclusivity Ban

Several commenters, including EchoStar and RCN, repeat their by now familiar claim that the FCC should expand the reach of the exclusivity ban. EchoStar urges the FCC to "close the terrestrial loophole."[42] It argues, among other things, that it is constructing spot beam satellites and can now offer local and regional programming – and therefore it would prefer to free ride off cable's local and regional programming efforts rather than create new programming itself.[43] RCN admits that "the Commission has not to date accepted th[e] view"[44] that section 628 should be interpreted to apply to vertically integrated cable programming, whether that programming is transmitted by satellite or terrestrial means. Undeterred, RCN complains that "it simply makes no sense whatever to interpret section 628 so as to be inapplicable to cable programming merely because it is distributed by terrestrial means."[45]

But the FCC has already examined and rejected these very arguments.[46] The language of Section 628 and its legislative history show that the limited reach of this provision was intentional. It applies to the delivery of "satellite cable programming and satellite broadcast

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[42] EchoStar Comments at 19.

[43] Id.

[44] RCN Comments at 29.

[45] Id. at 30.

[46] See e.g., RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp., 16 FCC Rcd. 12,048 (2001) (upholding Bureau denial of RCN program access complaint against MetroChannels), DirecTV v. Comcast

programming." As the FCC has appropriately recognized, Section 628(c) applies only to programming that is satellite delivered, "not programming that was 'previously satellite-delivered, or the 'equivalent' of satellite cable programming, or programming that would qualify as satellite cable programming but for its terrestrial delivery."[47]

RCN would like the Commission to read this language out of Section 628, arguing it merely "conveys only the common understanding in 1992, when section 628 was adopted, that satellite transmission was required for the distribution of cable programming."[48] But the legislative history of section 628 contradicts RCN's supposition that the exclusion of regional and local programming was some sort of historical accident. In fact, the prohibitions against discrimination and unreasonable refusals to deal in the program access provisions adopted by the Senate *did* extend to all vertically integrated national and regional programmers, regardless of how they were distributed.[49] But the House provisions applied only to satellite-delivered services, and the conference agreement, which was ultimately enacted, adopted the House provisions.[50] As the FCC has previously acknowledged, this further evidences Congress' intent to limit the exclusivity ban's reach.[51]

RCN also tries to argue that sports programming and other programming that it claims could not be "duplicated or replicated by a competitor" is somehow different and deserving of

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Corp., 15 FCC Rcd 22,802 (1999) (upholding Bureau denial of program access complaint against new channel Comcast Sports Net).

47 EchoStar Communications Corp v. Comcast Corp., 14 FCC Rcd. 2089, 2099 (CSB 1999); RCN Telecom Services of New York v. Cablevision Systems, 14 FCC Rcd. 17,093, 17,106 (CSB 1999); DirecTV v. Comcast, 13 FCC Rcd. 21,822, 21,834 (CSB 1998).

48 RCN Comments at 32.

49 See Senate Report of Senate Committee on Commerce, Science and Transportation, S. Rep, No. 102-92, 102d Cond., 2d Sess. 121 (1991).

50 Conference Report, H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 91-93 (1992).

special FCC-mandated access. But exclusive product is a common feature in the entertainment industry.[52] The ban on exclusivity is a departure from the norm.

Even if RCN or other competitors do not have the ability to show every single sports event, that does not mean that access to every sports event in a particular market is "vital" to their ability to compete.[53] There are numerous avenues for viewing sports, and no cable system operator has a lock on those events.[54]

Finally, some commenters seek to use Section 628(b) as a catch-all source of Commission authority to expand the rules to cover terrestrially-delivered services.[55] The most glaring problem with this argument is that the FCC has already found it lacking in statutory support on a variety of occasions. For example, in dismissing a complaint brought against a non-vertically-integrated, satellite-delivered service, the FCC made clear that "Section 628(b) cannot be converted into a tool that, on a *per se* basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate."[56] Section 628(b) "may not be used to preclude programming practices clearly permitted under the more specific provisions of Section

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51 See, e.g., RCN Telecom Services of New York v. Cablevision Systems Corp., 14 FCC Rcd. At 17,106 (CSB 1999) ("This indicates a specific intention to limit the scope of the provision to satellite service.")

52 See, e.g., Comments of Comcast at 9-10; Comments of AT&T Corp. at 8-10; Cablevision System Corp. Comments at 5-9.

53 In any event, notwithstanding its complaints, it appears that RCN does have access to a wide variety of sports programming – including Sports Net in Philadelphia, even though the Commission already determined that the program access rules do not apply to this terrestrially-delivered service. RCN Comments at 12 n. 26.

54 Other commenters allege that cable has a "stranglehold" on regional sports programming. See, e.g., Comments of Seren at 12. That is factually inaccurate, to say the least. Local and regional sports are available on a wide variety of outlets, including over-the-air on local stations (network affiliated and independent) and on a wide variety of non-broadcast outlets that are not cable-affiliated.

55 See, e.g., Comments of RCN at 31-35; Comments of Seren Innovations at 21-23; Comments of Broadband Service Providers Association at 12-19.

56 See, e.g., Dakota Telecom,. Inc. v. CBS Broadcasting, Inc. d/b/a Midwest Sportschannel, and Bresnan Communications, 14 FCC Rcd. 10,500, 10,507 (CSB 1999); EchoStar Communications Corp. v. Comcast Corp., 14 FCC Rcd. 2089, 2103 (CSB 1999) (same).

628(c)."[57] Thus, Section 628(b) cannot be used to extend the exclusivity ban to terrestrially-delivered programming.

B. The Commission has No Authority to Extend the Exclusivity Ban to Non-Vertically-Integrated Services

A few commenters urge the FCC to expand the exclusivity ban to encompass satellite services that are not vertically-integrated. For example, WSNet argues that the Commission should extend the program access rules to "various relationships that, while falling just short of the *de jure* vertical integration standards, have formed *de facto* vertically integrated relationships that have the anticompetitive effects that have raised the Commission's concerns."[58] WSNet fails to identify what these relationships are, and what anticompetitive effects they are causing. In fact, as described above, the instances in which non-vertically-integrated satellite-delivered services have entered into exclusive contracts appear to be rare indeed based on the record evidence.[59]

But even assuming that a few services are exercising their right to extend exclusivity to certain cable operators – as the Rural Independent Competitive Alliance claims (without support of any kind)[60] – that does not mean that the FCC could or should extend the prohibition. The Commission has repeatedly – and properly – refused to interfere with the affiliation decisions of independent, non-vertically integrated programmers, finding no evidence to warrant this

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57 Id.

58 Comments of World Satellite Network, Inc. at 6.

59 In any event, the FCC already has determined that WSNet, a reseller of programming, is not an intended beneficiary of the program access rules. World Satellite Network v. TCI, 14 FCC Rcd. 13, 242 (1999) (dismissing WSNet complaint for lack of standing under Section 628.) Thus, its supposed concerns regarding the programming marketplace provide no reason to continue or expand the exclusivity ban.

60 Comments of the Rural Independent Competitive Alliance at 6.

government intervention in private negotiations.[61] "Based on the Communications Act's treatment of exclusive contracts, we cannot consider such contracts a new or 'additional type of conduct' that may 'emerge as a barrier to competition' that the Commission may prohibit through Section 628(b)."[62]

Congress did not permit the FCC to expand the reach of its program access rules. And certainly nothing in this proceeding – initiated to consider whether to sunset the limits that Congress did adopt – suggests that this is an appropriate forum in which to consider these claims. Suffice to say that these claims are nothing new – and they do not warrant any change in the outcome.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in NCTA's initial comments, the temporary ban on exclusivity should expire in 2002, as Congress intended.

Respectfully submitted,

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[61] See Dakota Telecom, Inc. v. CBS Broadcasting, Inc., supra, at 10506 (acknowledging that "exclusive agreements between cable operators and non-vertically integrated programming vendors are not prohibited by Section 628(c) of the Communications Act" and that "given Congress' clear intent and language with respect to cable operators' exclusive contracts in the 1992 Cable Act, an exclusive contract represents a practice that Congress examined and did not consider anticompetitive)."

[62] Id. at 10, 507-10,508.