Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	CS Docket No. 01-290
Act of 1992	)	
	)	
Development of Competition and Diversity	)	
In Video Programming Distribution:	)	
Section 628(c) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

JOINT REPLY COMMENTS

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EXECUTIVE SUMMARY

The record before the Commission confirms that enforcement of Section 628(c)(2)(D) of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Act") "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." The initial comments filed by the Joint Parties and others in response to the *Notice of Proposed Rulemaking* establish the following:

- Competitive wireline, wireless cable and private cable operators ("terrestrial competitors") cannot provide a competitive multichannel video service to subscribers without access to programming. In addition, a loss of access to programming would prevent terrestrial competitors from offering packages of video, broadband and/or voice services competitive with those of the largest cable multiple system operators ("MSOs").

- The root cause of the program access problem, *i.e.*, the consolidation of the largest cable MSOs in national and local markets, has become materially worse since passage of Section 628(c)(2)(D). Indeed, it is highly unlikely that Congress ever intended to have the Commission sunset Section 628(c)(2)(D) at a time when the agency may be on the verge of authorizing massive MSO consolidations such as Comcast-AT&T Broadband.

- The programming covered by Section 628(c)(2)(D) is critical - it includes substantial amounts of sports and "brand name" news and entertainment programming that drive subscribership and advertising sales. The MSOs are well aware of this, and thus have not hesitated to deny competitors access to this programming where the Commission has permitted them to do so.

- Where the MSOs have owned or controlled sports programming and withheld it from competitors, the effect has been devastating: in the Philadelphia market (where Comcast has denied competitors access to Comcast SportsNet), DBS penetration is less than 4%. The Commission will invite this result on a national scale (and thus reverse the progress competitors have made in the marketplace over the past several years) if it stops enforcing Section 628(c)(2)(D).

- Terrestrial competition encourages the MSOs to add new services, improve existing ones and/or lower rates. Hence, consumers ultimately would pay the dearest price if the Commission were to permit a sunset of Section 628(c)(2)(D). Conversely, there is no evidence that the Commission's enforcement of the statute has caused the cable MSOs any cognizable economic harm whatsoever. To the contrary, the record reflects that programming services owned or controlled by the MSOs have succeeded without exclusivity and will continue to do so if Section 628(c)(2)(D) remains in force.

The cable MSOs offer no meaningful response to any of the above. Instead, relying on economic treatises and their own surmise, the MSOs contend that somehow *they* have been victimized by the Commission's enforcement of Section 628(c)(2)(D), and that the Commission must now sunset the statute in the name of "national competition policy" and thereby free the MSOs from the regulatory chains that have restrained them from increasing the cable industry's 80% market share. Putting the obvious absurdity of the argument aside, the short answer to this is that Congress did not pass Section 628(c)(2)(D) to protect the MSOs. Rather, Congress recognized that the MSOs hold disproportionate power in the marketplace, and that they can and will eliminate competition by withholding essential cable networks from other distributors of multichannel video programming. The Commission thus should give no credence to the MSOs' complaint that DBS operators, television broadcast networks and newspapers have greater exclusivity rights than they do: the MSOs are held to a different standard on exclusivity because Congress determined that they *are* different.

Furthermore, the statutory provision that created this proceeding, Section 628(c)(5), does not direct the Commission to reform "national competition policy" or evaluate the merits of exclusivity across all media. To the contrary, the text of the statute gives the Commission the much narrower task of determining whether enforcement of Section 628(c)(2)(D) "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." If the record supports a finding to that effect (as it does in this docket), then the Commission has full authority to continue enforcing the statute. Since the MSOs historically have exhorted the Commission to read the text of Section 628 as literally as possible (*cf.* terrestrial distribution), they should have no difficulty with this approach.

The MSOs also continue to make the fatal mistake of assuming that the Commission's inquiry here should begin and end with the competitive position of DBS, when both the legislative history of Section 628 and the Commission's own precedent firmly establish that the impact of exclusive cable programming contracts on non-DBS competitors must be accorded substantial weight. Equally misguided is the MSOs' demonstrably false contention that exclusivity is necessary to promote program diversity and provide incentives for the MSOs to invest in programming. The argument has been proven wrong time and again by the success of MSO-owned programming services that have been denied exclusivity by the Commission (Speedvision, Outdoor Life, Sci Fi Channel) or that otherwise do not or cannot offer exclusivity to incumbent cable operators.

Finally, the Joint Parties do not believe it is necessary or appropriate for the Commission to impose limitations on any continued enforcement of Section 628(c)(2)(D), either by tying it to the sunset date for exclusive retransmission consent agreements (January 1, 2006) or by adopting formulae for discontinuing enforcement of the statute on a network-by-network or market-by-market basis. With unprecedented concentration of the cable MSOs and the DBS industry apparently on the horizon, it would be highly premature for the Commission to assume at this point in time that terrestrial competitors will no longer require protection against exclusive cable programming contracts by January 1, 2006 or any other date certain. Moreover, any attempt by the Commission to discontinue enforcement of the statute on a network-by-network or market-by-market basis will ensnare the Commission's staff in case-by-case adjudications that may drain scarce Commission resources for years to come. To the extent that the Commission believes it must review the exclusivity issue on a periodic basis, it may do so through its statutorily mandated annual video competition reports to Congress. At such time as those reports indicate that market conditions justify a permanent sunset of Section 628(c)(2)(D), the Commission would have full authority to issue a *Further Notice of Proposed Rulemaking* and resolve the matter there.

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JOINT REPLY COMMENTS

The parties identified below (the "Joint Parties"), representing wireline broadband, wireless cable and private cable operators who provide competitive multichannel video programming service to consumers throughout the United States, hereby submit these joint reply comments with respect to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1]

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[1] The Joint Parties are Altrio Communications, Inc.; BellSouth Entertainment, LLC; the Independent Multi-Family Communications Council ("IMCC"); Qwest Broadband Services, Inc.; and The Wireless Communications Association International, Inc. ("WCA"). A description of each Joint Party is provided at Exhibit A of the Joint Parties' initial comments in this docket. *See* Comments of the Joint Parties, CS Docket No. 01-290, Exhibit A (filed December 3, 2001) (the "Joint Comments").

I. INTRODUCTION.

Programming is the lifeblood of this business.

Comcast President Brian L. Roberts, commenting on Comcast's proposed acquisition of AT&T Broadband.[2]

However unintentionally, Mr. Roberts has summarized what the *NPRM* in this proceeding is about. In the Cable Consumer Protection and Competition Act of 1992 (the "1992 Act"), Congress determined that cable's competitors cannot survive without access to programming, but that vertically integrated cable programming services have the ability and the incentive to favor their affiliated cable operators at the expense of competitors that do not serve a comparable "critical mass" of subscribers.[3] Congress thus adopted Section 628(c)(2)(D) of the 1992 Act, which generally prohibits exclusive contracts between vertically integrated cable programming networks and incumbent cable operators.[4] Pursuant to a directive in Section 628(c)(5), the Commission must now decide whether to continue enforcing the statute beyond October 5, 2002. Mr. Roberts has not overstated the point – the Commission's decision will bear directly on the supply of programming to terrestrial competitors and thus determine their fate for years to come.

While the ramifications of the Commission's decision will be wide, the fundamental legal issue before the Commission here is a narrow one. Contrary to what the largest cable multiple system operators ("MSOs") have argued in their initial comments, Congress did not create this rulemaking to resolve matters of "national competition policy" or the merits of

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[2] Klein, "Comcast-AT&T Deal Spotlights Bigger Drama," *The Washington Post* (Dec. 21, 2001), *at* http://www.washingtonpost.com/wp-dyn/articles/A9733-2001Dec20.html.

[3] *See, e.g, Outdoor Life Network and Speedvision Network*, 13 FCC Rcd 12226, 12231, 12235-6 (CSB, 1998) ("*Outdoor Life*").

[4] 47 U.S.C. § 548(c)(2)(D).

exclusivity across all media. Rather, the text of Section 628(c)(5) gives the Commission the much narrower task of determining whether enforcement of Section 628(c)(2)(D) "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[5] As in any rulemaking proceeding, the Commission has broad discretion to resolve that question as necessary to serve the public interest – all the agency must do is examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made."[6] As explained by the United States Supreme Court in *FCC v. WNCN Listeners Guild*:

> [T]he Commission's general rulemaking authority permits the Commission to implement its view of the public-interest standard of the [Communications] Act "so long as that view is based on consideration of permissible factors and is otherwise reasonable." Furthermore, . . . the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate conclusions is not required since "'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'"[7]

Under the principles articulated above, the record in this docket provides the Commission with more than adequate justification for enforcing Section 628(c)(2)(D) beyond October 5, 2002. The initial comments filed by the Joint Parties and other terrestrial competitors confirm that programming is indeed the lifeblood of their business, that the programming owned or controlled by the largest cable MSOs is absolutely critical to the success of any competitive multichannel video service, and that there is every reason to believe that the MSOs can and will

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[5] *Id*. § 548(c)(5).

[6] *United Video, Inc. v. FCC*, 890 F.2d 1173, 1178 (D.C. Cir. 1989) (citations omitted) ("*United Video*").

[7] 450 U.S. 582, 594-5 (1980) (footnotes and citations omitted) *("WNCN Listeners Guild")*; *see also United Video*, 890 F.2d at 1180 ("Courts reviewing an agency's selection of means to accomplish policy goals are 'not entitled to insist on empirical data for every proposition on which the selection depends.'" . . [A]n agency contention may be 'so obvious or commonsensical that it needs no empirical support to stand up.'") (citations omitted).

withhold that programming from their competitors if the Commission permits them to do so, particularly if the Commission liberalizes its cable horizontal ownership cap and thereby increases the MSOs' already unparalleled control over distribution of video programming in national and local markets. The MSOs, on the other hand, have responded with arguments that are either irrelevant or flatly contradicted by the text of Section 628 and its legislative history, Commission precedent, the MSOs' own marketplace experience with programming services that they own or control, and/or the MSOs' own prior public statements where programming is concerned. Nothing in the MSOs' filings outweighs the immediate and substantial harm that would befall terrestrial competitors if the Commission were to stop enforcing Section 628(c)(2)(D).

All said, while Congress clearly contemplated that Section 628(c)(2)(D) would sunset at some point in time, that time has not arrived. The Commission should continue to enforce Section 628(c)(2)(D) beyond October 5, 2002.

II. DISCUSSION.

A. *The Initial Comments Filed In Response to the NPRM Reaffirm That The Commission Must Continue to Enforce Section 628(c)(2)(D).*

The comments filed by terrestrial competitors in this docket reaffirm several critical points. First, notwithstanding daunting competitive and economic challenges, terrestrial competitors are investing billions of dollars in constructing, launching and operating wireline or wireless broadband networks capable of delivering video and non-video services on a par with those offered by the largest cable MSOs. As noted by the Broadband Service Providers Association ("BSPA"):

> Section 628 was created to promote fair competition and to stimulate the development of new technologies, and BSPA members are spending *billions* of dollars to deploy fiber-rich, last mile broadband networks that are capable of serving consumers with these new, state-of-the-art broadband technologies. However, due to the high up-front costs to build and operate such networks, as well as the difficulty in competing with entrenched monopolists who also control the content to be delivered, few markets have the benefits of significant competitive entry. New entrants, such as broadband providers, are forced to market their services against incumbent cable operators who have substantial advantages in the competitive battle: name recognition, embedded customer base, and strong economies of scale.[8]

The record also confirms that the largest cable MSOs have upgraded service and/or moderated or reduced rates in areas where terrestrial competition has taken hold. RCN, for

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[8] Comments of the Broadband Service Providers Association, CS Docket No. 01-290, at 10 (filed Dec. 3, 2001) (emphasis in original) ("BSPA Comments"). *See also* Joint Comments at 17 (quoting Congressional testimony given on behalf of the National Cable & Telecommunications Association as to the status of terrestrial competition) and 19-20 (discussing new competitive wireline systems being launched in the Los Angeles market by Altrio Communications, Inc., and terrestrial competition provided by wireless cable and private cable or "SMATV" operators); Comments of RCN Telecom Services, Inc., CS Docket No. 01-290, at 8 (filed Dec. 3, 2001) ("RCN is building its own network based on state-of-the art fiber optic facilities, a network which has been described by one outside source as 'one of the most advanced in the world.' The network incorporates SONET ring architecture and targets high density areas comprising 44% of the U.S. residential communications market spread over only 6% of its geography. RCN seeks to serve principally the residential, rather than the commercial market.") ("RCN Comments"); *id.* at 6 ("The new entrant has no captive subscribers, no initial revenue, and enormous start-up expenses such as securing the local franchise and gaining access to local conduit or utility poles. . . . Local franchise authorities charge as high a price as possible for granting a franchise and typically require substantial assurances of a franchise applicant's financial and operational experience and capability. . . Accordingly, the potential competitor must earmark funds, purchase long lead time items, enter into programming commitments, hire hundreds of employees in each market, and, most important, fight for each subscriber because the local residents who want cable service are probably already customers of the incumbent. To use a well-worn metaphor, the low-hanging fruit has already been picked."); Comments of Qwest Broadband Services, Inc., CS Docket No. 01-290, at 2-3 and Exhibit A (filed Dec. 3, 2001) (discussing Qwest's cable overbuild systems in the Phoenix, Denver and Omaha areas) ("Qwest Comments"); Comments of Everest Midwest Licensee LLC, CS Docket No. 01-290, at 1-2 (filed Dec. 3, 2001) (discussing Everest's competitive wireline system in the Kansas City, MO market) ("Everest Comments"); Comments of Seren Innovations, Inc., CS Docket No. 01-290, at 7-8 (filed Dec. 3, 2001) (discussing Seren's cable overbuild activities in Minnesota and California); Comments of Carolina Broadband, Inc., CS Docket No. 01-290, at 1-2 (filed Dec. 3, 2001) (discussing Carolina Broadband's competitive wireline service); Comments of Independent Multi-Family Communications Council, CS Docket No. 01-290, at 7-9 (filed Nov. 30, 2001) (discussing competitive challenges faced by private cable operators) ("IMCC Comments"); Comments of Braintree Electric Light Department, CS Docket No. 01-290, at 1-2 (filed December 1, 2001) (discussing Braintree's competitive wireline service in Braintree, MA) ("BELD Comments"); Comments of Gemini Networks, Inc., CS Docket No. 01-290, at

example, has observed this phenomenon as a result of its entry into the New York City, Boston, Philadelphia and Washington, D.C. markets.[9] Qwest reports that its cable overbuild in Omaha has produced vigorous competition with Cox Cable in the delivery of "bundled" cable, voice and data services, prompting Cox to characterize Omaha as "one of the most competitive marketplaces in the nation."[10] Further, as already noted by the Joint Parties, the Commission's most recent annual video competition report to Congress cites examples of communities where market entry by terrestrial competitors has redounded to the benefit of consumers.[11] It therefore comes as no surprise that at least one large cable MSO has advised Congress that terrestrial competitors contribute to an environment in which incumbent cable operators are motivated to add new services and improve existing ones.[12]

At the same time, however, the terrestrial competitors leave no doubt that they have no meaningful chance of survival without access to programming owned or controlled by the largest cable MSOs, particularly sports programming.[13] The Joint Parties, for example, have already noted the staggering impact of Comcast's refusal to sell Comcast SportsNet to DBS competitors

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2-3 (filed Dec. 3, 2001) ("Gemini Comments"); Comments of the Competitive Broadband Coalition, CS Docket No. 01-290, at 1-5 (filed Dec. 3, 2001) ("CBC Comments").

[9] RCN Comments, Appendix A.

[10] Qwest Comments at 2 (footnote omitted); *see also id.* at 3.

[11] Joint Comments at 18.

[12] *Id.* at 17-18, *quoting* Testimony of Jerry Kent, before the Committee on the Judiciary, Subcommittee on Antritrust, Business Rights and Competition, at 1 (April 4, 2001).

[13] According to the Commission's most recent video competition report to Congress, vertically integrated, satellite-delivered cable networks that carry national and/or regional sports programming include TBS (Major League Baseball/NBA), TNT (NBA), Comcast SportsNet, Fox Sports Chicago, Fox Sports Cincinnati, Fox Sports New England, Fox Sports New York, Fox Sports Ohio, Fox Sports Pacific, Madison Square Garden Network, SportsChannel Florida, and Sunshine Network. Joint Comments at 15. It has been reported that the NBA is poised to enter into an agreement with AOL Time Warner that will lead to the creation of a new AOL Time Warner-NBA cable sports network that would carry 100 NBA games a season, in addition to those carried on TNT. Romano, "NBA Pushes Limits," *Broadcasting & Cable*, at 10 (Dec. 31, 2001).

in the Philadelphia market. Consistent with Comcast's barely concealed desire to "corner the market," DBS penetration in the Philadelphia market stands at less than 4%, versus over 15% nationwide.[14] RCN's initial comments amplify the point:

> RCN's business plan anticipates a penetration rate of about 30% of the homes it passes in each market it builds out. As the surveys it has taken indicate, approximately 40-58% of any local market would essentially be impenetrable to an overbuilder if it lacked access to the bulk of local sports programming. The result would be a penetration rate of about 15%, a rate so low that no entrepreneur would be willing to risk the hundreds of millions of dollars required to overbuild an urban area with modern fiber optic plant.[15]

Terrestrial competitors have also confirmed that the effects of losing access to MSO-owned sports programming would be compounded if they were also to lose access to MSO-owned news and entertainment programming, a substantial portion of which is highly rated or

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[14] Joint Comments at 13-14.

[15] RCN Comments at 17. *See also* Seren Comments at 12 ("Sports programming, and in particular local sports programming is unique. It cannot be duplicated by competing MVPDs or acquired from alternative sources, even if the cost of doing so were not an issue. The denial of regional sports programming to Seren would be a roadblock [to] our ability to survive."); BSPA Comments at 14 ("[T]o the extent competitors are denied access to regional sports programming, their ability to enter the market and provide multichannel video programming, including satellite delivered programming, to consumers would be 'significantly hindered' or 'prevented' outright."); Gemini Comments at 5 ("Gemini believes that [regional sports] programming is an essential programming service. This programming is being distributed terrestrially in a number of key markets and [is] an important element in a multi-channel video programming package. Prohibiting cable operators from misusing their control over this type of programming will promote the competitive viability of new facilities-based broadband networks in various areas around the Nation, including in the more expensive to build top ten markets and their adjacent suburbs."); Everest Comments at 4 (discussing impact of AOL Time Warner's failure to provide Everest with timely access to local sports programming carried by AOL Time Warner's affiliate, Metro Sports); Carolina Broadband Comments at 4 ("Absent access to programming, particularly 'marquee' programming such as local sports, viewers will simply not switch to a competitor. If competitors are unable to attract viewers, they will be unable to attract advertising revenues, which, in turn, will result in competitors lacking adequate financing and ultimately to insolvency. In short, if incumbent cable providers are permitted to use their market dominance to inhibit competitors['] access to programming, competitors will be unable to survive."); IMCC Comments at 9 ("If, for example, AOL Time Warner were to gain the exclusive right to distribute games played by their Major League Baseball Atlanta Braves and National Basketball Association Atlanta Hawks teams, the result would be certain death for any non-cable MVPD (such as [private cable operator Advanced TeleMedia]) trying to compete in the Atlanta area.").

otherwise popular with subscribers.[16] For example, the American Cable Association reports that its members stand to lose access to between 34% and 43% of their satellite-delivered cable programming services if Section 628(c)(2)(D) is permitted to sunset.[17] BELD reports that up to 42% of its satellite-delivered cable programming services would be at risk if the statute were to sunset.[18] The Joint Parties believe that comments filed by other terrestrial competitors during the reply and/or *ex parte* phase of the *NPRM* will report potential service losses of comparable magnitude if the Commission were to stop enforcing Section 628(c)(2)(D).[19]

Finally, the terrestrial competitors have confirmed that a sunset of Section 628(c)(2)(D) would put at risk the enormous investments they are making to provide consumers with packages of video, broadband, and/or voice services competitive with those of the largest cable MSOs. As explained by RCN:

> RCN's business strategy is critically dependent on the bundled provision of four categories of service, rather than just one or two: RCN seeks to provide video distribution services, high-speed Internet access, local exchange telephone and long distance telephone services to its subscribers. It is essential to the success of RCN's business plan that each of these services produces a revenue stream. Historically, it has been assumed that cable overbuilding is not commercially feasible because of the very high costs to establish a competitive infrastructure

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[16] According to the Commission's most recent video competition report to Congress and other Commission precedent, MSO-owned news and entertainment networks include CNN/CNN Headline News, Cartoon Network, Cinemax, Comedy Central, Discovery, E! Entertainment, Encore, HBO, MSNBC, Starz!, TBS, TNT and USA. Joint Comments at 15 n.39.

[17] Comments of the American Cable Association, CS Docket No. 01-290, at 6-11 (filed Dec. 3, 2001) ("ACA Comments").

[18] BELD Comments at 1.

[19] *See e.g.*, Reply Comments of Altrio Communications, Inc. CS Docket No. 01-290 (filed Jan. 7, 2002); Reply Comments of CNI Wireless, Inc., CS Docket No. 01-290 (filed Jan. 7, 2002). The possibility that terrestrial competitors might lose access to programming upon a sunset of Section 628(c)(2)(D) is by no means speculative. Indeed, terrestrial competitors have reported that they are *already* experiencing difficulties obtaining full and fair access to programming due to various loopholes in Section 628, or due to the tying and bundling practices of various programmers. *See, e.g.*, Qwest Comments at 4; Seren Comments at 9; Everest Comments at 4-5; ACA Comments at 17-18; IMCC Comments at 9; BELD Comments at 1; RCN Comments at 12-13; Comments of the Rural Independent Competitive Alliance, CS Docket No. 01-290, at 5-8 (filed Dec. 3, 2001); CBC Comments at 14 n.23.

> and to induce customers to terminate existing relationships. It is only the advent of modern fiber optics and the pro-competitive policies of the Telecommunications Act of 1996, which, by permitting RCN to generate four separate revenue streams, allow it to develop a commercially feasible broadband business through overbuilding.[20]

In sum, the record is clear: terrestrial competitors will be exposed to serious and irreparable harm if the Commission does not continue to enforce Section 628(c)(2)(D) beyond October 5, 2002. Furthermore, to the extent that the Commission is required to use any predictive judgment here, it should be exercised in favor of continued enforcement of the statute – it is well settled that the Commission need not wait for competition to be obliterated by exclusive cable programming contracts before concluding that Commission intervention is required.[21] Indeed, that sort of *post hoc* approach could not be reconciled with the core objective of Section 628(c)(2)(D), *i.e.*, to "*preserve and protect*" competition and diversity in the video marketplace. Against this backdrop, it is more than reasonable for the Commission to conclude that the indispensability of the programming at issue here (confirmed by the devastating impact of Comcast's behavior in the Philadelphia market), the apparently inevitable consolidation of the

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[20] RCN Comments at 8-9. *See also* Everest Comments at 3 ("[I]t is the possibility of offering multiple services to residential customers that makes the last mile build an economically viable proposition. The average monthly revenue for Everest customers, exclusive of long distance and pay-per-view is $86. With long distance and pay-per-view, average monthly revenue is $106 per month. It is this type of revenue, coupled with a 30% penetration rate, that supports a viable business plan for a last-mile build. However, in order to attract the percentage of customers that supports a cable alternative to incumbents, it is essential that competitive start-ups, such as Everest, be able to offer programming that is comparable to that being offered by the large MSOs."); CBC Comments at 16-17 ("Regardless of the technology employed, it is universally acknowledged that the provision of video entertainment programming over these [broadband] networks is essential to ensure their economic viability."); Seren Comments at 8 ("Fair access to competitive programming remains absolutely essential to our vitality. Advanced technology and stellar customer service would not afford us the ability to compete with the incumbent cable operator unless we also offer competitive programming content. Without competitive content we would be doomed to failure."); Gemini Comments at 4 ("The financial markets have been very difficult for more than a year. Sources of financing will simply not open up again if new [broadband service providers] are denied access to video programming, as will certainly happen if the sunset date is not extended.").

[21] *See WNCN Listeners Guild*, n. 7 *supra.*

largest cable MSOs (*e.g.*, Comcast-AT&T Broadband) and DBS operators,[22] and the crippling effect that a sunset of Section 628(c)(2)(D) would have on enforcement of Section 628 as a whole[23] create an intolerable risk that the slow but steady gains achieved by terrestrial competitors over the past several years will be permanently reversed if Section 628(c)(2)(D) were permitted to sunset. The best interests of consumers demand that the statute remain in force.

B. *The Cable MSOs Make No Compelling Case For A Sunset of Section 628(c)(2)(D).*

At bottom, the cable MSOs offer three arguments in support of sunsetting Section 628(c)(2)(D): (1) as a matter of "national competition policy," the Commission should give the MSOs exclusivity rights comparable to those of DBS operators, television broadcasters and/or newspapers;[24] (2) Section 628(c)(2)(D) defeats program diversity by discouraging the MSOs from investing in programming;[25] and (3) the growth of DBS obviates any need for continued enforcement of the statute.[26] For the reasons set forth below, these arguments fail.

[22] *See* Joint Comments at 10-11; Seiberg, "Comcast-AT&T Could Spur Monopsony Probe," *The Daily Deal*, at 1 (Dec. 21, 2001) ("Comcast Corp.'s acquisition of AT&T Broadband would give it control of 40% of the cable market, a dominance level that could trigger a rare monopsony investigation by federal regulators.").

[23] *See* Joint Comments at 3-4.

[24] *See, e.g.*, Comments of AT&T Corp., CS Docket No. 01-290, at 2 (filed Dec. 3, 2001) ("Sunset would fully accord with economic principles, diversity principles and national competition policy applicable to all other sectors of the U.S. industry.") ("AT&T Comments"); Comments of Cablevision Systems Corp., CS Docket No. 01-290, at 6-7 (filed Dec. 3, 2001) ("Cablevision Comments"); Comments of Comcast Corporation, CS Docket No. 01-290, at 9-10 (filed Dec. 3, 2001) ("Comcast Comments"); Comments of the National Cable & Telecommunications Association, CS Docket No. 01-290, at 15-16 (filed Dec. 3, 2001) ("NCTA Comments").

[25] *See, e.g.*, Comments of AOL Time Warner Inc., CS Docket No. 01-290, at 2 (filed Dec. 3, 2001) ("AOL Time Warner Comments"); Cablevision Comments at 10-13; AT&T Comments at 7-8.

[26] *See, e.g.*, Comcast Comments at 2-3 ("The rule is now plainly an anachronism: it constitutes protectionist regulation for DBS operators that are among the very largest – and are the fastest growing – multichannel video programming distributors in the nation. . . Such large and powerful competitors obviously are in no need of government assistance designed for fledgling-based MVPDs."); NCTA

First, the text of Section 628(c)(5) plainly does not direct the Commission to conduct an inquiry into "national competition policy" or the merits of exclusivity across all media. Rather, Section 628(c)(5) only gives the Commission a far narrower directive to determine whether enforcement of Section 628(c)(2)(D) "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming," a condition which the record satisfies here. Indeed, given the MSOs' historical position that Section 628 should be interpreted to the letter, it is strange that the MSOs would now urge the Commission to stray so far from the plain text of Section 628(c)(5). Particularly in the case of terrestrial distribution, the cable MSOs have repeatedly contended (and the Commission apparently has agreed) that the Commission cannot go beyond the words used by Congress in Section 628, and that the Commission therefore has no authority to extend the program access law to anything other than vertically integrated, satellite-delivered programming.[27] Of course, the MSOs cannot have it both ways: if they truly believe that the Commission's authority is limited by the language used by Congress in Section 628, then they cannot reverse field and now argue that the Commission should ignore that language and transform this proceeding into something well beyond what Section 628(c)(5) requires.

Comments at 7-11. Cablevision also raises *in terrorem* First and Fifth Amendment Arguments, apparently to remind the Commission that they may take this matter to court if the Commission does not permit the statute to sunset on October 5, 2002. Cablevision Comments at 40-43; *see also* AOL Time Warner Comments at 4-6. Given that the United States Court of Appeals for the District of Columbia Circuit has already declared that Section 628 does not violate the First Amendment (*Time Warner Enetertainment Co. L.P. v. FCC*, 93 F.3d 957, 977-79 (1996)), it is difficult to see how the Commission could be reversed on First Amendment grounds if, as authorized by Congress in Section 628(c)(5), it determines that the statute continues to be necessary to preserve and protect competition and diversity in the video distribution marketplace - a finding which, as noted above, it has broad discretion to make. In addition, the Commission has seen Cablevision's Fifth Amendment argument before and rejected it. *See Petition of WXTV License Partnership, G.P.*, 15 FCC Rcd 3308, 3318-19 (2000).

[27] *See, e.g., EchoStar Communications Corporation v. Comcast Corporation et al.*, 14 FCC Rcd 2089, 2099 (CSB, 1999); *DirecTV, Inc. v. Comcast SportsNet et al.*, 13 FCC Rcd 21822, 21834-5 (CSB, 1998).

Moreover, Congress holds the MSOs to a different standard on exclusivity because it has determined that the MSOs *are* different. As explained by the Commission:

> The program access provisions of the 1992 Cable Act were enacted to increase competition and diversity in the multichannel video programming distribution market by providing greater access to cable programming services. In adopting the program access provisions, Congress sought to address the concern that potential competitors to cable operators often face unfair hurdles when attempting to gain access to the programming they need to compete. Congress found that the cable industry was significantly vertically integrated, i.e., cable systems and programmers are often commonly owned, and vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors. It determined that the effect of those vertical relationships in the cable industry was to restrict the availability of programming to competing distributors. Congress concluded, therefore, that the use of exclusive contracts for the distribution of programming between vertically integrated programming vendors and cable operators inhibited the development of competition among distributors, thereby limiting subscriber choice.[28]

Not surprisingly, then, the Commission has concluded that Congress did not intend to include DBS-exclusive contracts within the ambit of Section 628, and that as a general matter such contracts have no cognizable anticompetitive effect.[29] Indeed, it is ludicrous for the MSOs to suggest, for example, that they are prejudiced by DirecTV's semi-exclusive rights to carry games of the National Football League.[30] For proof, the MSOs need only compare the effects of Comcast's refusal to sell Comcast SportsNet to DBS competitors in Philadelphia with the effects

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[28] *Outdoor Life*, 13 FCC Rcd at 12231 (footnotes omitted); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd 3105, 3124 (1994) ("During the House floor debates on the amendment to the House bill (which ultimately became Section 628 with modification) the sponsor and supporters of the amendment emphasized its importance in lifting barriers to entry into the video distribution market by competing technologies. While we recognize that silence as to non-cable technologies is not inherently dispositive in light of the ambiguous statutory language, we give great weight to the legislative history's emphasis on cable operators.") (footnote omitted) ("*DBS Exclusivity Order*").

[29] *DBS Exclusivity Order,* n.28 *supra.*

[30] *See, e.g.,* AOL Time Warner Comments at 9-10. DirecTV's agreement with the NFL is not exclusive as against incumbent cable operators. Comments of DirecTV, Inc., CS Docket No. 01-290, at 7 n. 27 (filed Dec. 3, 2001). Thus, the MSOs failure to obtain a similar arrangement with the NFL is attributable to their own business judgment, not exclusivity.

of DirecTV's semi-exclusivity for the NFL. In the former case, DBS penetration stands at less than 4%; by contrast, it is fair to say that DirecTV's semi-exclusive rights to carry NFL games (or, for that matter, any other exclusive or semi-exclusive DBS programming) has not had a comparable effect on MSO penetration in Philadelphia or anywhere else in the United States.

Equally baffling is the MSOs' suggestion that considerations of fairness require that they be accorded the same exclusivity rights as television broadcasters.[31] Comcast, for instance, attempts to make this point by noting that the Commission does not require the Fox television network to provide "The Simpsons" to the CBS Network or CBS affiliates.[32] It is unclear why Comcast believes this is significant – according to Nielsen ratings taken for the December 3-9, 2001 period, "The Simpsons" is not even the highest rated program in its own time slot (ranking 35th overall) and achieves ratings only fractionally higher than those of competing CBS programming.[33] In fact, notwithstanding its exclusive rights to "The Simpsons" and other programming, Fox is the least watched of the "big four" national television networks in prime time,[34] and thus its market position cannot plausibly be compared with that of the largest cable MSOs who, as in the case of Comcast in Philadelphia, retain the power to dismantle competition by holding exclusive rights to even a single cable network.[35] For similar reasons, no sensible

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[31] It is especially odd that the MSOs would cite the Commission's reinstitution of its syndicated exclusivity ("syndex") rules as support for the proposition that they should be accorded the same exclusivity rights as broadcasters. *See, e.g.,* AT&T Comments at 11. Surely the MSOs have not forgotten that they *opposed* the Commission's reinstitution of its syndex rules, a contradiction duly noted by the D.C. Circuit. *United Video*, 890 F.2d at 1180 n.2 ("Even cable company executives, the Commission noted, stress the strategic importance of exclusivity, though they did not do so, of course, in the syndex proceeding.") (citation omitted).

[32] Comcast Comments at 10.

[33] "BroadcastWatch," *Broadcasting & Cable*, at 20 (Dec. 17, 2001).

[34] *Id.*

[35] *See* Higgins, "No Holiday For Consolidation," *Broadcasting & Cable*, at 6-7 (Dec. 31, 2001) (quoting representative of Forrester Research as stating that the Comcast-AT&T Broadband deal is "the beginning of a dramatic shift in the television industry – the beginning of the end of the network era in TV. . . with

comparison can be drawn between the competitive impact of The Washington Post's exclusive rights to David Broder's column versus that associated with according the MSOs nationwide exclusivity for HBO, CNN, Discovery, or MSO-owned networks devoted partially or entirely to national or regional sports programming.[36]

Second, while the MSOs contend that exclusivity is necessary to spur MSO investment in programming and ensure creation and development of new cable networks, nowhere do they refute the substantial amount of marketplace data to the contrary. Indeed, not even the MSO's own trade association appears to believe that exclusivity has any meaningful impact on program diversity:

> Among the new options that cable customers have are digital video services. Cable program networks have already launched some 60 new digital channels, offering consumers additional choice and further program diversity. Examples include the Biography Channel and History Channel International (from A&E); Science, Civilization, and Kids (from Discovery); Noggin, Nick Too, and Nickelodeon Game Sports (from Nickelodeon); and style. (from E!). There are six new Hispanic channels from Liberty Canales, new music channels from MTV and BET, and separate channels targeting Indian, Italian, Arabic, Filipino, French, South Asian and Chinese viewers from The International Channel. There are also many new premium offerings from HBO (HBO Family, ActionMAX, and ThrillerMAX), Showtime (Showtime Extreme, Showtime Beyond) and Starz Encore (Family, Cinema, Movies for the Soul, and Adventure Zone).[37]

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one MSO in 22 million households, they are in the driver's seat."); "Basic Sets Primetime Marks in 2001," *Multichannel News* (January 3, 2002) (discussing ratings slippage of television networks versus basic cable), *at* http://www.multichannel.com

[36] Comcast Comments at 10. The legislative history of the 1992 Act indicates that Congress considered and rejected the MSOs' newspaper analogy before passing Section 628. *See* Statement of James P. Mooney, President and Chief Executive Officer, National Cable Television Association, to the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, at 22 (March 14, 1991); Letter from The Media Companies Group to Chairman Edward J. Markey, Subcommittee on Telecommunications and Finance, House Committee on Energy and Commerce (July 16, 1991). Also, the MSOs overlook another important point: whereas a consumer can obtain access to Mr. Broder's column simply by paying twenty-five cents for a copy of *The Washington Post*, that same consumer cannot obtain access to any MSO-exclusive programming without purchasing an MSO's cable service in its entirety and at far greater cost. This highlights the fact that the respective effects of newspaper exclusivity and cable exclusivity on consumer welfare simply are not comparable.

[37] Testimony of Robert Sachs, President and CEO, National Cable & Telecommunications Association, on Competition in the Multi-Channel Video Programming Distribution Marketplace, before the House

It therefore is no surprise that the MSOs have no answer to the phenomenon of Speedvision and Outdoor Life which, notwithstanding the Commission's refusal to give them an exemption from Section 628(c)(2)(D)'s prohibition on exclusivity, have grown to become two of the more popular "niche-oriented" cable channels in circulation, currently reaching 45 million and 40 million cable homes respectively.[38] The MSOs are similarly mute on the Sci Fi Channel, which too was denied a Section 628(c)(2)(D) exemption by the Commission yet has succeeded quite well without exclusivity.[39] Again, the MSOs should consult their trade association:

> Sci Fi Channel . . . was launched in September 1992 into ten million homes – the second largest launch in cable history. Nine years later, Sci Fi continues to attract industry-wide interest in its achievements. After a massive re-design and launch of a full slate of original series in 1999, the Channel aggressively expanded its original program offerings in 2000 – crowned by the stunning ratings success of the epic miniseries *Frank Herbert's Dune* last December. In 2001, Sci Fi has over 10 hours of original series programming per week, and has expanded to a second night of originals – *making it the largest provider of original primetime scripted series on cable.*
>
> With strong investment from its parent company and notable programming successes, Sci Fi continues to generate buzz among advertisers, affiliates and consumers. The Channel recently offered a second, West Coast feed, and, with over 71 million subscribers and growing stronger every day, Sci Fi faces a bright future.[40]

Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce (Dec. 4, 2001), *at* http://www.ncta.com/press/press.cfm?Prid=205&showArticles=ok. At a minimum, the networks launched by Discovery, E! and HBO would be MSO-owned and thus subject to Section 628(c)(2)(D)'s ban on exclusivity. Furthermore, the inability to offer exclusivity has not stopped Comcast from launching the G4 "video gaming" channel, which has already received carriage commitments from cable systems serving millions of subscribers. Joint Comments at 25 n.62. All of this belies NCTA's suggestion that a sunset of Section 628(c)(2)(D) is necessary to motivate the MSOs to invest in programming. *See* NCTA Comments at 16-17.

[38] Joint Comments at 24, n.59. Similarly, The Golf Channel (of which Comcast is majority owner) has been extremely successful as a non-exclusive service. *See, e.g.*, Umstead, "Niche Sports Nets Show They Have Game," *Multichannel News* (Nov. 26, 2001) *at* http://www.multichannel.com.

[39] *Cablevision Industries Corporation and Sci Fi Channel*, 10 FCC Rcd 9786 (CSB, 1995).

[40] "Sci Fi Channel Profile," available *at* http://www.ncta.com/guidebook_pdfs/SciFi.pdf (emphasis in original).

Likewise, it is difficult to take AOL Time Warner's alleged need for exclusivity seriously given, to cite one example, HBO's substantial and highly successful investments in popular programming such as "The Sopranos" and "Sex and the City," both of which have made HBO one of the most highly demanded cable networks among consumers without the supposed marketplace advantage of exclusive contracts.[41] Furthermore, Cablevision's alleged need for exclusivity is equally difficult to reconcile with the public statements of its programming arm, Rainbow Media Holdings, Inc.:

> With a customer base of 75 million homes, AMC [American Movie Classics] is the premiere 24-hour movie network dedicated to the world of American film. The network offers one of the most comprehensive libraries of films from the 1930s through the 1980s and a diverse blend of original series, documentaries and interstitials. A part of cable history for 16 years, AMC was recently rated among the top 10 in television by *Time* and won two Daytime Emmys in 2000.
>
> For 20 years, Bravo has been the first and only service wholly dedicated to film and the performing arts, with its trend-setting, critically acclaimed programming featuring the best in American and international film, theater, dance, music, documentaries and, increasingly, original shows that profile the creative process and culture. . . . Today, Bravo is more popular than ever, reaching 50 million U.S. homes and recording five consecutive quarters of increased ratings.
>
> As the defining network for films made outside the Hollywood studio system, The Independent Film Channel presents a cutting-edge blend of unedited feature-length television premieres, documentaries, shorts and animation. Celebrating its fifth birthday in 1999, IFC caters to more than 48 million homes nationwide. . . IFC Productions provides financing for established filmmakers who strive to retain their creative freedom and is the name behind critical, commercial success such as Karyn Kusama's *Girlfight* and Kim Pierce's Academy Award-winning *Boys Don't Cry*.[42]

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[41] *See, e.g.*, Haugsted, "'Sex' Sets Sunny Maid for Cable," *Multichannel News*, at 12 (Nov. 12, 2001). A lack of exclusivity also has not prevented AOL Time Warner-owned TBS, TNT, CNN and Cartoon Network from achieving wide distribution and high ratings among basic cable services. *See, e.g.*, Reynolds, "Lifetime Edges ESPN for Weekly Laurels," *Multichannel News*, (Dec. 27, 2001), *at* http://www.multichannel.com.

[42] Indeed, Cablevision's recent experience with its own terrestrially-delivered MetroChannels suite of programming services tends to disprove the MSOs' argument entirely – exclusivity notwithstanding, Cablevision recently announced that it has significantly scaled back MetroChannels' operations,

In other words, all of the above-cited examples only confirm what even the MSOs know by now: the success or failure of a cable programming network is not inextricably tied to whether that network is able to enter into exclusive contracts with the cable MSOs, and that the quality and marketability of a cable network's programming, not exclusivity, ultimately determines whether it will achieve extensive cable distribution.[43]

Third, as already discussed in the Joint Parties' initial comments, the MSOs' contention that the growth of DBS obviates any need for further enforcement of Section 628(c)(2)(D) is flatly contradicted by the legislative history of Section 628(c)(2)(D) and the Commission's own precedent, both of which confirm that the interests of non-DBS competitors must be accorded substantial weight when determining whether a sunset of the statute would serve the public interest.[44] Indeed, the plight of terrestrial competitors relative to DBS only reinforces their

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canceling several shows and laying off as many as 38 employees. Umstead, "Rainbow to Scale Back MetroChannels," *Multichannel News* (Dec. 5, 2001), *at* http://www.multichannel.com.

[43] Joint Comments at 25. It should also be noted that the Commission has already rejected the MSOs' related argument that exclusivity protection is necessary to prevent competitors from "free-riding" on the MSOs' programming investments. *See Outdoor Life,* 13 FCC Rcd 12239-40; *Time Warner Cable*, 9 FCC Rcd 3221, 3229 (1994).

[44] Joint Comments at 21-22. Cablevision also suggests that the antitrust laws are sufficient to address any anticompetitive MSO behavior if the Commission were to stop enforcing Section 628(c)(2)(D). Cablevision Comments at 37-40. It is well-settled, however, that the Commission's obligation to regulate in the public interest is separate and distinct from the antitrust laws. As the Commission observed with regard to AT&T's acquisition of TCI:

> Our public interest analysis is not, however, limited by traditional antitrust principles. In the telecommunications and cable industries for which we have statutory responsibility, as in most others, competition is shaped not only by antitrust rules, but by the regulatory policies that govern the interactions of firms inside the industries. An antitrust analysis – such as that undertaken by the Department of Justice in this case – focuses solely on whether a proposed merger will harm competition. Our public interest analysis, however, also encompasses the broad aims of the Communications Act. For example, an antitrust analysis of cable television service providers takes place against a backdrop of rules adopted by this Commission, as directed by Congress, that among other things limit the ability of cable operators to prohibit their competition from carrying certain programming. To apply our public interest test, then, we must determine whether the merger violates our rules, or would otherwise frustrate our implementation or

argument for continued enforcement of the statute. According to the Commission's most recent annual videos competition report to Congress, DBS penetration currently stands at better than 15% versus only a few percentage points for terrestrial competitors.[45]

Thus, where terrestrial technologies are concerned, there is no merit to the MSOs' suggestion that they have little economic incentive not to sell their programming to competitors.[46] For example, assume that a cable MSO and its next largest terrestrial competitor control 80% and 10% of a television market with 100,000 households, meaning that the MSO and its terrestrial competitor control 80,000 and 10,000 households, respectively. Since the MSO controls the lion's share of the households in the market, a programmer has little choice but to enter into an affiliation agreement with the MSO, to ensure that its advertisers achieve their desired viewership. By contrast, that same programmer likely can well afford to not sell its programming to the MSO's terrestrial competitor who controls only 10% of the market and, unlike the MSO, has no substantial presence in other markets nationwide. That is, if the programmer's service is popular (as in the case of sports programming, for example), the terrestrial competitor's subscribers will in many if not all cases switch their allegiance and purchase service from the MSO, particularly in markets where DBS does not offer a full complement of local television signals. In that scenario, the programmer loses nothing by entering into an exclusive contract with the MSO, and in fact may have tremendous economic

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> enforcement of the Communications Act and federal communications policy. That policy is, of course, shaped by Congress and deeply rooted in a preference for competitive processes and outcomes.

Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor To AT&T Corp., Transferee, 14 FCC Rcd 3160, 3168-9 (1999) (footnotes omitted).

[45] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1, at Table C-1 (rel. Jan. 8, 2001).

[46] See, e.g., AOL Time Warner Comments at 10; AT&T Comments at 23.

incentive to do so if the programmer is offering other services that it wants the MSO to carry locally and nationally. Consumers, unfortunately, ultimately benefit the least, since the programmer's exclusive contract with the MSO compromises the terrestrial competitor's financial viability and thus its ability to deliver the benefits of competition to the public.

C. *The Commission Should Not Impose Any Constraints On Any Continued Enforcement of Section 628(c)(2)(D).*

Both the Commission and certain commenting parties have suggested that the Commission might consider "splitting the baby" in this proceeding by imposing limitations on any future enforcement of Section 628(c)(2)(D), either by tying it to the January 1, 2006 sunset date for exclusive retransmission consent agreements in the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") or by adopting formulae for discontinuing enforcement of the statute on a network-by-network or market-by-market basis.[47] With unprecedented concentration of the cable MSOs and the DBS industry apparently at hand, it would be highly premature for the Commission to assume at this point in time that terrestrial competitors will no longer require protection against exclusive cable programming contracts by January 1, 2006 or any other date certain. Equally important, the Commission must take notice of the fact that many terrestrial competitors just obtained or are in the process of obtaining financing and/or constructing systems and introducing their services to consumers. Certainly, even the mere prospect that Section 628(c)(2)(D) could sunset as soon as January 1, 2006 is enough to set those efforts back substantially and perhaps permanently.[48] Moreover, any attempt by the Commission to

[47] *See NPRM* at ¶¶ 14-15; Everest Comments at 8-9; RCN Comments at 36-37.

[48] Also, there is nothing in the SHVIA (a law targeted almost entirely at DBS, not terrestrial competition) which suggests any intent by Congress that the January 1, 2006 sunset date for exclusive retransmission consent contracts have any effect on when (if at all) the Commission should permit a sunset of Section 628(c)(2)(D). Indeed, in its *First Report and Order* implementing the retransmission consent provisions of the SHVIA, the Commission recognized that the sunset provisions in the SHVIA and Section 628(c)(2)(D) are separate and distinct, and reinforced that separation by rejecting requests by cable's

discontinue enforcement of the statute on a network-by-network or market-by-market basis will ensnare the Commission's staff in case-by-case adjudications that may drain scarce Commission resources for years to come. To the extent that the Commission believes it must review the exclusivity issue on a periodic basis, it may do so through its statutorily mandated annual video competition reports to Congress.[49] At such time as those reports indicate that market conditions justify a permanent sunset of Section 628, the Commission would have full authority to issue a Further Notice of Proposed Rulemaking on the subject and resolve the matter there.[50]

III. CONCLUSION.

The Joint Parties recognize that Congress clearly intended that Section 628(c)(2)(D)'s ban on exclusivity sunset at some point in time – the question before the Commission in this proceeding is whether that time has arrived. As established by the record, the answer to that question is "no" where terrestrial competitors are concerned. The Joint Parties therefore urge the Commission to issue a clear and unequivocal declaration in this proceeding that enforcement of Section 628(c)(2)(D) "continues to be necessary to preserve competition and diversity in the

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competitors to incorporate Section 628's anti-discrimination provisions into its retransmission consent rules. *See Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd 5445, 5465 n.108, 5484-5 (2000).

[49] *See* 47 U.S.C. § 548(g).

[50] In the alternative, the MSOs may avail themselves of Section 628(c)(4), which permits the Commission to exempt MSO-owned programming services from Section 628(c)(2)(D) on a case-by-case basis where certain public interest criteria are satisfied. Here it is ironic that Comcast should complain that the relief available under Section 628(c)(4) is "very narrow and limited." Comcast Comments at 12. As reflected in the Commission's rulings on the terrestrial distribution issue, Comcast has perhaps been the greatest beneficiary of the Commission's case-by-case adjudications of program access matters, in no small part due to the "very narrow and limited" interpretation of Section 628 which Comcast has repeatedly advocated before the agency.

distribution of video programming," and that the Commission will therefore continue to enforce the statute beyond October 5, 2002.

Respectfully submitted,

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