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

In the Matter of:	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	
And Competition Act of 1992	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity	)	
In Video Programming Distribution:	)	
Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF NORTHPOINT TECHNOLOGY, LTD.

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EXECUTIVE SUMMARY

Almost nine years after passage of the 1992 Cable Act, Americans still have limited choices for video programming. Although new entrants like Northpoint Technology, Ltd. ("Northpoint") represent a new choice in the video programming market, and have spent millions of dollars in development costs and in overcoming countless hurdles to bring their products to the market, consumers will realize the benefits of choice and lower costs brought by new entrants only if Northpoint and others continue to have access to programming. Without section 628(c)(2)(D), this access is unlikely to continue in any meaningful way.

In the comments that were submitted in this proceeding, incumbent operators advanced four primary arguments for lifting section 628(c)(2)(D)'s ban on vertically integrated cable companies entering into exclusive programming arrangements with their affiliate programmers; mainly that: (i) robust competition exists in the market; (ii) the ban on exclusivity is a disincentive to investment in programming and stifles competition; (iii) cable companies have an economic incentive to provide programming to a wide audience without a ban; and (iv) anti-trust laws are sufficient to prevent any abuse of market power. Northpoint's Reply Comments discuss and rebut these claims.

First, while some commenters point to the growth of certain competitors to cable -- mainly DBS -- as evidence of a fully competitive market, the development of DBS is better understood as evidence that 628(c)(2)(D) is working, but not finished. Growth of competition is not prima facie evidence of a competitive market, and no commenter contends that the inroads made by DBS have unfolded for other new entrants. DBS has developed in a pro-competitive regulatory environment brought about by section 628(c)(2)(D). In order for similar progress to

be made for Northpoint and other similarly situated entrants, they must be allowed to become viable competitors.

Second, many of the commenters representing the interests of cable companies argue that the ban on exclusivity is a disincentive to investment in programming by making it difficult to raise capital, by restricting consumer choice and by stifling innovation. However, no empirical evidence is offered to support these assertions. No examples are cited where funding has been denied or innovation stifled. Conversely, discontinuance of the rule would have the negative impact of chilling investment in cable competitors. Exclusive contracts deny cable competitors crucial programming, thus drastically impeding Northpoint's and other new entrants' ability to provide real alternatives to cable, while at the same time exclusive contracts remove incentives for cable companies to compete.

Third, the incumbent cable companies argue that there exists powerful economic incentives for them to sell to the widest audience, and therefore they will not discriminate. Northpoint submits that the long-term benefits of exercising monopsony power, however, far exceed the short term economic gains from nondiscrimination.

Fourth, proponents of sunsetting the rule argue that antitrust laws are adequate remedies for potential harms. Antitrust laws are an after-the-fact remedy and do not preemptively avert abuses of market power. It cannot plausibly be argued that the antitrust laws, which provide competitors with an after-the-fact remedy for anti-competitive conduct, can supplement sound up-front policies designed to afford competitors some semblance of a level playing field. Without continuance of the rule, potential competitors will perish and the anti-trust laws will not be able to revive them.

In sum, section 628 has laid the foundation for competition, which has allowed new entrants to compete in the Multichannel Video Program Distribution ("MVPD") market. Continuance of the prohibition on exclusive contracts is necessary if robust competition offering consumers more choices and lower prices is to occur. Most importantly, the facts discussed herein unequivocally demonstrate that, today even more than in 1992, section 628(c)(2)(D) is necessary in order to allow diversity in programming.

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REPLY COMMENTS OF NORTHPOINT TECHNOLOGY

Northpoint Technology, Ltd. ("Northpoint"), by its attorneys, hereby submits these Reply Comments in the above captioned proceedings. Northpoint, through its innovative patented digital wireless terrestrial transmission technology, seeks to offer American consumers more choice for video programming. Northpoint will deploy its systems ubiquitously and in some instances serve as consumers' only provider. Its low operational costs will enable it to offer prices much lower than cable and satellite incumbents. Northpoint will provide at least 96 channels of quality programming for approximately $20.00 per month, substantially below the rates cable and DBS now charge their customers. Moreover, unlike DBS, Northpoint's programming will include local TV channels on a must-carry basis for its subscribers in 210 markets. Once the FCC approves Northpoint's applications, it can begin deployment in six months and be operational in all 210 markets within two years.

I. INTRODUCTION

Most Americans do not have competitive choices for video programming. In its *Seventh Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, the FCC found that of the 33,000 cable community units nationwide, only 330 or one percent have been certified by the Commission as having effective competition, which the FCC has defined as meaning that consumers have a choice of more than one MVPD.[1]

Almost nine years after passage of the 1992 Cable Act (the "Act") Americans still have limited choices for video programming. Northpoint represents a new choice. We have spent millions of dollars in development costs and in overcoming countless hurdles to bring this exciting new product to market. However, in order for consumers to realize the benefits of choice and lower costs that Northpoint's new product offers, it is crucial that new entrants like Northpoint have access to programming, as programming is the key component for success in the MVPD market.[2]

In enacting section 628(c)(2)(D) in 1992, Congress recognized that content was king:

> "Programming is the key...Without programming, competitors of cable are...stymied...It means that cable is jacking the price up on its competitors so high that they can never get off the ground. In some cases they deny programs completely to those competitors to make sure they cannot sell a full package of services. So the hot shows are controlled by cable."[3]

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[1] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* CS Docket No. 00-132 (rel. Jan 2, 2001), ("*Seventh Annual Report*") at ¶138.

[2] The Commission itself has said that "access to programming is an essential prerequisite to the ability to compete against incumbent cable operators." *Outdoor Life Network and Speedvision Network,* 13 FCC Rcd 12226, 12235 (CSB, 1998). See also Comments of Independent Multi-Family Communications Council (IMCC), CS Docket No. 01-290, filed November 30, 2001 at 2; Comments of Braintree Electric Light Department, CS Docket No. 01-290, filed December 1, 2001, at 2; Comments of Qwest Broadband Services, Inc., CS Docket No. 01-290, filed December 3, 2001 ("Qwest Comments"), at 3.

[3] 138 Cong. Rec. H6533-34 (daily ed. July 23, 1992) (statement of Rep. Tauzin)

Legislators recognized that without section 628(c)(2)(D) new entrants would not be able to compete with the entrenched cable companies. In relevant part, section 628(c)(2)(D) bans vertically integrated cable companies from entering into exclusive programming arrangements with their affiliated programmers. Congress found that competitors to incumbent cable operators often face insurmountable hurdles in seeking access to critical programming required to compete, and that historically cable companies used exclusive contracts to prevent their competitors from obtaining crucial programming. In banning vertically integrated companies from entering into exclusive contracts, Congress found that such companies had the incentive and ability to favor their own affiliated cable operators over their competitors. The facts to be detailed below will reveal that the landscape has not changed much since 1992.

The incumbent cable companies correctly note that the standard of review for the Commission in deciding whether or not the continuation of the rule is required is whether it is necessary to "preserve and protect competition and diversity in the distribution of video programming." [4] Under this standard, the Commission must continue the rule because the conditions which gave rise to the rule still exist today. Many of the companies that filed in this proceeding seeking the sunset of the rule are the very same companies responsible for the lack of competition. Cable companies maintain a hefty 80% overall market share. It is true that DBS has gained subscribership in certain markets; however, there is little head-to-head competition between cable and DBS. The top ten multiple system owners ("MSO"s) serve close to 90% of all subscribers nationwide.[5]

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[4] Comments of AT&T Corp., CS Docket No. 01-290, filed December 3, 2001 ("AT&T Comments"), at 1.

[5] *Seventh Annual Report* at ¶15.

While there are fewer vertically integrated companies, this decline in and of itself does not signal an improvement. What is relevant is the increasing power that a few large vertically integrated companies can yield in the video distribution market.

AT&T, currently the largest cable company, has an ownership interest in 64 national programming networks, comprising 23% of all programming services in terms of subscribership and 11 of the top 20 services in terms of prime time programming. AOL/TW, the second largest cable company, has a controlling ownership interest in 34 national program networks, accounting for 12% of all programming.[6] If Comcast and AT&T merge the combined entity will control 83 of the national programming networks, accounting for 30% of all programming. In effect, the top two cable companies will have 42.4% of the national subscriber base[7] and will have ownership interest in 42% of all national programming networks.[8] Today, vertically integrated cable companies, due to consolidation and clustering, have even greater ability to exercise their vast market power to stifle competition by denying critical programming to their competitors.

The DBS industry, which has yet to demonstrate itself as a truly viable alternative to cable, now seeks to become a new monopoly. If Direct TV and Echostar merge consumers will have only two choices -- the cable hegemony or the DBS monopoly. If the dream of a robust competitive video distribution market is ever to be a reality, section 628's ban on exclusive agreements must be maintained.

In an effort to refute the irrefutable, those seeking sunset of the rule essentially make the following arguments:

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[6] *Id.* at ¶174.

[7] *Id.* at ¶169.

[8] *Id.* at ¶174.

(A) Today, there are fewer vertically integrated companies, many new entrants, and a proliferation of new and diverse programming. Therefore, the market is competitive and the rule banning exclusive contracts is no longer required;

(B) The ban on exclusivity is a disincentive to investment in programming by making it more difficult to raise capital, thus restricting consumer choice and stifling innovation and diversity;

(C) It is not in the cable companies' economic interest to discriminate; and

(D) Anti-trust laws are designed to prevent any abuse of market power; therefore the rule is no longer required.

For the reasons discussed below, each of these arguments is fatuous. In fact, there is more of a need for the rules today than in 1992.

II. ARGUMENT

A. Claim – Robust competition exists today. There are fewer vertically integrated companies and many new entrants resulting in a proliferation of new and diverse programming. Thus the rule is no longer required.[9]

FACT—Congress' goal for a fully competitive market has yet to be achieved. However, it is precisely because of section 628(c)(2)(D) that there are new entrants. DBS's growth is directly attributable to the prohibition on exclusive contracts, but this result has yet to unfold for other new entrants.

The incumbent cable companies argue that there is robust competition. They cite the entry of new competitors and the growth of DBS.[10] The facts show otherwise. The market is not yet competitive. The growth in DBS subscribership trumpeted by the cable incumbents is directly attributable to the very rule they now seek to eliminate. Because of section 628(c)(2)(D) and the Satellite Home Viewer Improvement Act (SHIVA), DBS providers were able to

[9] See Comments of Cablevision Systems Corp., CS Docket No. 01-290, filed December 3, 2001, at 2. ("Cablevision Comments"), at 25; Comments of the National Cable & Telecommunications Association ("NCTA"), CS Docket No. 01-290, filed December 3, 2001 ("NCTA Comments"), at 7; and AT&T Comments, at 16.

[10] NCTA Comments, at 7. See also Comments of iN DEMAND L.L.C., CS Docket No. 01-290, filed December 3, 2001, at 8.

acquire crucial programming that enabled them to launch their services. However, in most local markets DBS does not compete head-to-head with cable. Although DBS has given consumers in some markets another choice, effective competition still does not exist.[11] The fact that one percent of video subscribers has two choices, while 99% have only one choice or in some instances no choice at all, can hardly be said to be robust competition.[12]

The incumbents assert that there are many new entrants, *e.g.*, SMATV, MMDS, overbuilders and other wireless technologies that did not exist in 1992. None has been able to bring forth the expected vigorous competition. However, supporters of the rule do not mention that one of the key assumptions of the Act was that the incumbent local telephone exchange carriers (LECs) would vigorously compete against cable. As the Commission found in its *Seventh Annual Report,* "This year, we find that the rate of entry by LECs appears to be slowing even by the most aggressive telephone companies, and several LECs have reduced or eliminated their MVPD efforts."[13]

Once one strips away the DBS numbers, the combined MVPD market share for the remaining competing technologies is less than 3%. MMDS has actually decreased by 14.7%, SMATV has shown little growth, and most LECs have abandoned plans to provide video.[14] In short, little has changed since 1992. The LECs have abandoned the MVPD market but Northpoint remains, ready to be a true competitor to cable and satellite.

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[11] *Seventh Annual Report* at ¶75.

[12] As previously stated, only one percent of Americans across the country have more than one choice of a provider for video programming.

[13] *Seventh Annual Report* at ¶10.

[14] *Id.* at ¶14.

History has shown that DBS would not have progressed without section 628(c)(2)(D) and SHIVA. Today the same is true for Northpoint -- without access to critical programming it will be severely handicapped in its attempt to compete with the cable hegemony and the threatened DBS monopoly.

Finally, the incumbent cable companies argue that there are fewer vertically integrated companies. Making a huge leap in logic, they conclude that the mere fact that there are fewer vertically integrated companies justifies the sunset of the rule. No credible rationale for this conclusion is offered. None is offered because none exists.

Over the past three years, the big companies got bigger. AT&T purchased TCI and Media One. AOL, the largest online service provider, became the second largest cable company by purchasing Time Warner, a mega media firm. Now Comcast, the third largest cable company, is poised to purchase the largest cable company, AT&T. The depth and breadth of the reach of these companies is staggering.[15] For example, AT&T, the nation's largest cable operator serving over 19% of all MVPD subscribers, has ownership interest in 64 national programming networks, comprising 23% of all programming services in terms of subscribership, and 11 of the top 20 services in terms of prime time ratings are vertically integrated.[16]

As previously stated, if the proposed merger of Comcast with AT&T is consummated, the combined entity will have ownership interest in 83 of the national programming networks, accounting for 30% of all programming. AOL/TW will remain the second largest cable company, having ownership interest in 34 national program networks, accounting for 12% of all

[15] The *Washington Post* writes, "Once the Comcast and AT&T systems are knitted together, Comcast will be able to deliver huge audiences by inserting the same commercial across dozens, if not hundreds, of cable channels. At the same time, it will be able to use its wired connection to more than 20 million cable homes to offer local telephone service." Alec Klein, Christopher Stern and Frank Ahrens, *Comcast-AT&T Deal Spotlights Bigger Drama*. Wash. Post, Dec. 21, 2001, at A1.

[16] *Seventh Annual Report* at ¶174.

programming. In effect the top two companies will have ownership interests in 42% of all national programming networks. It thus appears that a few large companies have morphed into a powerful cable hegemony, possessing even greater abilities than existed in 1992 to stifle competition and deny consumers choice and lower prices for video services.

Indeed, the above facts suggest that the state of competition is arguably worse today than in 1992. Previously, programmers had more avenues to sell their programming; however, consolidation and clustering have reduced the number of MSOs and thus the available avenues for sale by programmers. Today there are fewer but more powerful vertically integrated companies. In many markets there will be only one cable operator for a programmer to sell to. Thus, the few remaining MSOs have incredible market power to pick winners and losers. The MSO could exert its influence to intimidate programmers to enter into exclusive agreements to the disadvantage of both the MSO competitors and the programmer.[17]

Given the reduction in the number of purchasers the programmer would have little choice but to comply with the exclusivity demands of the purchasing MSO, even though it reduces the programmer's viewing audience.[18] Depriving competitors of programming would make them less competitive and ultimately result in the elimination of competitors, fewer choices, and higher prices to consumers.

This is a classic example of monopsony power. The imbalance of power not only exists today but also has been exacerbated by consolidation. The ban must be maintained in order "to

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[17] See Qwest Comments, at 4.

[18] Additionally, there are fewer choices for purchasers of programming. Programming has been consolidated into a few companies. The *Seventh Annual Report* found that: : " . . . [I]t appears that a significant amount of video programming is controlled by only 11 companies, including cable MSOs, broadcasters, and other media entities. Of the top 20 programming networks in terms of subscribership, more than half (i.e., 12) are owned by one or more of these 11 companies, with nine of these networks vertically integrated with cable MSOs." *Id* at ¶175.

protect and preserve diversity in programming distribution". The facts don't lie; cable still reigns undefeated over the MVPD landscape.

B. Claim – The ban on exclusivity is a disincentive to investment in programming by making it difficult to raise capital, and it restricts consumer choice. The ban stifles innovation.[19]

FACT—Investment has flourished in cable programming as evidenced by the increase in cable programming. If section 628(c)(2)(D) is allowed to sunset, the opposite will occur—there will be a disincentive for investors to invest in cable's competitors.[20]

None of the companies advancing the above arguments provided any empirical evidence to support these assertions. They cite no examples where funding has been denied or innovation stifled. They do not nostalgically refer back to the glory days before the rule to show that innovation and diversity were rampant and that cable companies used their vast power and influence to sell programming to the "widest possible audience" because there are "powerful economic incentives" to do so.[21] The reason they do not is because prior to the enactment of section 628 the days were anything but glorious for cable's competitors. Today, due to section 628 the groundwork has been laid that can eventually lead to a truly competitive MVPD market.

The incumbent cable companies argue that Congress and the Commission have long recognized that exclusive contracts can be a competitive tool useful for the promotion of diversity and innovation in programming.[22] They argue that this is a tool they should not be

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[19] Cablevision Comments, at 2. See also AT&T Comments, at 10.

[20] As Congressman Tauzin aptly noted, "Programming is the key...Without programming, competitors of cable are...stymied." 138 Cong. Rec. H6533-34 (daily ed. July 23, 1992) (statement of Rep. Tauzin).

[21] Comments of AOL Time Warner Inc., CS Docket No. 01-290, filed December 3, 2001 ("AOL/TW Comments"), at 10. It is interesting to note that proponents of lifting section 628's ban offer only specious claims that somehow exclusivity will mysteriously yield diversity, e.g. "territorial exclusivity has long been acknowledged for its contributions to program diversity." AOL/TW Comments, at 20. Congress seemed to "acknowledge" quite the opposite conclusion by enacting section 628's ban on exclusive programming in order to foster diversity.

[22] AOL/TW Comments, at 20.

denied. They further argue that the rule violates the First and Fifth Amendments. The First and Fifth Amendment arguments can be summarily dismissed because the rule has already been held to be sufficiently narrowly tailored to pass scrutiny. All of the examples cited to support the remaining arguments are inapplicable. For example, incumbent cable companies analogize this situation to "fast food franchises" and "tire stores," which are free to enter into exclusive agreements.[23] What they fail to state is that fast food chains and tire stores are examples of companies operating in a robust and fully competitive market. As the previously mentioned facts show, the MVPD market is not yet fully competitive. Until the market is competitive, as history has so amply demonstrated, exclusive contracts are not a tool for differentiation, they are a proven anti-competitive weapon.

The arguments presented by the incumbents are inconsistent. First, when arguing that the market is competitive they state that there is plenty of diverse programming, and the barriers to entry for programmers are virtually non-existent -- "[a]ll you need is talent and communications hardware."[24] AOL/TW states that: "The quantity and diversity of programming has increased exponentially since Congress enacted the ban on exclusive contracts almost ten years ago."[25] In the next breath, however, they argue that the ban is a disincentive to investment, thereby limiting diversity and innovation.[26] If one assumes *arguendo* that programming is as easy to produce as AOL/TW suggests, then it should not be difficult to obtain capital investments for its purchase.

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[23] AT&T Comments, at 9.

[24] AT&T Comments, at 20.

[25] AOL/TW Comments, at 18.

[26] AOL/TW Comments, at 19.

If the rule has stifled investment, the cable companies' new channel offerings certainly do not support this contention. In fact, there has been a proliferation of new programming.[27] Indeed, in supporting price increases above the rate of inflation, cable companies have long argued that increases are due to new programming costs, and that the price per channel has decreased when adjusted for inflation. They boast that they have launched some 60 new digital channels and that, as of September 30, 2001, cable had a customer base that included: 13.7 million digital video customers, 6.4 million high speed data customers and 1.5 million residential cable telephone customers.[28] During the 12-month period ending July 1, 2000, "[C]able subscribers received an average of three additional channels of programming ... In fact, data from the FCC and General Accounting Office show that the price per channel of cable's video services has declined since 1986 when adjusted for inflation."[29] If maintaining the ban would discourage investment and harm consumers, then why has cable been able to offer more programming at lower prices on a per channel basis? We submit it is the threat of competition that has prompted new programming and innovation. However, without truly viable competitors the industry has every incentive to return to its pre-1992 Act anti-competitive behavior. Discontinuance of the rule would have the impact of chilling investment in cable's competitors because exclusive contracts will drastically impede Northpoint's and other new entrants' ability to provide real alternatives to cable, and undermine incentives for the cable companies to compete.

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[27] *Seventh Annual Report* at ¶8.

[28] *Competition in the Multi Channel Video Programming Distribution Marketplace Before the House Subcommittee on Telecommunications and the Internet*, 107th Cong. (December 4, 2001) (statement of Robert Sachs, President and CEO, National Cable & Telecommunications Association).

[29] *Id.* Sachs goes on to testify that "Year-to-year comparisons which fail to consider the increased number of channels that operators provide to customers...create a misleading picture. In fact...the price per channel of cable's video services had declined since 1986 when adjusted for inflation". *Id.*

Finally, the incumbent cable companies argue that there is an abundance of programming and therefore exclusive program contracts would not limit others in obtaining programming. This argument is inaccurate. Unless the incumbent vertically integrated monopolist is barred from withholding crucial programming, new entrants will fail. Marquee programming such as CNN, ESPN and HBO are a "must have"—they are not substitutable. By way of analogy, DBS subscribership reached a plateau until Congress in SHIVA allowed DBS providers access to local broadcast signals.

C. Claim – Cable companies have an economic incentive to provide programming to the "widest possible audience" without an exclusive ban, therefore none is needed.

FACT-- The long-term benefits of exercising monopsony power far exceed any short-term economic gains from nondiscrimination.

AOL/TW and other dominant cable companies argue that:

> " . . . [W]ithout an exclusive restriction, there are powerful economic incentives for AOL/TW to provide its popular cable networks to the widest possible audience."[30]

Again, a blanket statement is made but no credible supporting evidence is provided. There may very well exist economic incentives for a vertically integrated MSO to provide programming to others, but the critical question is -- at what price and under what terms and conditions? Prior to the enactment of section 628(c)(2)(D), rural MVPD providers paid 400%-500% more for the same programming sold to affiliated cable operators.[31] Although theoretically there could be short-term gains from nondiscrimination for the incumbent cable companies, realistically the long-term gains achieved through the exercise of monopsony power

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[30] AOL/TW Comments, at 10. See also NCTA Comments, at 14.

[31] Comments of the National Rural Telecommunications Cooperative, CS Docket No. 01-290, filed December 3, 2001, at 3.

far exceed the short-term gains. Ultimately, the long-term gains are the elimination or severe handicapping of the competitor and the domination of the programmer.[32]

This is precisely the type of "economic incentive" brought about by undue influence and excessive market power that Congress sought to eliminate by enacting section 628(c)(2)(D). As previously stated, consolidation and clustering have increased the power of the cable hegemony; the threat of abuse of market power is as real today as it was in 1992.

D. Claim – The antitrust laws are designed to prevent any abuse of market power

FACT-- Antitrust laws are an after-the-fact remedy. Potential competitors will perish and the anti-trust laws will not be able to revive them.

It cannot plausibly be argued that the antitrust laws, which provide competitors with an after-the-fact remedy for anti-competitive conduct, can supplement sound up-front policies designed to afford competitors with some semblance of a level playing field. In this context, a competitor's cause of action would be a "refusal to deal," which is perhaps the most unsettled body of antitrust law. Moreover, any type of antitrust litigation is always protracted and expensive. New entrants already faced with immense hurdles would find survival difficult. Northpoint has already spent seven years and millions of dollars in its attempt to gain regulatory approval. Protracted antitrust litigation would be yet another unnecessary and costly hurdle that would impede and delay Northpoint in providing consumers an alternative to cable and satellite. Ultimately, American consumers would suffer the full brunt of the demise or death of competitors by having fewer choices and higher prices.

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[32] Qwest and WideOpen Access allege that under the existing rules, vertically integrated cable operators already discriminate against them. Qwest Comments, at 3. If discrimination exists in the face of the ban, then why should one believe that without the restriction nondiscriminatory behavior would ensue?

If section 628(c)(2)(D) is not extended, the robust competition that Congress envisioned will not occur. New entrants will disappear from the landscape leaving only the cable hegemony and the DBS monopoly (or duopoly, if the merger is not consummated). After-the-fact remedies afforded by the anti-trust laws will not be able to resurrect the dead.

III. CONCLUSION

The incumbent cable operators' arguments, one by one, must fall. The market is not competitive; there is no proof that the ban is a disincentive to investment; diversity and innovation have not been stifled; the rule has already been held to be sufficiently narrowly tailored to pass First and Fifth Amendment scrutiny; and antitrust laws are inadequate, after-the-fact remedies.

The facts show that due to the ban on exclusive contracts new entrants have appeared and are beginning to offer competition to cable, but a robustly competitive market envisioned by Congress has not yet developed. Eighty percent of video subscribers nationwide still subscribe to cable. Ninety-nine percent of Americans only have one choice for video service and that choice is cable.[33] A competitive MVPD market is achievable but only if new entrants are able to obtain critical programming. Just as DBS growth is attributable to section 628(c)(2)(D) and SHIVA, new entrants like Northpoint will require the same access to marquee programming.

If the Commission allows the rule to sunset, the harmful consequences to competitors and consumers will far outweigh any conceivable harms resulting from the continuation of the rule. If the rule sunsets and, as predicted, new entrants fail because of their inability to obtain critical programming, American consumers will not realize the benefits of competition and diversity. At best some consumers will have a cable-satellite duopoly, and a few niche players might survive.

[33] *Seventh Annual Report*, at ¶138.

Were the Commission to extend the rule, the risks to the incumbent cable companies are virtually nonexistent while the rewards achieved through true competition, such as increased diversity and lower prices for the American consumer, are great. As the incumbent cable companies have argued, diversity and innovation have flourished under the existing ban. New entrants have entered the market and are beginning to offer competitive alternatives, but this is just the beginning phase of the development of competition. The continuation of the rule is necessary for a fully robust competitive market to evolve.

In sum, section 628 has laid the foundation for competition which has allowed new entrants to compete in the MVPD market. Continuance of the prohibition on exclusive contracts is necessary if robust competition officering consumers more choices and lower prices is to occur. Most importantly, the facts discussed herein unequivocally demonstrate that, today even more than in 1992, section 628(c)(2)(D) is necessary in order to allow diversity in programming.

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