

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

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

REPLY COMMENTS OF PANAMSAT CORPORATION

PanAmSat Corporation (“PanAmSat”), by its attorneys, hereby submits reply comments in the above-referenced proceeding.¹

INTRODUCTION

PanAmSat owns and operates a global satellite system. In the United States, PanAmSat satellites are used, among other things, to deliver video programming to cable operators and other multichannel video programming distributors (“MVPDs”).

Section 628(c)(2)(D) of the Communications Act, as amended, generally prohibits exclusive contracts for cable programming between vertically integrated programming vendors and cable companies. Section 628(c)(5), however, provides that this prohibition will sunset on October 5, 2002, unless the Commission determines that Section

¹ Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, *Notice of Proposed Rulemaking*, CS No. 01-290 (rel. Oct. 18, 2001). Because of last-minute issues, PanAmSat was unable to file by the January 7, 2001, deadline, and respectfully requests leave to file these reply comments two days late.

628(c)(2)(D) “continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.” In this proceeding, the Commission has asked whether the requirements of Section 628(c)(2)(D) should be permitted to sunset.

PanAmSat takes no position on the sunset issue. If the requirements of Section 628(c)(2)(D) are extended, however, PanAmSat urges that the Commission eliminate the regulatory anomaly that allows vertically integrated multiple cable system operators (“MSOs”) to avoid the requirements of the law by shifting from satellite delivery to terrestrial delivery of their programming. The terrestrial loophole gives these vertically integrated companies an artificial incentive to forego satellite delivery of programming, even when satellite delivery is more efficient.²

I. The Terrestrial Loophole Distorts The Marketplace.

MSOs are expanding their use of terrestrial delivery. Already, fiber based networks deliver local cable programming in New York City, Chicago, Philadelphia, Boston, Indianapolis, Minneapolis, Orlando, Columbus, Kansas City, and southern

² Various parties to this and other proceedings have opposed the terrestrial loophole in Section 628(c)(2)(D), focusing principally on the loophole’s impact on competition in the MVPD market. See Comments of the American Public Power Association, CS No. 01-290, at 6 (filed Dec. 3, 2001); Joint Comments of Altrio Communications, Inc., BellSouth Entertainment, LLC, Independent Multi-Family Communications Council, Qwest Broadband Services, Inc, Wireless Communications Association International, Inc., CS No. 01-290, at 13 (filed Dec. 3, 2001); Comments of Broadband Service Providers Association, CS No. 01-290, at 11-19 (filed Dec. 3, 2001); Comments of Carolina Broadband, Inc., CS No. 01-290, at 3 (filed Dec. 3, 2001); Comments of Competitive Broadband Coalition, CS No. 01-290, at 10 (filed Dec. 3, 2001); Comments of Echostar Satellite Corporation, CS No. 01-290, at 18-19 (filed Dec. 3, 2001); Comments of National Rural Telecommunications Cooperative, CS No. 01-290, at 9-10 (filed Dec. 3, 2001); Comments of RCN Telecom Services, Inc., CS No. 01-290, at 29-35 (filed Dec. 3, 2001); Comments of Seren Innovations, Inc., CS No. 01-290, at 17-19; Comments of World Satellite Network, Inc., CS No. 01-290, at 7-8 (filed Dec. 3, 2001); *see also* Comments of DirecTV, CS No. 01-129, at 9-10 (filed Aug. 3, 2001).

New Jersey.³ Moreover, fiber optic cable, both lit and dark, continues to spread across the nation, making terrestrial delivery increasingly available.

PanAmSat's concern arises in those instances where the method of delivery of programming is shifted from satellite to terrestrial, not because terrestrial distribution is more efficient,⁴ but because the shift enables an MSO to avoid the program access provisions of Section 628(c)(2)(D). By creating an artificial incentive to choose terrestrial delivery, the Section 628(c)(2)(D) loophole distorts the marketplace. This practice harms MVPD subscribers, who must pay higher rates to cover the costs of terrestrial distribution even when it is less efficient, and fixed satellite service ("FSS") providers, which are denied the opportunity to compete for program distribution customers on a level playing field.⁵

II. The Commission Has The Authority To Close The Terrestrial Loophole.

The Commission possesses authority, independent of Section 628(c)(2)(D), to close the terrestrial loophole. In fact, the Commission has expressed its willingness to protect against various actions, such as the migration of cable programming to terrestrial delivery, that amount to regulatory bypass.⁶ Moreover, in the *Seventh Annual*

³ See Comments of Wireless Communications Association International, Inc., CC No. 01-129, at 4 (filed Aug. 3, 2001) citing Testimony of Decker Anstrom, President and CEO, National Cable Television Association, before the Senate Antitrust, Business Rights and Competition Subcommittee (Oct. 8, 1997); Umstead, "Ops Eye Low-Cost Local Heroes," *Multichannel News*, at 74 (May 4, 1998).

⁴ Because of their broad footprint and costs that are not distance sensitive, satellites frequently are the more efficient distribution mode for point-to-multipoint services such as the delivery of programming to cable systems.

⁵ As is clear from both the text and from the legislative history of the Cable Act, moreover, Congress did not intend to limit the reach of Section 628 to programming delivered via satellite. Congress referenced satellite delivery in Section 628 not because satellite was the only form of delivery about which it was concerned, but because satellite delivery, at that time, was the sole form of program delivery. Terrestrial delivery of programming, as the Commission has acknowledged, is a recent development. See In the Matter of Annual Assessment of the Status of Competition in Markets For the Delivery of Video Programming, *Fourth Annual Report*, 13 FCC Rcd 1034, 1149 (1998).

⁶ See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in

Report regarding competition in the MVPD industry, the Commission promised that “if a trend developed where vertically integrated programmers began to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission’s rules, it would ‘consider an appropriate response to ensure continued access to programming.’”⁷ If the Commission elects to extend the requirements of Section 628(c)(2)(D) beyond October 2, the time for an “appropriate response” will have arrived.

Video Programming Distribution and Carriage, *Report and Order*, 13 FCC Rcd 15822 at 15856-7 ¶ 71 (1998).

⁷ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Seventh Annual Report*, 16 FCC Rcd 6005, 6082 (2001).

CONCLUSION

Because of changes in technology and practice in the MVPD industry since the passage of the 1992 Cable Act, vertically integrated cable operators can avoid the proscriptions of Section 628(c)(2)(D) by altering their method of delivery of programming. Far from what Congress intended, the migration to terrestrial delivery has distorted the marketplace by allowing these companies to opt for terrestrial delivery, even when such delivery is less efficient. Confronted with this reality, should the Commission decide to extend Section 628(c)(2)(D), it should also eliminate the terrestrial delivery loophole.

Respectfully submitted,

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