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JAN - 7 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 7, 2002

Honorable Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Re: ***CS Docket No. 01-290***
Notice of Proposed Rulemaking

Dear Ms. Salas:

Enclosed please find the original and four (4) copies of **Reply Comments of EchoStar Satellite Corporation** for filing in the above captioned rulemaking proceeding. Attached to the reply comments is an Economic Assessment Report which contains an original verification page.

We also filed a true and correct copy of these same reply comments electronically (via ECFS).

Sincerely,

Alice E. Loughran

Alice E. Loughran

Enclosures

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Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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JAN - 7 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 ECHOSTAR SATELLITE CORPORATION

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January 7, 2002

SUMMARY

EchoStar strongly supports extension of the prohibition on exclusive video programming contracts enacted by Congress in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") beyond October 5, 2002. In its initial comments in this proceeding, EchoStar demonstrated why it is imperative that the Commission retain the exclusivity rule, which is of critical importance to increasing competition to still-dominant cable providers in the multichannel video programming distributor ("MVPD") market. In these Reply Comments, EchoStar responds to the main arguments of the opponents of extending the exclusivity prohibition. Those opponents are virtually all well-entrenched cable operators, many of them vertically integrated with programmers, that stand to reap enormous competitive advantages and increase their market power if the ban is lifted. They have provided the Commission no basis on which to permit this essential rule to sunset.

The opponents portray the MVPD market as a highly competitive one, in which they are being hobbled in their efforts to keep up with Direct Broadcast Satellite ("DBS") and other alternatives to traditional cable by the need to adhere to the program access rules, including the exclusivity ban. The reality, of course, is far otherwise. The continued dominance of cable in the MVPD market is indisputable. With a national market share of almost 80%, and market shares in certain local markets significantly higher than that, the contention that cable companies no longer possess substantial market power in the distribution market is unsustainable. The ability of cable alternatives like DBS to offer comparable programming is essential to their ability to constrain the pricing power of the cable companies, thereby lessening the need for burdensome rate regulation. It is not credible to contend that this market is currently so

competitive that the need for comparability of programming between cable and non-cable MVPDs has disappeared.

The basic conditions that led Congress to impose the exclusivity ban in 1992 have not changed. Cable operators continue to have both the incentive and the ability to "lock up" desirable programming produced by vertically integrated video programmers through exclusive contracts that leave competitors like EchoStar in a severely disadvantaged situation. It is not enough to say that the market for video programming is competitive, and non-cable MVPDs can simply look elsewhere for comparable programming. From the consumers' point of view, the ability to offer the "full slate" of expected cable programming is all-important, and an MVPD that could not do so (that could not, for example, offer HBO, CNN or some not-yet-launched network that is vertically integrated with a cable operator) may find itself unable to compete at any price with the incumbent cable operator. Nor, contrary to the ban's opponents, will extending the current exclusivity rule reduce the incentives for new and more diverse programming. The substantial growth in new programming services during the period the ban has been in effect confirms that this concern is wildly overblown. Moreover, to the extent there may be instances in which exclusivity is necessary to development of a new and untested programming service, the waiver provision within the existing rule is more than adequate to address such situations.

The recent agreement between EchoStar and Vivendi, a programmer that does not own any cable systems, demonstrates that exclusivity is not essential to the creation of new programming. Vivendi has agreed, among other things, to develop five new cable programming channels, and EchoStar has agreed to distribute them. Far from being premised on exclusivity, this arrangement is structured to encourage the opposite—carriage on as many distributors as possible. This structure confirms that one of the primary objectives of any firm not possessing market power in the downstream distribution market is the broadest possible dissemination among alternative distribution platforms.

In any event, the exclusivity rule has plainly contributed to the growth of programming diversity by facilitating DBS competition and thereby fueling a substantial increase in channel capacity. Because of the DBS competition made possible by the exclusivity ban, cable firms have been pressured to invest in additional channel capacity, which has encouraged new programming services. In addition, DBS firms have played an important role as launch platforms for independent programmers.

For cable-affiliated programmers, the desire for broad distribution of the programming is offset by the expectation of additional downstream revenues from the end consumer if the cable system affiliate can distribute the programming to the consumer on an exclusive basis. Of course, for exclusivity to pay in this situation, the distributor generally needs to have market power downstream, which it can protect and further leverage by excluding competitors from that programming.[1] This appears to explain the ardent interest of the cable industry in obtaining the ability to enter into exclusive carriage agreements. This is not to say that a vertically integrated programmer's legitimate incentives will not sometimes militate towards exclusivity, as they do sometimes in the case of unaffiliated programmers. The Commission, however, can always permit an exclusive deal involving cable-affiliated programming under the current rules when it is truly pro-competitive. On the other hand, a

[1] While a dominant cable system can distort the incentives of an independent programmer too by paying an exclusivity premium, it is easier to effectuate this anti-competitive incentive when the programmer is vertically integrated with one or more cable MSOs and the benefits from foreclosure are, at least in part, already internalized.

blanket blessing of all such exclusives does not make sense in light of the anti-competitive incentives that are part of the calculus for a cable-affiliated programmer.

Not only is the anti-competitive incentive of foreclosure present in the calculations of cable-affiliated programmers, but foreclosure has also been shown to be effective. Comcast's Philadelphia sports exclusives appear to have paid off: the pace of EchoStar customer acquisitions in Philadelphia has been significantly slower than in other cities where EchoStar carries the regional sports programming. Past experience, therefore, shows both that cable-affiliated programmers will act on their anti-competitive incentives if left unrestrained, and that this conduct has been profitable to them in the past, encouraging them to act in the same manner in the future.

While necessary, continuation of the ban on exclusive deals is far from enough to avoid anti-competitive behavior with respect to cable programming. Vertical integration aside, cable operators retain enormous buying power in the programming market, and have clear incentives to use this power in concert to extract preferential terms from independent programmers. The recently announced proposal to merge the cable systems of AT&T and Comcast may magnify exponentially the risks of such anti-competitive conduct. EchoStar recognizes that Congress has given the Commission limited authority to tackle this problem. EchoStar hopes that its proposed merger with Hughes will, if approved, curtail the problem. As EchoStar has explained in the merger application, that transaction will create a non-cable distributor that can offer programmers a significant enough subscriber base to limit the significant disparity in programming carriage terms that EchoStar now suffers compared to the large cable MSOs.[2]

[2] The opponents' attempts to manufacture a constitutional issue here are unavailing. The D.C. Circuit has already upheld the existing exclusivity rule against a First Amendment challenge, *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), and there is no reason to believe the outcome would change merely because the Commission extends the existing rule beyond October 5, 2002. Moreover, the Commission has been specifically directed by Congress that the rule should be extended if the agency finds that the "prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C § 548(c)(5). The Commission should therefore follow its usual practice of deferring constitutional issues to the courts, concentrating instead on making the judgment Congress has directed it to make. As shown below, that judgment can only be that the prohibition continues to be necessary, and that it therefore should be extended.

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REPLY COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its Reply Comments in response to the initial comments filed by various parties with respect to the Commission's Notice of Proposed Rulemaking ("NPRM") in this proceeding. The focus of the NPRM is on the question whether the prohibition on exclusive video programming contracts enacted by Congress in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") should be continued beyond October 5, 2002. In its initial comments, EchoStar demonstrated why it is imperative that the Commission retain the exclusivity rule, which is of critical importance to preserving the increasing competition in the multichannel video programming distributor ("MVPD") market. In these Reply Comments, EchoStar responds to the main arguments of the opponents of extending the exclusivity prohibition. Those opponents are virtually all well-entrenched cable operators, many of them vertically integrated with programmers, that stand to reap enormous competitive advantages and increase their market share if the ban is lifted. They have provided the Commission no basis on which to permit this essential rule to sunset.[3]

The opponents portray the MVPD market as a highly competitive one, in which they are being hobbled in their efforts to keep up with Direct Broadcast Satellite ("DBS") and other alternatives to traditional cable by the need to adhere to the program access rules, including the exclusivity ban. The reality, of course, is far otherwise. The continued dominance of cable in the MVPD market is indisputable. With a national market share of almost 80%, and market shares in certain local markets significantly higher than that, the contention that cable companies no longer possess substantial market power in the distribution market is unsustainable. The ability of cable alternatives like DBS to offer comparable programming is essential to their ability to constrain the pricing power of the cable companies, thereby lessening the need for burdensome rate regulation. It is not credible to contend that this market is currently so competitive that the need for comparability of programming between cable and non-cable MVPDs has disappeared.[4]

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[3] The principal opponents of extending the exclusivity ban are the large multiple system operators ("MSOs") that have the most to gain from tilting the competitive playing field further in their direction, including AT&T Corp. ("AT&T"), Comcast Corporation ("Comcast"), AOL Time Warner Inc. ("AOL Time Warner"), and Cablevision Systems Corp. ("Cablevision"). Extension of the ban is also opposed by the cable industry's principal trade association, the National Cable & Telecommunications Association ("NCTA") and by iN DEMAND L.L.C., a pay-per-view provider that is partially owned by AT&T Broadband. These entities are referred to collectively herein as "the opponents."

[4] Because of their concern over the inaccurate portrayal of the MVPD market in the comments of certain of the opponents, EchoStar and DIRECTV jointly retained three economic experts (Jonathan M. Orszag, Peter R. Orszag, and John M. Gale) to prepare an analysis of the current state of the market and the continued need for the exclusivity ban. A copy of their report, which is entitled "An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers," is attached hereto as Exhibit 1. The report is cited hereafter as "Economic Assessment, Ex. 1 at __." The authors of the report conclude that, because "[c]able systems continue to hold an overwhelming share of MVPD

(Continued ...)

DISCUSSION

I. Contrary to the Opponents of Extending the Exclusivity Rules, There Is Neither a Presumption in Favor of Sunset, Nor a "Burden of Proof" on Those Advocating Extension of the Rule

The opponents advance two procedural arguments at the outset that are apparently designed to deflect attention away from the weakness of their position on the merits. First, they contend that the statutory language in Section 628(c)(5) creates a "strong presumption" that the exclusivity ban will sunset on October 5, 2002, which can only be overcome by some extraordinary showing of competitive harm.[5] Second, they argue that the "burden of proof" to overcome this presumption rests on the proponents of extending the rule, including, in one version of the argument, both the "burden of production" and the "burden of persuasion."[6] Both of these arguments misconceive the mission Congress has assigned to the Commission and the nature of this proceeding.

The statutory language that governs this issue is simple and straightforward. Section 628(c)(5) provides as follows:

> The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be

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subscribers," they would, in the absence of the exclusivity ban, "still have the incentive and ability to harm consumers by foreclosing access to vertically integrated programming to competing MVPD providers." Economic Assessment, Ex. 1 at 31.

[5] *See, e.g.*, AT&T Comments at 3-5; NCTA Comments at 2-4.

[6] *See, e.g.*, AT&T Comments at 6 ("sunset language of Section 628(c)(5) must . . . be interpreted to impose a presumption in favor of expiration, and to shift the burden of proof – both production and persuasion – onto its opponents"); Comcast Comments at 3; AOL Time Warner Comments at 3.

> necessary to preserve and protect competition and diversity in the distribution of video programming.

47 U.S.C. § 548(c)(5); *see also* 47 C.F.R. § 76.1002(c)(6). In effect, Congress has directed the Commission to conduct a proceeding during the period October 5, 2001 through October 4, 2002 to determine whether, in the Commission's view, the exclusivity ban "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." *Id.* If the Commission determines that the ban continues to be necessary, the ban will remain in effect after October 5, 2002. If the Commission determines that the ban is no longer necessary, it will cease to be effective on that date. Although sunset of the ban is the default option under this statutory scheme, there is nothing explicit (or even implicit) in the statutory language to suggest that Congress intended to create a presumption on the sole question entrusted to the Commission, which is whether the ban continues to be necessary, *given the circumstances that now exist.*[7]

The assertion that the proponents of extending the ban bear some sort of "burden of proof" in this proceeding has even less merit. Concepts like the "burden of production" and the "burden of persuasion" are appropriate in an adjudicatory context, where the Commission is deciding issues for a particular party or parties, and where the factual issues frequently involve

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[7] The cases cited by the opponents where particular statutory provisions have been interpreted as creating a presumption are inapposite. Those cases typically involve particularized adjudications. *See, e.g.,* AT&T Comments at 6 n.14 (citing *Panhandle Producers v. Economic Regulatory Agency*, 822 F.2d 1105 (D.C. Cir. 1987) and *Cia Mexicana de Gas, S.A. v. FPC*, 167 F.2d 804 (5th Cir. 1948)). In such an adjudicatory context, creating a presumption in favor of a specified result and placing the burden on the party seeking to avoid that result makes sense. Here, however, the Commission is not being asked to resolve a particularized issue for an individual claimant. Rather, the question is what rule should apply to an entire industry. In that circumstance, the Commission should not create any presumption one way or the other, but should simply decide the issue before it—the continued necessity for the exclusivity ban—in an unbiased way and on the basis of the best evidence and policy judgments available to it.

concrete historical facts. Such notions have no place, however, in a rulemaking proceeding such as this one.[8] Certainly, it behooves all parties to come forward with the best information available to them, so that the Commission can make a fully informed decision. However, it is ultimately the Commission's job to make the judgment that Congress has assigned to it as to whether the exclusivity ban continues to be necessary. Moreover, that judgment must be made not just on the basis of "evidence" in the narrow sense of findings about historical facts, but also on the basis of predictive judgments (*i.e.*, judgments about "legislative facts") of the very type that expert agencies were created to make.[9] To constrain a rulemaking proceeding such as this with inapposite evidentiary rules designed for an adjudicatory context would be inconsistent with the Commission's statutory role, as well as setting a bad precedent for future industry-wide rulemaking proceedings.

Thus, the Commission should approach its task in this proceeding in a straightforward manner, with no thumb on the scale. The mission is simply to make a finding, one way or the other, whether the exclusivity rule continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. If the Commission finds, on the basis of its expert judgment and the evidence available to it, that the exclusivity rule

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[8] As one court has aptly stated: "The opportunity to present and cross-examine witnesses, *a clear allocation of the burden of proof,* and a clear standard against which past conduct is being measured, all of which enhance the adjudication process involving issues of fact are normally either not present or materially different in non-adjudicatory agency proceedings." *International Tel. & Tel. Corp. v. American Tel. & Tel. Co.*, 444 F. Supp. 1148, 1156 (S.D.N.Y. 1978) (emphasis added).

[9] *See, e.g., Cellnet Communications v. FCC*, 149 F.3d 429, 441-42 (6th Cir. 1998) (predictive judgments by agencies entitled to "particularly deferential review"); *accord Melcher v. FCC*, 134 F.3d 1143, 1151 (D.C. Cir. 1998).

is necessary in the MVPD market, the rule should continue in effect, just as Congress intended.[10] As set forth below, EchoStar is confident that, if the Commission considers the relevant facts and circumstances in a fair-minded way, it can reach only one conclusion—that the exclusivity ban *is* necessary to preserve and protect competition and diversity, and indeed that developing competitive challenges to cable would be stopped in their tracks if the exclusivity rule were allowed to sunset.

II. On the Merits, the Ban on Exclusive Contracts Continues to Be Necessary To Preserve and Protect Competition and Diversity

A. Cable Continues to be the Dominant Player in the MVPD Market

A central theme of the opponents is that the ban on exclusive contracts is no longer necessary because the MVPD market has become highly competitive and the conditions of cable market dominance that originally motivated the prohibition have dissipated.[11] The record could not be clearer, however, that the MVPD marketplace continues to be dominated by large, vertically integrated cable operators with both the ability and the incentive to use their control over programming to protect their market power and disadvantage competitive

[10] The fact that some in Congress viewed the exclusivity ban as a "transitional" rule, *see* NCTA Comments at 3-4, is not inconsistent with Congressional intent that the ban should continue beyond the initial 10-year term if the Commission makes the required finding. Indeed, if Congress had intended the ban to sunset after 10 years without regard to conditions in the marketplace, it could have said so explicitly. Instead, it provided for a review in the final year of the 10-year period so that the Commission could assess the current status of the competitive marketplace as it now exists to determine whether the original rule had outlived its usefulness.

[11] *See, e.g.*, AT&T Comments at 16-19; Comcast Comments at 4-7; Cablevision Comments at 20-28; AOL Time Warner Comments at 7-10; NCTA Comments at 4-11.

challengers. Indeed, although competition has grown in the past few years, cable continues to have substantial market power in the MVPD market by any traditional antitrust standard.[12]

In fact, the Commission reached precisely that conclusion in its most recent annual report on the state of competition in the MVPD marketplace: "Cable television still is the dominant technology for the delivery of video programming to consumers in the MVPD marketplace, although its market share is declining."[13] Even the modest decline in cable market share must be put in perspective. The market share of the cable industry nationwide is still in excess of 77%,[14] and is higher still in many individual markets.[15] Moreover, although non-cable alternatives, including DBS, are growing (and in some cases growing rapidly), they have not yet succeeded in constraining the market dominance of the incumbent cable operators.[16] In fact, as more and more cable systems introduce digital cable, thereby expanding both the number of channels offered and the capability to provide bundled broadband service, the ability of DBS to

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[12] *See* Economic Assessment, Ex. 1 at 15-20.

[13] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005 (rel. Jan. 8, 2001) (hereafter "Seventh Annual Report") at ¶ 5.

[14] *See* Comments of NCTA in response to 2001 Notice of Inquiry, at 7 (dated Aug. 2, 2001).

[15] Under traditional antitrust standards, a market share in excess of 50% raises concerns about monopoly power, and a market share over 70% is often equated with monopoly power. *See Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 129 (2d Cir. 1981) (firm with market "share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power"); *accord Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999).

[16] Economic Assessment, Ex. 1 at 15.

constrain the market power of cable is likely to be further reduced unless DBS can recover the lost ground.[17]

The continued ability of cable operators to raise prices at a rate exceeding general inflation is strong evidence that they are still able to exert substantial market power despite the existence of various non-cable alternatives.[18] Indeed, just last month, Adelphia Communications Corp. announced rate increases for many of its cable television subscribers in Palm Beach and Miami-Dade County, Florida that will take the rate for expanded service (which some 98 percent of Adelphia's South Florida customers reportedly elect) from $36.35 per month to $41.35 per month, an increase of almost 14%.[19] The ban on exclusivity, by ensuring comparability of program offerings as a prerequisite for effective competition, is necessary to promote greater direct price competition and thereby avoid the need for burdensome cable rate regulation at the retail level. This effect is consistent with congressional and Commission policies favoring competition over regulation to the extent possible.[20]

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[17] Economic Assessment, Exh. 1 at 16.

[18] *See State of Competition in the Video Marketplace: Hearing on Cable and Video: Competitive Choices, Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Business Rights and Competition*, 107th Cong. (Apr. 4, 2001) (prepared testimony of the Cable Services Bureau, FCC) (citing the Commission's 2000 Annual Report on Cable Industry Prices, 16 FCC Rcd. 4346 (2001)).

[19] *See* Joseph Mann, "Adelphia to boost cable TV rates in Palm Beach, Miami-Dade," *South Florida Sun-Sentinel*, December 20, 2001.

[20] *See Implementation of Sections 12 and 19 of the Cable Television Consumer and Protection Act of 1992, First Report and Order,* 8 FCC Rcd. 3359, 3369 (rel. Apr. 30, 1993) ("Our regulations regarding program access are designed . . . in a manner that is faithful to the policy of Congress to . . . rely on the marketplace, to the maximum extent feasible ...."); *see also FCC Commissioner Michael Powell Advises Investment Analysts to Look for Evidence of Regulators Promoting Innovation and Competition*, FCC News Release (Mar. 13, 1998),

(Continued ...)

As further evidence of cable's dominance in the MVPD market, the recently announced agreement between EchoStar and Vivendi-Universal ("Vivendi") illustrates that MVPDs without market power do not have the same ability or incentive to enter exclusive distribution agreements with programmers. Specifically, in exchange for its investment in EchoStar, Vivendi will receive, among other things, the ability to place five new channels on EchoStar's system.[21] In contrast to cable operators' exclusive sports programming arrangements, however, the EchoStar/Vivendi agreement is *non-exclusive* and expressly requires Vivendi to gain an equal amount of carriage for the new networks on third-party platforms within three years. As one investment analyst observed, the agreement represents an attempt by EchoStar to better compete against cable.[22]

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available in 1998 WL 110174 (announcing a "new regulatory thinking" that favors free market competition in communications).

[21] Under the agreement, Vivendi will make a $1.5 billion investment in EchoStar and will receive a minority equity stake and a board seat. Vivendi's economic interest in ECC is expected to amount to less than 10% on a fully diluted basis, based on the number of shares outstanding on December 14, 2001, and the voting stake will be smaller still at about 2%, before the merger with Hughes is consummated. Upon EchoStar's proposed merger with Hughes Electronics, these percentages will further decrease to less than 5% equity interest and about 1% voting interest in the new EchoStar Communications Corporation. As part of the transaction, ECC has also agreed to carry five new Vivendi channels and to make available the equivalent of about eight video channels on its system for new interactive services, such as interactive games, movies, sports, education and music services; to deploy non-exclusively certain "middleware" technology on some set-top boxes; to facilitate interactive services; and to carry Vivendi films and music on a pay-per-view basis. *See Letter pursuant to 47 C.F.R. § 1.65 notifying the Commission of the Definitive Agreement with Vivendi Universal S.A. Filed by Echostar, General Motors Corporation and Hughes Electronics Corporation* (Dec. 18, 2001), *available at* http://www.fcc.gov/transaction/echostar-directv/echostar_ltr121801.pdf.

[22] COMMUNICATIONS DAILY, Vol. 21, No. 242 (December 17, 2001) at 3 (quoting an unnamed analyst as saying, "Charlie [Ergen] is showing people he is serious about becoming a strong competitor to cable. This deal moves him closer to his goal.").

Under the logic espoused by the cable industry in this proceeding, it presumably would have been in EchoStar's and Vivendi's economic interests to pursue an exclusive arrangement. Not so. First, unlike cable, EchoStar does not have the economic power to attain such programming exclusivity. In a national market dominated by cable's nearly 80% market share, a programmer would have trouble surviving on EchoStar, or for that matter DBS, alone. Even if EchoStar is permitted to merge with Hughes Electronics, the combined entity would have trouble sustaining by itself a new network on a subscriber base of approximately 15 million. Moreover, a programmer that enters a DBS-exclusive carriage agreement may find itself subject to the cable industry's collective retribution when it seeks cable carriage for its other properties.

Second, in the absence of MVPD market dominance, non-exclusivity generally presents programming entities such as Viviendi with a greater return on investment. Vivendi's new networks will be stronger economically when distributed as widely as possible, instead of on just a DBS platform. Exclusivity would have posed a cost to Vivendi and, since Vivendi is not a vertically integrated MVPD, it would have had no countervailing economic benefit in the form of better subscriber acquisition. A cable operator, by contrast, is more likely to assume the cost of diminished distribution in exchange for undermining competing MVPDs.[23]

In short, as the attached Economic Assessment concludes, "Despite claims that the structure of the MVPD market has changed enough to make foreclosure unprofitable, cable firms are still dominant in the market and the fundamental motivation for the prohibition therefore has not significantly changed."[24]

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[23] *See* Economic Assessment, Ex. 1 at 24 n.58.

[24] Economic Assessment, Ex. 1 at 17 (footnote omitted).

B. The Market Power of Major MSOs and Their Vertical Integration With Video Programmers Create a Situation Rife With the Threat of Anti-Competitive Conduct

A number of the opponents argue that the Commission should terminate the ban on exclusive contracts because such contracts are economically efficient and, in effect, should never have been prohibited in the first place.[25] The theory is that video programmers would have economic incentives to offer exclusivity to certain downstream distributors even in a perfectly competitive market, because the competitive advantage to the downstream distributor from offering the program on an exclusive basis is sufficient to permit that distributor to compensate the programmer for giving up the right to reach additional consumers through other distribution channels.[26] The opponents go on to give numerous examples of circumstances in which exclusive arrangements exist in competitive markets, suggesting that these contracts must be equally benign in the MVPD market context.[27]

This contention is simply wrong, and misconceives the basis on which Congress enacted the exclusivity ban in the first instance. No one contests that exclusive contracts can, in appropriate circumstances, be economically beneficial. The issue here is whether the particular market circumstances that led Congress to conclude that these arrangements had an unduly negative effect on competition in the MVPD market have changed significantly since 1992. The

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[25] *See, e.g.,* AT&T Comments at 6-13; Comcast Comments at 9-13; AOL Time Warner Comments at 14-18; Cablevision Comments at 5-10.

[26] *See, e.g.,* "Competition for Video Programming: Economic Effects of Exclusive Distribution Contracts," Economists Incorporated, Dec. 3, 2001, attached to Cablevision Comments (hereafter cited as "Economists Inc. Report").

[27] *See, e.g.,* Cablevision Comments at 6-7; AT&T Comments at 8-10.

answer clearly is no. Cable operators still have much the same degree of market power in the distribution market, and virtually the same degree of influence in the video programming market, that they had when the ban was first imposed.[28] Indeed, in some respects, the power of the largest cable companies has been substantially enhanced because, through consolidation and clustering, a handful of MSOs now control a very high percentage of cable systems nationwide.[29]

As a result of their dominant market position, cable operators can leverage their influence over video programmers to "lock up" popular or desirable programming to the detriment of consumer welfare. According to the Economic Assessment attached hereto:

> Some commentators have indicated that cable firms will have no incentive to use exclusive contracts to foreclose competition. Such a perspective, however, is inconsistent with current economic

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[28] As noted in the attached Economic Assessment, although the opponents argue that the percentage of vertically integrated programming services has declined, it is important to note that much of the most popular cable programming continues to be vertically integrated. *See* Economic Assessment, Ex. 1 at 18.

> For example, according to the FCC, four of the top six for-profit video programming networks ranked by subscribership are vertically integrated with a cable provider. In addition, three out of the top five video programming networks ranked by prime-time ratings are vertically integrated with cable firms. These top channels (e.g., TBS, USA, TNT) are critically important to DBS firms in offering a viable alternative to cable providers.

Id. (footnotes omitted).

[29] Economic Assessment, Ex. 1 at 19-20. As noted in the attached Economic Assessment, in 1995, the top ten cable systems accounted for less than 60 percent of all cable subscribers nationwide. Today, the top ten cable operators serve almost 90 percent of U.S. cable subscribers, and the degree of cable concentration will increase further if the pending merger of the cable operations of AT&T and Comcast is approved and implemented. *Id.* at 20. This concentration is important because "the larger the size of the integrated cable firm's potential subscriber base, the larger the potential benefit from foreclosing access to programming." *Id.* at 19.

> theory. It is also belied by two facts: first, when allowed to do so, cable systems have demonstrated a willingness to engage in foreclosure (e.g., Comcast's SportsNet in Philadelphia); and second, the strength of the cable industry's effort to lift the prohibition raises questions about the motivation for that effort.[30]

The effect of such foreclosure is clear: "If a cable firm is able to lock in subscribers, the firm increases its power to raise prices. Such pricing power can thus be used to adversely affect consumers in the future."[31]

An excellent real world example of this use of exclusive contracts to disadvantage rivals and harm consumers is provided by the actions of Comcast with respect to local sports programming in Philadelphia. As described in the Economic Assessment (Ex. 1), Comcast has exploited an arguable loophole in the exclusivity ban (*i.e.*, the Commission's failure to apply it to cable programming delivered by terrestrial means) to "lock up" the rights to show key local and regional sports programming broadcast by its SportsNet affiliate.[32] The effect on the market has been dramatic: "While many factors can influence the DBS penetration rate in a particular market, the lack of regional sports programming appears to have reduced DBS subscribership in Philadelphia."[33] For example, "the DBS penetration rate in Philadelphia is by far the lowest of the top 20 cities in the United States," with Philadelphia at just 3.9 percent, compared with an average of 9.3 percent among the top 20 cities.[34] Indeed, one local Philadelphia broadcast station

[30] Economic Assessment, Ex. 1 at 5.

[31] Economic Assessment, Ex. 1 at 23 n.54. While vertical integration facilitates this type of anti-competitive conduct, it is also possible for programming to be "locked up" even in the absence of vertical integration.

[32] Economic Assessment, Ex. 1 at 22.

[33] Economic Assessment, Ex. 1 at 22.

[34] *Id.* at 23 (citing Forrester Research, Inc., Technographics Benchmark Survey, 2001).

recently contended that Comcast uses its local sports programming to hamper competition by refusing to make SportsNet available to satellite-TV providers. The Philadelphia Inquirer quoted the president and general manager of WPVI in Philadelphia as saying SportsNet "is a key part of their [Comcast's] strategy to monopolize this market."[35] The Philadelphia experience is thus a good barometer both of the incentives for dominant cable operators to use exclusive contracts to foreclose competition, and also the detrimental effects of such activities.

In response, the opponents make two somewhat contradictory arguments. On the one hand, some of the opponents contend that, in the absence of the ban, they can (and presumably will) lock up desirable programming through exclusive contracts, but that this is a good thing because it will spur competitors to create their own alternative programming in the quest for economic survival.[36] Other opponents contend that permitting the ban to expire will have only a small effect on competition because cable operators have little incentive to seek exclusivity, and will therefore rarely foreclose programming from competing MVPDs.[37]

Obviously, these arguments cannot both be correct. More importantly, in the current context, neither is applicable. With respect to the argument that exclusive contracts are

[35] Economic Assessment, Ex. 1 at 22 n.54 (citing Patricia Horn, "As Competition Lags for Cable TV, Prices Tend to Rise," *Philadelphia Inquirer*, June 3, 2001, p. E01). The same article quoted a DIRECTV spokesman as saying with respect to Philadelphia: "We clearly don't have the same kind of success in getting customers in that area as we have in other similar markets, due to this issue with Comcast. These SportsNets are like local channels. They are part of a local package that is essential for us to be fully competitive with cable." *Id.* at 23 n.56

[36] *E.g.,* Cablevision Comments at 15-18; Comcast Comments at 9-11.

[37] *E.g.*, AT&T Comments at 23-24; AOL Time Warner Comments at 10 ("Even without an exclusivity restriction, there are powerful economic incentives for AOLTW to provide its popular cable networks to the widest possible audience.").

beneficial and should be encouraged, the attached Economic Assessment explains in detail why, in the context of the MVPD market, this argument is wrong. Most significantly, "[m]aintaining the prohibition on exclusive contracts for video programming among vertically integrated cable firms attenuates the potential for anti-competitive behavior."[38] Thus, the need for the ban on exclusivity remains as strong today as it has ever been.

The second contention—that cable operators have little incentive or ability to use exclusive contracts to foreclose competition—is equally incorrect. First, if this contention were true, it is not apparent why the cable industry would be spending valuable time and resources arguing for the termination of the exclusivity ban. Second, the argument is based on an inapplicable economic model that assumes a fully competitive market, rather than the real world MVPD market that is plainly dominated by cable. Certainly, in a fully competitive market, video programmers and MVPDs alike would have little incentive to enter into exclusive arrangements, because the economics of the industry drive the programmer to seek the widest possible audience whenever possible. In fact, that is precisely the prevailing practice of non-affiliated programmers: exclusive deals involving programmers that are not affiliated with cable systems are the exception rather than the rule, raising at least some suspicion about the motives of those commenters who are so ardently interested in the ability to reach exclusive deals.[39] As discussed above, non-exclusivity (and indeed an incentive for broad distribution) is also the dynamic operating in the recently announced EchoStar-Vivendi arrangement.

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[38] Economic Assessment, Ex. 1 at 25.

[39] *See* Economic Assessment, Ex. 1 at 23 & n.58.

However, the MVPD market is anything but a fully competitive arena. Opportunities for abuse of market power abound, owing to the dominant position occupied by the cable operators. Contrary to the economic report attached to the Cablevision Comments,[40] the incentives of cable operators to enter into competitively harmful exclusive contracts are significantly different from those that would exist in a fully competitive world.[41] Moreover, it is no defense to argue that the downstream cable operators already have market power and could exercise it in the absence of exclusivity. There can be no doubt that the ability to withhold desirable programming from alternative MVPDs is a powerful tool that both facilitates and enhances the exercise of the market power cable operators already possess.[42]

As a result, continuing the ban on exclusive contracts in this specific circumstance (*i.e.*, video programmers aligned in interest with market dominant cable operators) makes sense, notwithstanding that exclusive contracts are permitted, and even encouraged, in some other contexts. Cablevision, for example, cites to the example of the exclusivity rights granted to local broadcasters against duplicate programming imported via distant signals.[43] Putting to one side the question whether exclusivity is economically justified in that context,[44] the situations are so

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[40] *See* Economists Inc. Report, *supra* note 26.

[41] Economic Assessment, Ex. 1 at 11.

[42] *See* Economic Assessment, Ex. 1 at 15.

[43] Cablevision Comments at 10, citing *In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Report and Order*, 3 FCC Rcd. 5299 (1988) (*"Syndicated Exclusivity Order"*).

[44] History suggests that the protection of exclusivity in that context arose more from a concern with preserving the viability of local broadcasters than because of the economic efficiencies or benefits of exclusivity, per se. *See Syndicated Exclusivity Order*, at ¶ 9:

(Continued ...)

different that the suggested analogy must fail. In the syndicated exclusivity context, the cable operator (and indeed any other MVPD) is still permitted to transmit the programming itself; it is simply prohibited from importing duplicate programming from a distant source. This is a sharp contrast to the cable exclusivity context, where the MSOs are seeking the ability to deny competing MVPDs *any* access to certain programming, not just access from a duplicate source. The effect of such exclusivity, if permitted, would be to deny the viewers of those competing MVPDs the ability to see the affected programming *at all* unless those viewers are coerced into switching to cable for their video distribution service (or elect to pay the cost of two MVPD providers). As discussed in the attached Economic Assessment, "exclusivity for programming on the broadcast networks (e.g., ABC, NBC, and CBS) does not require viewers to adopt the

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> Thus, at this stage of cable's development the Commission was principally concerned that cable's growth not endanger these allocation schemes and the economic viability of local broadcast television. In order to protect these schemes, the Commission concluded that the public interest required more than mediation among those desiring to provide service to the public. Rather, it required, in the Commission's view, exercising a firm administrative grip on the development of cable. This outlook led to a regulatory regime the first part of which required carriage of local signals. In the second prong of its policy, the Commission sought to identify those signals a cable system could carry without threatening the continued financial viability of individual local broadcasting stations within the system's service area. The Commission had concluded that cable systems' importation of distant signals to duplicate such programming was an unfair method of competition. Thus, among the rules adopted at this time were uniform non-duplication rules to protect both network programming and syndicated programming for which local broadcasters had negotiated exclusive exhibition rights. The basic principle applied was that non-duplication benefits were "something to which a station is entitled, without a showing of special need, within its basic market area."

entire bundle of broadcast programming in order to view the exclusive programming."[45] For example, "if NBC has an exclusive right to broadcast the Olympic Games, a viewer would have to watch NBC to see the events. But the viewer does not have to switch to NBC to watch all other 'over-the-air' programming. By contrast, if NBC were carried on cable systems and not on DBS systems, the viewer would have to switch all programming from DBS to cable (or incur the added cost of subscribing to both DBS and cable) in order to view the Olympics."[46]

Similarly, the very limited exclusive arrangements entered into by DIRECTV and EchoStar are in no way comparable to the types of exclusivity sought by the cable MSOs. The opponents of extending the ban are simply wrong in suggesting that DIRECTV's NFL Sunday Ticket is exclusive as against cable or other non-DBS MVPDs.[47] The exclusivity is against any other DBS provider providing the same programming.[48] Because it is neither dominant in the overall distribution market, nor vertically integrated with video programmers,[49] EchoStar lacks

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[45] Economic Assessment, Ex. 1 at 13.

[46] Economic Assessment, Ex. 1 at 14.

[47] *See* iN DEMAND Comments at 11; NCTA Comments at 10; Cablevision Comments at 7-8; AT&T Comments at 9.

[48] *See* Economic Assessment, Ex. 1 at 23 n.58. Notably, if and when the EchoStar-Hughes merger is approved, this exclusivity provision will become moot.

[49] Even after the EchoStar-Vivendi transaction, it is the video programmer (Vivendi) that will own a small (and non-controlling) interest in the MVPD (EchoStar), not the other way around as in the cable context. (Three years after the transaction closes, EchoStar could exercise an option to acquire a 10% stake in the programming networks involved. Unless and until that happens, however, EchoStar holds no equity interest in the networks.) Moreover, to the extent EchoStar's subsidiary Kelly Broadcasting Systems, Inc. ("Kelly") has obtained exclusive distribution rights for certain foreign language networks (*e.g.*, Greek, Russian, Arabic), it did so through arm's length negotiations with foreign programmers, not through acquisition of control over these programmers. Furthermore, those rights mean only that other U.S. distributors must deal with Kelly (as opposed to the foreign content providers) with respect to this programming.

both the incentives and the ability to enter into anti-competitive exclusivity arrangements excluding all cable systems. As the attached Economic Assessment concludes:

> For an independent programmer to be willing to enter into an exclusive contract with an MVPD firm, the MVPD firm must be willing to compensate the programmer for forgoing the revenue from all other MVPD outlets in the region covered by the contract .... Since cable firms account for nearly 80 percent of the MVPD market, it is unlikely that a non-cable MVPD provider would find it profitable to engage in such an exclusive arrangement.[50]

In short, the opponents are making a "wolf in sheep's clothing" argument. They are seeking to analogize themselves to economically benign forms of exclusive distributorship contracts that prevail in other contexts, without recognizing that their dominant position makes those analogies inapt. Again, the question the Commission must answer is whether the exclusivity ban *in this particular market* continues to be necessary because the conditions that led to that ban continue to apply. Showing that exclusivity is not prohibited in other markets with other economic characteristics contributes nothing to that exercise.

C. Reliance by the Opponents on the Existence of Competition in the Upstream Video Programming Market Is Misplaced

Recognizing that the inevitable effect of permitting exclusive contracts between cable operators and vertically integrated video programmers will be to foreclose competing MVPDs (and their viewers) from access to desirable programming, a number of the opponents argue that no harm will arise from this foreclosure because the upstream video programming

[50] Economic Assessment, Ex. 1 at 24 n.58.

market is highly competitive.[51] Under this theory, competitors like EchoStar that are denied access to desirable cable networks like HBO or CNN can simply go to the video programming market and obtain substitute programming that will prevent consumers from migrating to cable to see their favorite programs. Thus, it is asserted, the Commission need not fear any competitive harm arising from permitting the exclusivity ban to sunset.

Like many of the opponents' economic theories, this one may apply in a perfectly competitive market, but it bears little resemblance to the real world of video program distribution. In a perfectly competitive environment, if one distributor "locks up" a particular brand of widget through an exclusive distribution contract, other distributors simply go to alternative suppliers of widgets and are fully able to compete in the ordinary way. Thus, so long as the upstream supply market is competitive, there is no threat to consumer welfare from an exclusive distribution agreement. However, contrary to the implication of the opponents' arguments, video programming is not a fungible good like widgets. It is a highly differentiated product for which, in many cases, there simply are no good substitutes available.

In the case of certain programming networks (*e.g.*, "marquee" networks like HBO or CNN), the inability of a non-cable MVPD to carry those networks may by itself cause consumers to forgo lower prices in favor of switching to cable, notwithstanding that many other less-popular channels are still available. Moreover, even with respect to networks that do not fall in the "must-have" category on their own, the availability of a full range of programming can be sufficiently important to consumers that denial of a number of minor channels would likewise constitute an insuperable obstacle to mounting a successful competitive challenge to cable. In

[51] *See* Cablevision Comments at 30-31, 35-37; AT&T Comments at 19-22.

fact, empirical evidence shows that consumers value most highly the ability to view the greatest number of channels available, which makes almost any significant degree of exclusivity problematic for cable competitors.[52] In fact, as the Philadelphia example demonstrates, even the unavailability of a small portion of the overall programming available (in that case, regional sports telecasts) can have a profound effect on DBS penetration rates.[53]

III. Extending the Exclusivity Ban Will Not Significantly Reduce the Incentives to Create New Or More Diverse Programming, and In Fact Will Preserve and Protect Diversity, as Articulated in the Statute

Another theme of the opponents' comments is that the exclusivity ban allegedly reduces the incentives of cable operators to create or support new or more diverse programming.[54] The apparent theory is that cable operators will not invest in new programming that they hope will be successful in the marketplace unless they can expect to reap the benefits of exclusivity if the programming is successful. Related to this theory is the contention that non-cable MVPDs benefit from a "free rider" effect and therefore lack the incentive to create their own programming.[55] Again, these contentions do not reflect the realities of the video distribution marketplace, and in any event do not undermine the case for extending the current

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[52] *See* Economic Assessment, Ex. 1 at 26 ("recent survey of new DBS subscribers found that the leading reason for switching to DBS was 'more channels'").

[53] Economic Assessment, Ex. 1 at 22-24.

[54] *E.g.*, AT&T Comments at 10-11; Cablevision Comments at 2, 14-15; NCTA Comments at 17.

[55] *E.g.*, AT&T Comments at 8, 12; Comcast Comments at 10; Cablevision Comments at 9, 15.

exclusivity rules. In fact, the exclusivity ban is completely consistent with preserving and protecting program diversity, which is an express goal of the statute.[56]

With respect to the alleged discouragement of new or diverse video programming, it should suffice to point out that, over the ten-year period in which the exclusivity ban has been in effect, the quantity and diversity of video programming available has literally exploded. "Since 1992," the attached Economic Assessment notes, "the number of national programming channels has increased 223 percent, from 87 in 1992 to 281 in 2001."[57] Moreover, the driving factor behind this explosive growth has not been exclusivity (which is generally prohibited under the existing rules for cable-affiliated programmers and exceedingly rare for non-affiliated ones), but the demand by consumers for an ever-increasing range of choices, combined with the technological ability to offer additional channels. The contention that a ban on exclusivity has had any significant negative effect (or will in the future have any significant negative effect) on the incentives to create desirable new programming is questionable in the extreme.

Because of the DBS competition made possible by the exclusivity ban, cable firms have been pressured to invest in additional channel capacity. As stated by NCTA President and CEO Robert Sachs:

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[56] The statute's explicit reference to "diversity" here contrasts with more general statutory references to the "public interest" that the Commission has traditionally read to include a "diversity" component. *1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 15 FCC Rcd. 11058 (¶8 & n.16) (rel. June 20, 2000). By requiring the Commission to examine diversity in this proceeding, Congress has eliminated any doubt that it sought to maintain a plethora of voices in the marketplace.

[57] Economic Assessment, Ex. 1 at 25 (citing NCTA Comments at 12).

> Being digital from the start, and having the advantage of a substantially greater channel capacity, DBS spurred cable operators to replace hundreds of thousands of miles of coaxial cable with fiber optics so that they too could offer consumers hundreds of channels of digital video and audio services.[58]

Moreover, "the DBS firms have played an important role in providing a launch platform for independent programmers."[59] Indeed, EchoStar's recent agreement with Vivendi "illustrates how an MVPD programmer can facilitate the entry of new programming on a non-exclusive basis."[60]

The pending merger between EchoStar and Hughes (DIRECTV) opens up further opportunities to enhance programming diversity. As described in the attached Economic Assessment:

> The proposed merger of EchoStar and DIRECTV could eventually "free up" roughly half of the current spectrum used by the individual firms, thus allowing the new EchoStar to increase the number (and diversity) of channels offered to subscribers. Given the preference of MVPD subscribers for "more channels," such an expansion of channel capacity would likely force cable systems to continue to upgrade their program offerings. With more channel capacity on both DBS and cable, programming diversity will likely expand.[61]

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[58] Economic Assessment, Ex. 1 at 26 (quoting Robert Sachs, Testimony Before Subcommittee on Antitrust, Business Rights and Competition, Committee on the Judiciary, United States Senate, April 4, 2001, pages 2-3).

[59] Economic Assessment, Ex. 1 at 26.

[60] *Id.* at 26-27.

[61] *Id.* at 27 (footnotes omitted).

Tellingly, the opponents cite very few concrete examples of specific program offerings that have been discouraged or prevented by the exclusivity ban.[62] Once again, this suggests an area where the alleged problem exists more in the world of economic theory than in the real world. Moreover, even if there are examples of such programming, the opponents have shown no reason why those few examples could not be readily accommodated through the existing waiver procedure, without incurring the substantial anti-competitive harm of having no rule at all. The argument that the existing procedure is unduly cumbersome or unworkable is belied by the facts. Of six petitions filed since 1992, two were granted, and in most cases the decision was issued within a few months of the notice of filing of the petition. Moreover, the proceedings are typically conducted on a paper record (*i.e.*, without a live hearing), and the statute specifically provides for an expedited decision.[63] As the attached Economic Assessment concluded, therefore: "This record simultaneously demonstrates that the FCC is willing to grant exemptions when exclusive contracts are in the public interest, and also that exclusive contracts are generally not in the public interest (especially since the number approved is relatively low despite the fact that the most auspicious cases were the ones presumably filed)."[64] In any event, the desire to promote new forms of video programming in no way justifies the real aim of the

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[62] *See* iN DEMAND Comments at 14-15. iN DEMAND's Comments refer to a one-time rock concert and a potential sports programming package as examples of programs that allegedly did not get produced because of the inability to provide exclusivity. *Id.* However, it is not clear from the comments exactly what role exclusivity (as opposed to other factors) played in these decisions.

[63] *See* 47 U.S.C. § 548(f) ("The Commission's regulations shall * * * provide for an expedited review of any complaints made pursuant to this section."); *see also In re Cable Television Consumer and Competition Act of 1992,* 8 FCC Rcd. 3359, 3416 (rel. Apr. 30, 1993).

[64] Economic Assessment, Ex. 1 at 30.

opponents, which is to deny access to already-existing name-brand video programming as a tool for suppressing competition from DBS and other non-cable MVPDs.

Moreover, the EchoStar/Vivendi agreement described above in Section III.A should remove any doubt about the DBS industry's incentive to participate in the development of programming, albeit on a non-exclusive basis. Under the agreement, new programming and services developed by Vivendi will be available to EchoStar subscribers. EchoStar entered this agreement despite the existing ban on exclusivity in the cable context, reflecting the market reality that, even with access to programming thanks to provisions of law, EchoStar remains engaged in an uphill battle against cable operators and must continue to innovate in order to compete. Agreements like the one between EchoStar and Vivendi are necessary but not sufficient to achieve full competition. Allowing the exclusivity ban to sunset would pose a severe setback in this competitive landscape.[65]

IV. There Is No First Amendment Barrier to Extension of the Existing Exclusivity Rule

Finally, at least two of the opponents assert that extension of the existing exclusivity rule would violate the First Amendment.[66] Essentially, their argument is that the prohibition on exclusive contracts, although facially neutral, has a "chilling effect" on speech because it discourages creation of new programming by vertically integrated video

[65] The opponents have not established that the general antitrust laws are a suitable substitute for the exclusivity rule. *E.g.*, Cablevision Comments at 37-39. For all of the reasons discussed in EchoStar's original comments, the general antitrust laws are simply too blunt an instrument to be useful for this purpose. *See* EchoStar Initial Comments at 15-18.

[66] *See* AOL Time Warner Comments at 4-6; Cablevision Comments at 40-41.

programmers.[67] As discussed further below, there are two fundamental problems with asserting this argument in the present context. First, the D.C. Circuit has already rejected a facial challenge to Section 628 of the Communications Act on precisely the grounds asserted here.[68] Second, even if the First Amendment issue were not settled as a result of the D.C. Circuit's prior ruling, the issue raised here is not the constitutionality of any action of the FCC, but the constitutionality of the statute itself, which is the type of issue the Commission has traditionally left to the courts to resolve. Thus, the alleged First Amendment issue presents no obstacle to the Commission's extension of the exclusivity rule if it determines that the statutory standard is met.

With respect to the D.C. Circuit's prior ruling, that case arose when AOL Time Warner's predecessor—Time Warner Entertainment Co.—brought a First Amendment challenge to Section 628(c)(2)(D), which is the provision of the 1992 Cable Act that originally required the Commission to impose the exclusivity ban. On review of the district court, the D.C. Circuit first held that the provisions of Section 628, including the exclusivity ban, were "content-neutral on their face, regulating cable programmers and operators on the basis of the 'economics of ownership,' a characteristic unrelated to the content of the speech."[69] Applying the intermediate

[67] *Id.* AOL Time Warner also advances an argument that the ban "coerces speech," and is therefore subject to strict scrutiny, because it allegedly mandates "that cable-affiliated programmers must distribute their programming through parties not of the programmer's choosing." AOL Time Warner Comments at 4. Nothing about the exclusivity ban "coerces speech," however. The rule applies only to speech that the video programmer has voluntarily created and voluntarily chosen to distribute to the public. From the standpoint of the video programmer, the only effect of the prohibition is to encourage more speech, by facilitating even broader distribution of the same message. Nor is any MVPD required to carry particular programming against its will.

[68] *See Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

[69] *Time Warner*, 93 F.3d at 977, quoting *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 7 (D.D.C. 1993).

scrutiny standard of First Amendment review, the court then went on to sustain the exclusivity rule against the claim that it was not "narrowly tailored" because it burdened more speech than was necessary to further the government's legitimate interest.[70] In particular, the court held that the "government's interest in regulating vertically integrated programmers and [cable] operators is the promotion of fair competition in the video marketplace," *id.*, and that this goal "both furthers an important government interest and is unrelated to the suppression of free expression." *Id.* It also noted that "Congress considered Time Warner's argument and concluded that the benefits of these provisions – the increased speech that would result from fairer competition in the video programming marketplace – outweighed the disadvantages – the possibility of reduced economic incentives to develop new programming." *Id.* The opponents in this case are essentially repeating the same arguments against precisely the same rule that was upheld by the D.C. Circuit as recently as 1996. There is absolutely no reason to believe that the extension of the existing rule beyond October 5, 2002 would lead to any different result under the First Amendment.

Moreover, even if the constitutional issues were still open for debate, it has been this Commission's practice to leave to the judiciary questions regarding the constitutionality of congressional enactments the Commission is called upon to apply.[71] Unlike the cases cited by

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[70] *Time Warner*, 93 F.3d at 978.

[71] *See, e.g., In re: Petition of Cablevision Systems Corporation for Modification of the ADI of Television Broadcast Stations WTBY, WRNN, WMBC-TV and WHAI-TV*, 11 FCC Rcd. 6453 at ¶ 43, n.40 (rel. May 31, 1996) (constitutionality of 1992 Cable Act's must-carry provisions pending before federal court; in the absence of a stay, "Cablevision's challenge to the constitutionality of the rules is inappropriate here").

the opponents,[72] this is not a case where the Commission is independently fashioning a rule of its own and therefore arguably must consider constitutional defenses to its own "'self-generated' policy."[73] Rather, this is simply a case of the Commission extending a congressionally-enacted rule if, but only if, it makes the finding specified in the statute Congress enacted.[74] Nothing about this situation suggests that the Commission is expected to, or should, independently evaluate the constitutional merits of the exclusivity ban Congress chose to adopt.

[72] *See, e.g.,* Cablevision Comments at 41 & n.125.

[73] *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656 (D.C. Cir. 1989); *see also Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1041-42 (D.C. Cir. 1997) ("The Commission has an obligation to address properly presented constitutional claims which . . . *do not* challenge agency actions mandated by Congress.") (emphasis added).

[74] In other words, the statute clearly contemplates that if the Commission finds that the exclusivity ban "continues to be necessary" based on the marketplace conditions in the final year of the ten-year period, then the existing congressionally-imposed rule will continue to operate beyond October 5, 2002.

CONCLUSION

For the reasons set forth above and in EchoStar's initial comments, the Commission should exercise its authority to extend the existing prohibition on exclusive contracts for affiliated video programming.

Respectfully submitted,

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