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APR 04 2002

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: 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 CS Docket No. 01-290

Dear Mr. Caton:

On behalf of AOL Time Warner Inc. ("AOLTW"), I am writing to supplement the record in the above-referenced proceeding to call the Commission's attention to a recent judicial opinion that provides guidance as to the Congressionally-mandated scope of the Commission's inquiry regarding the scheduled sunset of the exclusive contract restriction contained in Section 628(c)(2)(D) of the Communications Act.<sup>1</sup>

In their comments and reply comments, several parties agreed with AOLTW that Congress intended for the restrictions on exclusive programming arrangements to sunset absent solid proof of their "necessity" to preserve and protect competition and diversity.<sup>2</sup> AOLTW pointed out that the "necessity" clause of the statute means that the program access exclusivity restrictions can be retained only if the Commission expressly finds that

<sup>1</sup> 47 U.S.C. § 548(c)(2)(D).

<sup>2</sup> NCTA Comments at 2-4; AT&T Comments at 3-6; Comcast Comments at 3.

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“such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.”<sup>3</sup> The Commission’s analysis in this proceeding must therefore start with the presumption that the exclusivity restrictions should sunset, with the burden squarely on those advocating retention to demonstrate that the restriction is in fact “necessary to preserve and protect competition and diversity.” Evidence that retention would be “helpful” or “beneficial” to some particular competing multichannel video programming distributors (“MVPDs”) is not sufficient. There must be substantial and specific evidence on the record establishing that, without retention, competition and diversity in the distribution of video programming could not be preserved and protected.

Certain commenters asserted that Congress’ use of the term “necessary” in the statute has no meaning beyond requiring the Commission to conduct a proceeding to explore whether or not to retain the restriction. For example, DirecTV argued that “Congress has already presumed in its threshold enactment of Section 628 that the Section 628(c)(2)(D) exclusivity prohibition is ‘necessary’” and therefore all the Commission must now do is “examine whether that condition ‘continues’ to be the case.”<sup>4</sup> Likewise, RCN argued that “Congress simply imposed a presumptive ban on such exclusivity for a number of years, and left to the Commission to determine, at the end of that period, whether to continue the ban, and if so, under what terms and conditions to do so, taking account of the facts at that time.”<sup>5</sup>

Subsequent to the close of the formal comment period in this proceeding, there has been clarification of the meaning of the term “necessary,” specifically when used in the context of a Congressional requirement that the Commission determine whether to retain restrictions designed to protect competition and diversity. In Fox Television Stations, Inc. v. F.C.C. (“Fox”),<sup>6</sup> the D.C. Circuit Court of Appeals overturned the Commission’s decision to retain the national television station ownership cap and the cable-television broadcast cross-ownership restrictions after conducting the Congressionally mandated biennial reviews of those provisions pursuant to Section 202(h) of the 1996 Telecommunications Act.<sup>7</sup> Like the directive at issue here, Section

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<sup>3</sup> 47 U.S.C. § 548(e)(5).

<sup>4</sup> DirecTV Reply Comments at 10-11.

<sup>5</sup> RCN Reply Comments at 22-24.

<sup>6</sup> 280 F. 3d 1027 (D.C. Cir. 2002). More recently, in Sinclair Broadcast Group Inc. v. F.C.C., No. 01-1079 (D.C. Cir. April 2, 2002), the D.C. Circuit relied on its earlier interpretation of the term “necessary” in the Fox decision to reverse and remand the local television station ownership cap to the Commission for further consideration.

<sup>7</sup> See Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56, §202(h) (1996).

202(h) requires the Commission, on a biennial basis, to review its media ownership restrictions to determine whether they remain “necessary in the public interest as the result of competition.”<sup>8</sup> In Fox, the D.C. Circuit held that the use of the term “necessary” in the statute created an affirmative obligation on the Commission to justify retention of the ownership rules in question based on specific factual evidence in the record:

Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules. Under §202(h) the Commission may retain a rule only if it reasonably determines that the rule is “necessary in the public interest.”<sup>9</sup>

The deliberative process mandated by Congress in the biennial review parallels the process mandated by Congress in this proceeding. Here, the Commission is similarly charged with determining whether retention of the exclusive contract prohibition is “necessary.” In light of Fox, the Commission now has precise guidance regarding the proper interpretation and application of the “necessity” clause. The Fox court has confirmed the correctness of AOLTW’s analysis that use of the term “necessary” in the statute does indeed create a presumption in favor of sunset that imposes the burden of proof on those advocating retention. If adequate justification is not provided through supporting evidence in the record, the rule must be allowed to sunset. Moreover, evidence or conjecture that retention would be “helpful,” “beneficial” or “consonant with the public interest”<sup>10</sup> is not enough; the rule may be retained only if shown to be “necessary to preserve and protect competition and diversity.” As demonstrated elsewhere in the comments and reply comments, given the current state of marketplace forces, this hurdle cannot be overcome.

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<sup>8</sup> Id.

<sup>9</sup> See Fox at 1048.

<sup>10</sup> Id. at 1050.

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Should there be any questions regarding the foregoing, please contact the undersigned.

Sincerely,

A handwritten signature in cursive script that reads "Arthur H. Harding".

Arthur H. Harding  
Counsel for AOL Time Warner Inc.

cc: W. Kenneth Ferree  
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