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May 8, 2002

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al. (CS Docket No. 01-290) -- WRITTEN EX PARTE PRESENTATION*

Dear Ms. Dortch:

On behalf of The Wireless Communications Association International, Inc. ("WCA") and BellSouth Entertainment, LLC ("BellSouth"), we are writing in response to the April 4, 2002 written *ex parte* presentation submitted by AOL Time Warner Inc. ("AOL Time Warner") in the above-referenced proceeding.[1] Citing the D.C. Circuit's recent decision in *Fox Television Stations, Inc. v. FCC*, AOL Time Warner contends that the term "necessary" in Section 628(c)(5) of the Cable Consumer Protection and Competition Act of 1992 (47 U.S.C. § 548(c)(5)) creates a presumption in favor of eliminating the prohibition on exclusive contracts in Section 628(c)(2)(D) (47 U.S.C. § 548(c)(2)(D)), and that the presumption shifts the burden of proof on this issue to cable's competitors.[2] With only a passing reference to the record, AOL Time Warner concludes that "this hurdle cannot be overcome."[3]

AOL Time Warner's argument is a red herring. Regardless of where the burden of proof lies, the Commission has broad discretion to determine whether preserving the ban on exclusivity

[1] WCA and BellSouth, along with Altrio Communications, Inc., the Independent Multi-Family Communications Council and Qwest Broadband Services, Inc., have filed joint comments and joint reply comments in this proceeding. *See* Comments of The Wireless Communications Association International, Inc. *et al.*, CS Docket No. 01-290 (filed Dec. 3, 2001) (the "Joint Comments"); Reply Comments of The Wireless Communications Association International, Inc. *et al.*, CS Docket No. 01-290 (filed Jan. 7, 2002) (the "Joint Reply Comments").

[2] Letter from Arthur H. Harding, Counsel for AOL Time Warner Inc., to William F. Caton, Secretary, Federal Communications Commission, CS Docket No. 01-290, at 2-3 (filed Apr. 4, 2002) (the "AOL Time Warner Letter").

[3] *Id.* at 3.

"continues to be necessary to preserve and protect competition and diversity in the distribution of video programming,"[4] and the record evidence previously cited by WCA and BellSouth (much of which AOL Time Warner has not disputed) more than justifies continued enforcement of the ban. Specifically, the comments filed by cable's competitors establish the following:

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

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

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

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

- Terrestrial competition encourages the MSOs to add new services, improve existing ones and/or lower rates.[5] Hence, consumers ultimately would pay the dearest price if the Commission were to permit a sunset of Section 628(c)(2)(D). Conversely, there is no evidence that the Commission's enforcement of the statute

[4] 47 U.S.C. § 548(c)(5). *See also* Joint Reply Comments at 3-4.

[5] *See, e.g., Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 – Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, at ¶ 10 (rel. Apr. 4, 2002) ("In those areas where a cable operator faces effective competition from a wireline overbuilder . . . , we found that operators tend to offer more channels at a lower rate.").

> has caused the MSOs any cognizable economic harm whatsoever. To the contrary, the record reflects that programming services owned or controlled by the MSOs have succeeded without exclusivity and will continue to do so if Section 628(c)(2)(D) remains in force.[6]

Ironically, even if the Commission were to accept AOL Time Warner's view of the "current state of marketplace forces" (and it should not),[7] *Fox Television Stations* would permit continued enforcement of Section 628(c)(2)(D) on other grounds. In that case, the D.C. Circuit held that the statutory provision which AOL Time Warner analogizes to Section 628(c)(5) (Section 202(h) of the Telecommunications Act of 1996) permits the Commission to declare a rule "necessary" on grounds other than those which gave rise to the rule in the first place.[8] Here, there is at least one very compelling "alternative" ground for continued enforcement of Section 628(c)(2)(D): without it, Section 628's remaining provisions prohibiting unfair practices, undue influence and price discrimination effectively become meaningless. That is, absent the ban on exclusivity, a competitor that has been victimized by unfair practices, undue influence or price discrimination would not be guaranteed any access to the programming at issue, since the programmer would retain the option of entering into exclusive contracts with the largest incumbent cable operators with no threat of sanction by the Commission. As previously noted by WCA and BellSouth, this scenario would be tantamount to a sunset of *all* of Section 628, something Congress has given the Commission no authority to do.[9]

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[6] For citations to the relevant comments on all of these points, see the Joint Reply Comments at 4-10.

[7] AOL Time Warner Letter at 3.

[8] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050 (D.C. Cir. 2002).

[9] Joint Comments at 3-4.

Should there be any questions concerning this submission, please contact the undersigned.

Respectfully submitted

/s/
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