Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	MB Docket No. 07-29
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") hereby files these comments in accord with the Federal Communications Commission's ("Commission") *Notice of Proposed Rulemaking* ("*Notice*") in the above-captioned proceeding, in which the Commission seeks comment on whether the prohibition on exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators in Section 628(c)(2)(D) of the Communications Act, as amended, "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[1] Qwest believes that the answer is *yes*, and that the Commission can and should issue another extension of the statute's ban on exclusive contracts.[2]

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[1] 47 U.S.C. § 548(c)(5), quoted in, *In the Matter of 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*, MB Docket No. 07-29, Notice of Proposed Rulemaking, FCC 07-7 ¶ 1 (rel. Feb. 20, 2007); *see also* 40 Fed. Reg. 9289 (Mar. 1, 2007).

[2] Qwest presently has 21 cable franchises and provides nearly 60,000 subscribers with multichannel video service in Arizona, Colorado, Utah and Nebraska.

I. CONTINUATION OF THE PROHIBITION IS NECESSARY TO PRESERVE COMPETITION AND DIVERSITY IN THE DISTRIBUTION OF VIDEO PROGRAMMING.

Five years ago, when the Commission first reviewed whether it should permit the ban on exclusivity to sunset on October 5, 2002, the agency found that competition in the market for the distribution of video programming had improved, but not to a level sufficient enough to assuage Congress' concerns about the ability of competitors to obtain full and fair access to programming.[3] Absent the ban on exclusivity, Congress believed that cable-owned programmers would have the incentive and the ability to enter into exclusive contracts with incumbent cable operators, leaving consumers with no *bona fide* competition among providers of multichannel video service. As a new wireline entrant into the multichannel video market, Qwest submits that those concerns are as valid today as they were in 2002.

A. Developments in Today's Marketplace Heighten Concerns About Eliminating Restrictions on Contracts Between Vertically-integrated Programmers and Cable Operators.

The state of competition in today's marketplace for the delivery of video programming does not justify giving cable-owned programmers unlimited freedom to enter into exclusive contracts with incumbent cable operators. A critical part of the problem is the lack of competition to cable from providers using wireline technologies. In its most recent annual video competition report to Congress, the Commission found that multichannel video programming distributors ("MVPDs") other than incumbent cable and direct broadcast satellite ("DBS") operators serve less than 3% of the nation's MVPD subscribers.[4] This, obviously, reflects that local exchange carrier ("LEC") offerings of multichannel video service are in their early stages.

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[3] *See Notice* ¶¶ 1-4.

[4] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, 21 FCC Rcd 2503, 2506-07 ¶ 8 (2006) ("*Twelfth Annual Report*").

Indeed, LEC wireline video customers probably total fewer than one million, a mere fraction of the almost 43 million customers served by the four largest incumbent cable multiple system operators ("MSOs").[5]

Simply put, then, the vast majority of MVPD subscribers still do not have the benefit of a second wireline MVPD in their communities. This has substantial implications for consumers, since, as discussed *infra*, wireline competition has been shown to be a more effective deterrent to rising cable rates than DBS.[6] Chairman Martin put it best: "When consumers have the ability to choose among more than one cable operator, they receive one of the most important benefits of competition that the 1996 Act envisioned: lower prices."[7]

Moreover, horizontal concentration of both content ownership and distribution ownership in the market for the delivery of video programming remains prevalent. On the content side, ownership of programming shows significant concentration. For instance, as of December 2005, of the top 20 cable programming networks, 70% were owned by just four companies: Cox, Disney, Time Warner, and Viacom.[8] Of those four, two -- Cox and Time Warner -- are cable

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[5] *See* NCTA website listing of Top 25 MSOs -- As of September 2006.

[6] *See In the Matter of 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, Report on Cable Industry Prices, 21 FCC Rcd 15087, 15088 ¶ 2 (2006) ("Expanded basic prices [of incumbent cable operators] rose more than 6 percent or twice the rate of inflation last year. Prices are 17 percent lower where wireline cable competition is present. DBS competition, however, does not appear to constrain cable prices – average prices are the same as or slightly higher in communities where DBS was the basis for a finding of effective competition than in noncompetitive communities.").

[7] *Id.*, Statement of Chairman Kevin J. Martin at 1.

[8] *See Twelfth Annual Report*, 21 FCC Rcd at 2654, Appendix, Table C-5.

operators. Of the top 20 programming channels by subscribership, cable operators have an ownership interest in six of them, including three of the top four channels.[9]

At the same time, on the distribution side, as of June 2005, the four largest incumbent cable MSOs served nearly half of all MVPD subscribers.[10] However, this does not account for the fact that Comcast and Time Warner have since acquired the cable systems formerly owned by Adelphia, who in 2005 served 5.5% of all MVPD subscribers.[11] Hence, it is likely that the four largest incumbent cable MSOs now serve more than 50% of all MVPD subscribers.

Likewise, clustering of cable systems into regional distribution networks is also problematic, since regionally-based cable systems have substantial leverage over programmers. Further, where "clustered" cable operators also own programming, they are in a position to both receive and retransmit programming terrestrially, and thereby exploit the "terrestrial loophole" in the program access statute. Qwest's concern here is not benign -- cable operators hold ownership interests in nearly half of all regional cable networks, which include regional sports networks that, as the Commission has recognized, are "must-have" programming for competing MVPDs.[12] Yet, where this programming is wholly delivered terrestrially, vertically-integrated cable operators are not prohibited from denying that programming to their competitors.[13] The

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[9] *See id.* In reviewing the NCTA website, it appears these statistics remain the same at the end of 2006.

[10] *See id.*, 21 FCC Rcd at 2620, Appendix, Table B-3.

[11] *Id.*

[12] For example Comcast owns or has an interest in regional sports networks in Baltimore/Washington, D.C., Chicago, Philadelphia, Sacramento, New York City, New England and the Southeast and recently made an investment and took over management of the MountainWest Sports Network ("the mtn.").

[13] Comcast also operates CN8 – The Comcast Network, a local news and information channel that services 12 states and 20 television markets. This channel, which is available to Comcast and Cablevision subscribers, appears to be one example of terrestrially-delivered programming that is not subject to the Section 628(c)(2)(D) ban.

Commission need not and should not compound the problem by giving cable operators the right to exclusivity even when they receive the programming via satellite.

B. If the Prohibition Sunsets, the Competitive Viability of Smaller MVPDs Is Likely To Be Significantly Hampered.

Access to programming, especially "must-have" programming, remains critical to sustaining viable MVPD competition. This is particularly true in Qwest's case – indeed, if the Commission permits the prohibition on exclusivity to sunset, Qwest's ability to compete in the multichannel video market could be severely compromised.

Unlike the cable MSOs, Qwest holds no ownership interests in programming. As such, Qwest is dependent on purchasing its programming from others. Since subscribers ultimately are most interested in content, Qwest's ability to serve its customers is tied directly to its access to "must-have" vertically integrated programming, including CNN, HBO, TNT, iNDemand pay-per-view content, Discovery and regional sports networks. While the large cable operators with many millions of subscribers have substantial bargaining clout with programmers, Qwest and other smaller distributors do not. In turn, Qwest often is forced to accept less favorable terms and conditions in its programming contracts, which in turn undermines the competitive viability of its multichannel video services. Again, a sunset of the ban on exclusivity will only worsen the problem.

In turn, as noted above, any obstacles to wireline competition in the multichannel video market will forestall any reduction in cable prices. Qwest's relatively small but growing, video customer base is bringing much needed wireline video competition to those areas still controlled by incumbent cable operators. In those communities, Qwest video services have resulted in competitive pricing, improved customer service, and enhanced service offerings from both

Qwest and the incumbent cable operators.[14] Studies have recognized the benefits to consumers, particularly in the form of reduced prices, in areas where there is competition between new wireline entrants and incumbents.[15] These benefits will disappear if new wireline entrants cannot offer the same or better programming menus as incumbent operators.

Also, now that the Commission has lowered barriers to entry by reforming the cable franchise process, now is not the time to reverse field and take any action that would prevent new entrants from having fair access to programming. The Commission has recently found that "the current operation of the local franchising process in many jurisdictions constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment."[16] In particular, the Commission noted that "traditional phone companies seeking to enter the video market face unreasonable regulatory obstacles, to the detriment of competition generally and cable subscribers in particular."[17] In light of these findings, the Commission adopted rules and

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[14] *See Ex Parte* Letter from Melissa E. Newman, Vice President–Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Attachment at 6 (filed Apr. 26, 2006).

[15] The General Accounting Office ("GAO") performed a study in which it concluded that cable rates are 15-41% lower in markets where there is a wire-based competitor offering video services. GAO Subscriber Rates and Competition in the Cable Television Industry, Statement of Mark L. Goldstein, Director Physical Infrastructure Issues at 2 (rel. Mar. 25, 2004). *See also* '"In Delay There Is No Plenty': The Consumer Welfare Cost of Franchise Reform Delay", Phoenix Center Policy Bulletin No. 13, 2-3 & nn. 4-6, by George S. Ford, PhD & Thomas M. Koutsky, J.D. (rel. Jan. 2006) (identifying other studies demonstrating significant video service price decreases where there is head-to-head wire-based competition).

[16] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 06-180 ¶ 1 (footnote omitted) (rel. Mar. 5, 2007) ("*Cable Franchising Order*").

[17] *Id.* ¶ 2.

provided guidance as to what constitutes unreasonable local franchising requirements that violate the Communications Act. These developments, however, will have little effect if newly franchised entrants are unable to obtain programming that most video subscribers demand. In other words, if the Commission were to follow its adoption of the *Cable Franchising Order* with a sunset of the ban on exclusivity, it will merely be lowering one entry barrier to raise another.

II. CONCLUSION

For all of these reasons, Qwest urges the Commission to extend the prohibition on exclusivity of Section 628(c)(2)(D).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in MB Docket No. 07-29; and 2) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/Richard Grozier

April 2, 2007