

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

To: The Commission



COMMENTS

Matthew M. Polka
President and CEO
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Christopher C. Cinnamon
Bruce E. Beard
Scott C. Friedman
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for the American
Cable Association

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I. INTRODUCTION AND SUMMARY

ACA members need access to vertically integrated programming at fair and reasonable prices, terms and conditions to deliver competitive programming packages to consumers. Eliminating the protections of Section 628(c)(2)(D) would harm competition and threaten the continued viability of small and medium-sized cable operators.

Vertically integrated programming vendors continue to supply a significant amount of the programming carried on ACA member systems, including key “must have” entertainment programming and regional sports networks (“RSNs”).

The loss of such programming would significantly harm the ability of ACA members to compete against the vastly larger MVPDs dominating many markets. Without protections like Section 628(c)(2)(D), small and medium-sized cable operators risk becoming casualties in the war between the major MSOs, DBS providers, and the major phone companies.

To protect the continued viability of small and medium-sized cable operators, the Commission must extend Section 628(c)(2)(D) and adopt similar protection to guarantee access to vertically integrated DBS programming. In these Comments, ACA explains that:

- The Commission must retain Section 628(c)(2)(D) to protect competition and diversity in the distribution of video programming.
- The risk of harm has increased since the Commission last considered eliminating Section 628(c)(2)(D).
- The Commission must prohibit AT&T and Verizon from withholding distribution of “must have” programming.
- Access to vertically integrated programming has become more difficult as media consolidation continues to align “must have” programming with large MVPDs.
- In markets where DBS has a large market share, competition – and consumers – would suffer if ACA members do not have access to vertically integrated programming.
- The Commission must retain Section 628(c)(2)(D) or risk impeding investment in broadband deployment.

The American Cable Association. ACA represents nearly 1,100 independent cable businesses serving nearly 8 million cable subscribers primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. ACA members range

from family-run cable businesses serving a single town to multiple system operators that focus on smaller systems and smaller markets. About half of ACA's members serve less than 1,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets. No ACA member has an attributable interest in a satellite programming vendor.

ACA members share a vital interest in this proceeding. All ACA members carry vertically integrated programming on their basic or expanded basic tiers. Without Section 628(c)(2)(D), the overwhelming market power wielded by the major MSOs, DBS providers, and large phone companies would harm competition and diversity in markets served by ACA members. To ensure that smaller market cable customers continue to have access to key programming services, the Commission must extend Section 628(c)(2)(D).

II. ANALYSIS

A. The Commission must retain Section 628(c)(2)(D) to protect competition and diversity in the distribution of video programming.

The Commission has ample statutory authority to extend Section 628(c)(2)(D) to preserve and protect competition and diversity. As we explain below, the Section 628(c)(2)(D) protections are "necessary to preserve and protect competition and diversity in the distribution of video programming."¹ As the Commission has previously stated, the primary focus of the diversity

¹ 47 USC § 548(c)(5).

condition is to ensure that as many MVPDs as possible remain viable distributors of video programming.²

To compete and remain viable distributors, small and medium-sized cable operators need access to vertically integrated programming. ACA members cannot offer a robust programming line-up without vertically integrated programming. As summarized in the table below, the major MSOs own a substantial number of cable-affiliated satellite services.³

Cablevision			
AMC	Fuse	Independent Film Channel	Women's Entertainment
Time Warner			
Boomerang	Cartoon Network	CNN	CNN Español
CNN Headline News	CNN International	TBS	Turner Classic Movies
TNT	TNT HD	Court TV	
Home Box Office (HBO)	HBO 2	HBO Comedy	HBO Family
HBO Latino	HBO Signature	HBO Zone	HBO HD
Cinemax	Cinemax HD	Action Max (Cinemax multiplex)	@Max (Cinemax multiplex)
5StarMax (Cinemax multiplex)	MoreMAX (Cinemax multiplex)	OuterMax (Cinemax multiplex)	Thriller Max (Cinemax multiplex)
WMAX (Cinemax multiplex)			

² *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*, Report and Order, 17 FCC Rcd 12124, ¶ 62 (2002) (“Sunset Report and Order”); 1992 Cable Act, § 2(a)(5).

³ *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, 20 FCC Rcd. 14117, app. C (2005) (“2005 Annual Video Competition Assessment”).

Comcast			
AZN Television	E! Entertainment Style	G4 VideogameTV (formerly G4 tech TV)	Golf Channel
PBS Kids Sprout		TV One	Versus (formerly OLN)
Cox			
Discovery Channel	Discovery En Español	Discovery Health	Discovery HD Theatre
Discovery Home	Discovery Kids	Discovery Times	Animal Planet
BBC America	FiT TV	Military Channel	The Learning Channel (TLC)
Travel Channel	Science Channel		

In addition, MVPD investment in RSNs has increased dramatically since the Commission first reviewed Section 628(c)(2)(D) five years ago. Vertically integrated RSNs include the following:⁴

Regional Sports Network	MSO Ownership
Bravesvision (Atlanta)	Comcast
Comcast SportsNet Philadelphia	Comcast
Comcast SportsNet Chicago	Comcast
Comcast SportsNet Mid Atlantic	Comcast
Comcast SportsNet West	Comcast
Comcast / Charter Sports Southeast	Comcast/Charter
Cowboys TV (Dallas)	Comcast
Cox Sports Television	Cox
Falconvision (Atlanta)	Comcast
Fox Sports Net Bay Area	Cablevision
Fox Sports Net New England	Cablevision/Comcast

⁴ *Id.*

Fox Sports Net New York	Cablevision
Madison Square Garden Network	Cablevision
MetroSports – Kansas City, Mo.	Time Warner
Mountain West Sports Network	Comcast
Sports Net New York	Comcast/Time Warner

It is well settled that this combination of multichannel distribution and “must have” programming results in the incentive and ability to harm competition and consumers.⁵ The Commission has found this especially true for RSNs:

Since the Commission first began tracking regional cable programming networks in 1998, it has repeatedly recognized the importance of regional sports programming to MVPD offerings. This acknowledgement is based, in part, on the finding that for such programming, there are no readily acceptable close substitutes. The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: regional sports networks (“RSNs”) typically purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game.⁶

[T]he incentive for the vertically integrated regional programmer to foreclose programming, is further increased in situations in which there is no readily acceptable substitute for the programming, such as regional sports programming.⁷

⁵ *Sunset Report and Order*, ¶ 4.

⁶ *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473, at ¶ 133 (2004) (“*News Corp. Order*”) (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 24284 (1998)); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, ¶ 171 (2002); *Sunset Report and Order*, ¶ 54; FCC, OPP Working Paper #37, Broadcast Television: Survivor in a Sea of Competition at 124.

⁷ *Sunset Report and Order*, ¶ 54.

MVPDs controlling this “must have” programming have overwhelming market power over any competitor that lacks such programming, including ACA members.⁸ The unrestrained use of such market power would threaten the viability of any ACA member denied access to such programming.

No legitimate argument supports reducing small and medium-sized cable companies’ access to “must have” satellite programming. Section 628(c)(2)(D) is necessary to protect small and medium-sized cable companies and the public from the substantial public interest harms that would result from the unrestrained exercise of market power.

B. The risk of harm from eliminating Section 628(c)(2)(D) has increased since the Commission first extended the Section five years ago.

Since the Commission extended Section 628(c)(2)(D) in 2002, several developments have increased the need for the Commission to retain the prohibitions. Specifically, these developments include:

- The entry of AT&T, Verizon, and other phone companies into the video marketplace;
- The increase in media consolidation of MVPD and programming interests; and
- The substantial growth and penetration of DBS providers in rural areas.

These developments highlight the very concerns underlying Section

⁸ No ACA member serves more than 1.5% of U.S. Television households. Comcast serves 26%. Ted Hearn, *Martin Backs 30% Cap*, MULTICHANNEL NEWS, Mar. 19, 2007.

628(c)(2)(D) – to protect competition and diversity.⁹ The Commission must view these recent developments in light of Congress’s concern and protect competition and diversity in the small and rural markets many ACA members serve by extending Section 628(c)(2)(D). An examination of each development follows.

1. The Commission must prohibit AT&T and Verizon from withholding distribution of “must have” programming.

AT&T and Verizon’s entry into video distribution underscores the importance of Section 628(c)(2)(D) for small and medium-sized cable operators. AT&T and Verizon are extremely well financed, have nationwide roll-out plans, and are making considerable investments in video.

Each company has the ability and incentive to acquire vendors of “must have” programming, including RSNs. AT&T had gross operating revenues in 2006 of over \$63 billion, 2.5 times larger than Comcast’s operating revenues.¹⁰ With the acquisition of Bell South by AT&T those numbers will significantly increase. Verizon’s operating revenues were in excess of \$88 billion.¹¹ In short,

⁹ *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, Notice of Proposed Rulemaking*, MB Docket No. 07-29, ¶ 5 (rel. Feb. 20, 2007) (“2007 Sunset NPRM”) (“Congress based the program access provisions on its concern that in the absence of regulation, vertically integrated programmers have the incentive and ability to favor affiliated cable operators over nonaffiliated cable operators and programming distributors”).

¹⁰ AT&T Inc., 2006 Annual Report at 18, *available at* <http://www.att.com/gen/investor-relations?pid=9186> (AT&T reports 2006 operating revenues of \$63.055 billion); Press Release, Comcast Corporation, Comcast Reports 2006 Results and Outlook for 2007, *available at* <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-news> (Comcast reports 2006 operating revenues of \$24.966 billion).

¹¹ Press Release, Verizon Communications Inc., Verizon’s 4Q 2006 Results Cap Strong Year of Organic Growth in Wireless, Broadband and Business Markets, *available at*

the phone companies are more formidable competitors than even the largest MSOs.

AT&T and Verizon will have the same incentive to acquire and withhold programming from its competitors as any other MVPD. In addition, the phone companies will be competing primarily against other cable providers. While large, vertically integrated MVPDs might withstand the onslaught from AT&T and Verizon, small and medium-sized cable operators will require added protections.

To protect against the potential abuse of market power, the Commission must retain Section 628(c)(2)(D).

2. Access to vertically integrated programming has become more critical with the recent media consolidations aligning “must have” programming with large MVPDs.

Media consolidation aligning “must have” programming with large MVPDs makes access to vertically integrated programming essential for ACA members. In the *News Corp. /DirecTV Order*, the Commission recognized the public interest harm to competition resulting from the unfettered alignment of “must have” programming with a large MVPD.¹² The Commission affirmed this finding in the *Comcast/Time Warner/Adelphia Order*.¹³

<http://investor.verizon.com/financial/quarterly> (Verizon reports 2006 operating revenue of \$88.1 billion).

¹² *News Corp. Order*, ¶ 161.

¹³ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors and Transferors, Comcast Corporation and Time Warner Inc., Assignees and Transferees*, 21 FCC Rcd 8203, ¶ 123 (2006) (“*Comcast/Time Warner/Adelphia Order*”) (“We find that the transactions would enable Comcast and Time Warner to raise the price of access to RSNs by imposing uniform price increases applicable to all

In the *News Corp./DirecTV Order*, the Commission expressly acknowledged that small and medium-sized cable operators are especially at risk and warrant additional protection:

[W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for “must have” programming such as RSNs following News Corp.’s acquisition of control of DirecTV.¹⁴

Similar concerns about further alignment of “must have” programming with a large MVPD are raised in the pending *Liberty/DirecTV* proceeding by ACA and others.¹⁵

The Commission has consistently imposed conditions on these transactions, recognizing the potential for abuse of the market power gained by a large MVPD controlling “must have” programming.

In this proceeding, the Commission must focus on those without power, including small and medium-sized cable operators. As the Commission notes, these companies are especially at risk and deserving of special protection.¹⁶ To ensure that small and medium-sized operators receive continued protection, the Commission must retain Section 628(c)(2)(D).

MVPDs, including their own systems, by engaging in so-called “stealth discrimination,” or by permanently or temporarily withholding programming”).

¹⁴ *News Corp. Order*, ¶ 176.

¹⁵ *In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 07-18, Comments of the American Cable Association at 4-7 (filed Mar. 23, 2007) (“*ACA Liberty/DirecTV Comments*”); Comments of Echostar at 14 (filed Mar. 23, 2007); Comments of RCN at 2 (filed Mar. 23, 2007).

¹⁶ *News Corp. Order*, ¶ 176.

3. In markets where DBS has a large market share, competition – and consumers – would suffer if ACA members do not have access to vertically integrated programming.

DirecTV and EchoStar are now the dominant MVPDs in many of the smaller and rural markets served by ACA members.¹⁷ In these markets, ACA members require access to vertically integrated programming to effectively compete and offer choices in video and advanced broadband services to rural and small market customers. Due to the increasing dominance of DBS providers and their substantial market power, access to this “must have” programming is even more critical for ACA members now than when the Commission first extended the sunset of Section 628(c)(2)(D) five years ago.

As Congress has explained, vertically integrated programmers have every incentive to favor affiliated cable operators over other MVPDs.¹⁸ By favoring affiliated cable operators, the vertically integrated programmer can thwart the threat of competition from DBS and the phone companies. DBS providers and the large phone companies have similar incentives.

ACA members, though, would suffer acute harm from an “exclusive programming” war between the major MSOs, DBS providers, and phone companies. In situations involving regional or national exclusive distribution rights, vertically integrated programmers have little incentive to carve out

¹⁷ *2005 Annual Video Competition Assessment*, Comments of the American Cable Association at 3-4 (filed September 19, 2005); *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189 (2006), Comments of the American Cable Association at 2 (filed Nov. 29, 2006).

¹⁸ *2007 Sunset NRPM*, ¶¶ 2-5.

exceptions for smaller cable systems. With DBS steadily increasing its exclusive access to “must have” sports programming, the potential for harm to ACA members is very real.

This conflict between the market power of DBS and the programming of vertically integrated programmers can strangle competition and diversity in smaller and rural markets. When both DBS and the major MSOs obtain “must have” programming, ACA members find themselves at a clear disadvantage.

The recent MLB-DirecTV deal serves as an acute example of the disadvantages ACA members face. Vertical programmers control many of the RSNs that can televise the majority of the games of an ACA member’s regional MLB team. Now, DirecTV has announced an exclusive deal to televise all out-of-market MLB games; games previously available to cable operators.¹⁹ Without program access protection, an ACA member would be unable to show local or national MLB games. In markets where DBS is the main competitor to ACA members, one provider will have “must have” programming, and the other – the ACA member – will not.

ACA and others recently addressed the significant market power DirecTV yields – and the threat to competition – in comments filed in the Liberty/DirecTV proceeding.²⁰ Combining control of must have programming and DBS

¹⁹ Press Release, Major League Baseball, MLB, DirecTV expand multi-year agreement (Mar. 8, 2007), *available at* http://mlb.mlb.com/news/press_releases/.

²⁰ *ACA Liberty/DirecTV Comments* at 15 (“DirecTV, with almost 16 million subscribers, serves a customer base of at least 15.99 million more than most ACA members, and 14.6 million more subscribers than the largest ACA member. When combined, that vast disparity in market power between any ACA member and Liberty/DirecTV would be overwhelming”).

distribution raises the need for protection against this type of transaction.

As ACA has advocated, conditions to constrain the abuse of market power must be placed on mergers between DBS providers and programming vendors to protect against the substantial public interest harms that result.²¹ But these are not enough.

The Commission should adopt safeguards like those contained in Section 628(c)(2)(D) – either in this proceeding or in another – to cover vertically integrated DBS programming. Currently, Section 628(c)(2)(D) applies to programming vertically integrated with a cable operator.²² DBS providers have the same incentives to withhold programming from its competitors as a cable provider. The lack of access to such vertically integrated programming can hinder the small and medium-sized cable operator’s ability to effectively compete against the DBS provider, resulting in less robust competition in the small and medium-sized markets the operators serve. Without safeguards like those contained in Section 628(c)(2)(D) applied to vertically integrated DBS programming, competition and diversity will suffer – especially in the smaller and rural markets served by ACA’s members.

C. The Commission must retain Section 628(c)(2)(D) or risk impeding investment in broadband deployment.

Eliminating Section 628(c)(2)(D) will harm broadband deployment. A lack

²¹ *ACA Liberty/DirecTV Comments* at 4-7; *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Comments of the American Cable Association at 6-18, 21-22 (filed June 16, 2003).

²² 47 USC § 548(b).

of access to "must have" programming, especially RSNs, will hamper the deployment of broadband service and pose a significant barrier to a provider's ability to compete effectively.

It is well established that the Commission is charged with encouraging "broadband deployment by removing barriers to infrastructure investment."²³ To that end, the Commission has recently stated that broadband deployment is inextricably linked to the provision of video services.²⁴ Cable operators offering bundled services rely on their video service to increase the profitability of their broadband investment.²⁵ The lack of a competitive video offering reduces the attractiveness of the entire bundle and increases the likelihood that the customer will choose another provider for the entire bundle of services. By eliminating Section 628(c)(2)(D), the Commission would impede, rather than promote, investment in broadband deployment.

ACA members are at the forefront in bringing competitive video and advanced broadband services to smaller and rural markets. The investment necessary to provide such advanced services is based, to a large extent, on the ability to provide a competitive video product. The loss of Section 628(c)(2)(D) could hamper the ability of small to medium-sized cable operators to finance

²³ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by 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, 2007 WL 654264, ¶ 4 ("Franchise Order").

²⁴ *Franchise Order*, ¶ 51.

²⁵ *Id.* ("The record demonstrates that broadband deployment is not profitable without the ability to compete with the bundled services that cable provides").

advanced deployments.

III. CONCLUSION

The viability of small and medium-sized cable operators without satellite programming interests, including all of ACA's member companies, would suffer if the Section 628(c)(2)(D) protections are eliminated. Developments since 2002, when the Commission last extended the conditions, strongly support an extension. The Commission must extend Section 628(c)(2)(D) for at least another five years and adopt similar safeguards for vertically integrated DBS programming.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: 

Matthew M. Polka
President and CEO
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Christopher C. Cinnamon
Bruce E. Beard
Scott C. Friedman
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for the American Cable
Association