

April 16, 2007

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth St., SW
Washington, DC 20554

RE: Reply Comments

MB Docket No. 07-29 — 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

Dear Ms. Dortch:

Consumer Federation of America,¹ Consumers Union,² Free Press,³ Media Access Project⁴ and Communications Workers of America⁵ respectfully reply to comments filed in Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video

¹ The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.

² Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about goods, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

³ Free Press is a national, nonpartisan organization with over 350,000 members working to increase informed public participation in crucial media and communications policy debates.

⁴ Media Access Project (MAP) is a thirty five year old non-profit tax exempt public interest media and telecommunications law firm which promotes the public's First Amendment right to hear and be heard on the electronic media of today and tomorrow.

⁵ The Communications Workers of America (CWA) represents over 700,000 workers employed in telecommunications, broadcasting, cable TV, journalism, publishing, electronics and general manufacturing, as well as airlines, government service, health care, education and other fields.

Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, MB Docket No. 07-29.

Our comments (1) refute contentions that program access rules, as currently formulated, are no longer necessary in light of purported increased competition and decreasing vertical integration; and (2) support comments by small or competing multichannel video programming distributors (MVPDs) regarding the importance of extending program access rules under Section 628 and improving Commission procedures for resolving program access disputes.

The record makes clear that strong program access rules continue to be necessary to preserve and protect competition and diversity in the distribution of video programming and promote availability of programming. We concur with commenters asserting that program access rules remain essential to promoting video competition and diversity of programming.⁶ The Commission has noted that cable prices jumped by 93 percent between 1995 and 2005.⁷ Even accounting for the increase in the number of channels, cable rates have risen by 70 percent since Congress deregulated cable prices in 1996, nearly two and a half times the rate of inflation.⁸ It is clear that consumers are badly in need of the price relief that competition in MVPD service from facilities based competition may bring.⁹

Cable industry comments that increased competition in the MVPD market makes program access rules unnecessary¹⁰ are without merit and should be rejected. Though cable's share of the MVPD market has declined slightly, it continues to dominate the market with two-thirds of all subscribers.¹¹ While DBS providers have enjoyed

⁶ Comments of Coalition for Competitive Access to Content (CA2C Comments) at 2; Comments of EchoStar Satellite LLC (EchoStar Comments) at 1; Comments of AT&T, Inc. (AT&T Comments) at 4; Comments of Broadband Service Providers Association (BPSA Comments) at 1-2; Comments of the American Cable Association (ACA Comments) at 3; *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 (hereinafter *Sunset of Exclusive Contract Prohibition*).

⁷ Federal Communications Commission, *Report on Cable Industry Prices*, MM Docket No. 92-266, FCC 06-179, ¶ 2.

⁸ Bureau of Labor Statistics, U.S. Department of Labor, CPI-U, US City Average, All Items and CPI-U, US City Average, Cable and Satellite Television and Radio Services. The CPI-U for cable factors in quality improvements due to increased channel offerings.

⁹ FCC, *Report on Cable Industry Prices*, ¶ 2. ("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.")

¹⁰ Comments of the National Cable and Telecommunications Association (NCTA Comments) at 3-7; Comments of Comcast Corporation (Comcast Comments) at 2; Comments of Cablevision Systems Corp. (Cablevision Comments) at 2; in *Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29.

substantial growth, with market share rising 10 percent from 2004 to 2005, the cable industry's market share has declined only slightly, from 71.6 percent in June 2004 to 69.4 percent in June 2005, a less than two percent decline.¹² CA2C notes that while DBS has gained more than 10 million subscribers since 2002, cable lost fewer than 1 million subscribers during that same time period.¹³ Moreover, as CFA, CU and Free Press have noted in other proceedings, additional evidence demonstrates that DBS has not become a full competitor to cable. DBS has a substantially different subscriber base, with its largest penetration in smaller, rural markets and cable has substantially more subscribers than DBS in the top eleven markets.¹⁴ Moreover, the presence of DBS in the marketplace does not provide sufficient competition to discipline prices to consumers.¹⁵ These facts make clear that DBS has not established itself as a true competitor to cable.

Additionally, the shares of MVPDs other than cable or DBS have declined.¹⁶ The limited entry of Verizon and AT&T in the MVPD market does little to change the market power of dominant cable incumbents or the need for strong, enforceable program access rules. As the Commission's own findings demonstrate, LEC entry into video markets is nascent, with franchises secured in only limited markets.¹⁷ For example, Verizon first launched its FiOS TV service only two years ago and, though its FiOS network is available in 16 states, it currently offers FiOS TV in parts of only seven states — California, Florida, Maryland, Massachusetts, New York, Texas and Virginia.¹⁸ As of last

¹¹ Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Twelfth Annual Report), FCC 06-11, MB Docket No. 05-255, ¶8.

¹² Id. The Commission itself has questioned the accuracy of these numbers, and sought further comment on its counting methodology. ¶¶ 2, 31-36. Since publication of the Twelfth Annual Report, several of the largest cable operators have reported increases in subscribership and a decline in “churn” as a consequence of offering video, voice and data (“triple play”) packages. But even accepting the modest decline in overall cable subscription as against overall DBS subscription given by the 12th Annual Report, the market does not reflect a shift from cable dominance.

¹³ CA2C Comments at 5.

¹⁴ Reply Comments of Consumer Federation of America and Consumers Union in Opposition to the Transfer of Licenses, *Applications of Adelpia Communications Corporation, Comcast Corporation and Time Warner Cable Inc., For Authority to Assign and/or Transfer Control of Various Licenses*, MM Docket No. 05-192, at 21-22.

¹⁵ FCC, *Report on Cable Industry Prices*, MM Docket No. 92-266, FCC 06-179, at ¶2; See also, Government Accountability Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, October 2003, GAO-04-8 at 9.

¹⁶ FCC, *12th Annual Report*, MB Docket No. 05-255, at ¶8.

¹⁷ Id., at ¶ 121-124

¹⁸ News Release, *Two More Communities in Chester County Grant Verizon Cable Franchises; Choice, Competition Nearer for Residents*, August 10, 2006, <http://newscenter.verizon.com/kit/fiber>.

year, its video service passed fewer than 3 million homes,¹⁹ or less than 3 percent of all TV households, and in just over 100 franchise areas.²⁰ AT&T notes that its fiber-based video service U-Verse has only 10,000 subscribers to date.²¹ Anecdotal reports suggest that LEC success in attracting subscribers has been and will continue to be limited.²² Even if Verizon achieves its goal of passing 6 million homes with its video service by the end of 2007,²³ constituting less than six percent of TV households, its uptake rate will be far lower than that. Such limited *potential* competition does little to mitigate the market control of cable incumbents. Cable prices have continued to rise even in markets the LECs have entered, strongly suggesting that MVPD competition remains restrained.²⁴ And even limited competition from local exchange carriers in some markets does nothing to mitigate cable incumbents' power in markets where the LECs do not now, and do not plan to, offer their video services. The potential for such modest competition from fledgling MVPDs provides little grounds for eliminating long-standing program access rules that have proven necessary to protect even those MVPDs that have substantially larger market share.²⁵

In addition, regional clustering by dominant cable incumbents has expanded dramatically since the Commission considered program access rules in 2001. In 2000, three quarters of cable subscribers were located in regional clusters, up from one-third in 1994. The license transfers in the Adelphia/Time Warner/Comcast transaction, approved in 2006, drove that number to 85-90 percent.²⁶ We concur with commenters that the growth in regional clustering exacerbates competitive carriage concerns by giving

¹⁹ Comments of Verizon, *Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, at 4.

²⁰ <http://newscenter.verizon.com/kit/fiber>.

²¹ AT&T Comments at 4-5

²² See, e.g., David Lieberman, *Verizon, Cablevision skirmish as war nears*, USA Today, August 24, 2006. ("Cablevision says it's unfazed, with FiOS getting only 2% of potential customers in Cablevision markets where it has been offered for at least six months.'Verizon is not taking subscribers from us,' COO Tom Rutledge told analysts this month. 'I don't believe they're taking significant numbers from satellite, either.'")

²³ FCC, Twelfth Annual Report, at ¶124.

²⁴ Bernstein Research, *Comcast 2007 Expanded Basic Video Price Increases Running at 5.4%*, Nov. 29, 2006 (analyzing announced 2007 Comcast price increases in 12 markets) ("We believe Comcast's willingness – and ability – to continue taking sizable price increases is a signal that competitive intensity in the pay TV market remains restrained... We think [Comcast's] willingness to take the price increases is a signal that, at least in many markets, Comcast is feeling less competitive intensity than many investors believe.")

²⁵ See, e.g., EchoStar Comments at 14-15, Table 3; BPSA Comments at 16.

²⁶ Comments of Consumer Federation of America, Consumers Union and Free Press, *In the Matter of the Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules*, (Cable Ownership Proceeding), MM Docket No. 92-264, at 24.

dominant incumbents the incentive to dominate regionally important programming.²⁷ As CU, CFA and Free Press comments in earlier filings noted, clustered systems give incumbents more muscle to thwart competition.²⁸ Moreover, cable's market dominance through clustering continues to give it leverage to secure ownership interest in unaffiliated cable channels. Programmers unaffiliated with cable or national broadcast networks face significant barriers to carriage. Without carriage on the leading MVPDs, Time Warner and Comcast, independent channels cannot succeed.²⁹ Those comments noted that just under 90 percent of the networks that have achieved carriage on systems that pass 50 million or more homes are affiliated.³⁰ Affiliated programmers are nine times as likely to gain carriage as independent programmers.³¹ As leading MVPDs leverage the power derived from clusters to favor and increase their carriage of affiliated programming, program access rules remain essential to protect competitors.

We concur with commenters that the potential competition provided by new entrants only increases the incentive of dominant cable incumbents to deny program access.³² Where cable companies are able to deny program access to essential regional programming due to the terrestrial loophole, they have done so.³³ While new competitors may have an incentive to offer new programming not offered by the incumbent to provide service differentiation, to attract existing cable subscribers they must be able to offer the must-have programming offered by their competitor as well as additional services and improved quality. Where that programming is owned by the cable competitor, that competitor has a powerful incentive to deny carriage to prevent subscriber loss.

However, we reject Comcast's argument that access to "must-have" programming rather than affiliated programming is the issue.³⁴ We agree that program access rules

²⁷ CA2C Comments at 17-18.

²⁸ Comments of Consumer Federation of America, Consumers Union and Free Press, *Cable Ownership Proceeding*, MM Docket No. 92-264, at 26.

²⁹ Comments of Consumer Federation of America, Consumers Union and Free Press, Applications of Adelphia Communications Corporation, Comcast Corporation and Time Warner Cable Inc., for Authority to Assign and/or Transfer Control of Various Licenses (*Adelphia Transaction*), MM Docket No. 05-192, at 30; see *Twelfth Annual Report* at ¶173 ("The America Channel argues that carriage by both Comcast and Time Warner is essential for survival of advertiser-supported networks and that denial of carriage by either of these MSOs impacts a network's ability to procure funding and the minimal carriage necessary for market entry.")

³⁰ Comments of Consumer Federation of America, Consumers Union and Free Press, *Adelphia Transaction*, MM Docket No. 05-192, at 28-29.

³¹ *Id.*

³² AT&T Comments at 3.

³³ CA2C Comments at 15-16.

³⁴ Comcast Comments at 24.

applied to must-have programming affiliated with cable providers is essential, but it is not sufficient to increase competition in the MVPD market generally and make programming available to consumers who might not otherwise have access to it, as directed by Section 628 of the 1934 Communications Act. Achieving that goal requires access to all programming, essential or otherwise. Though denial of must-have programming raises competitive concerns for MVPDs competing head-to-head with incumbents that dominate regional markets, denial of access to *any* affiliated programming would frustrate the goals of the act to expand diversity of programming to consumers outside of the cable operators' market, to promote competition in programming generally and to prevent collusion among unaffiliated, non-competing but dominant distributors to limit penetration of non-incumbents in their respective markets

Moreover, the fact that the Act does not comprehensively prohibit exclusivity for all regionally important programming (by excluding DBS-affiliated programming from the reach of the Act) demonstrates clearly that "must-have programming" was not the sole issue the Act intended to address. Comcast's assertion that the application of the exclusivity provision is fraught with inconsistencies³⁵ is based on a misreading of the Act. It may be that Congress will, in the future, consider whether to extend program access rules to DBS-affiliated content, but its failure to do so to date cannot justify sunseting program access rules for MVPDs where anti-competitive concerns Congress sought to address remain as relevant today as when they were first enacted.

In addition, vertical integration of dominant incumbents into programming remains a significant competitive concern. NCTA's assertion that as a percentage of all channels, cable's ownership of programming has declined³⁶ tells the Commission little about the influence of the programming owned by cable distributors. The CA2C noted that the cable industry continues to control a critical mass of "must-have" programming that if denied to competitors, either actually or constructively, will harm competition from non-incumbents.³⁷ We concur. Comments submitted by CFA, CU, and Free Press during the Commission's consideration of horizontal and vertical ownership limits noted that popular programming accounts for the vast majority of cable viewing. The top two dominant cable companies, Time Warner and Comcast, were among the seven dominant owners of the most popular cable programming.³⁸ As the Commission noted, today, 3 of the top 15 national non-broadcast *prime-time* networks are owned by cable companies and six of the top 20 non-broadcast networks (ranked by subscribership) are vertically integrated with a cable operator.³⁹ In 2001, that number was only slightly higher — 9 of

³⁵ Comcast Comments at 24-25. Comcast asserts that the "current application of the exclusivity prohibition is fraught with inconsistencies" because it prohibits exclusivity for programming owned by cable companies that lacks significant audience share, but does not reach programming owned by DBS providers.

³⁶ NCTA Comments at 5.

³⁷ CA2C Comments at 4.

³⁸ Comments of Consumer Federation of America, Consumers Union and Free Press, *Cable Ownership Proceeding*, MM Docket No. 92-264, at 43.

the top 20 non-broadcast networks⁴⁰ — demonstrating that cable's vertical integration into must-have programming remains necessary to promote and protect competition.

Looking at a larger universe of programming, the Government Accountability Office found that cable operators are majority owners of one-fifth of the top 90 national networks.⁴¹ GAO found that only 20 percent of those channels did not have at least some ownership by cable companies.⁴² Though somewhat dated, these findings provide strong support for Commission analysis of continuing necessity of program access rules based on the *type* of programming owned by cable operators, not their overall ownership share as a percentage of all cable channels. In addition, though the number of channels available on cable systems has increased from 92 in 2004 to 104 in 2006, the number of channels watched increased only marginally during that time period, from 15 to 15.7, and the percentage of channels viewed actually declined from 16.2 percent to 15.1 percent.⁴³ This suggests that for competition analysis relevant to program access rules, the metric of "most popular" matters, not on the percentage of total channels owned by vertically integrated distributors or on some arbitrary definition of "must-have."

Thus, we support extension of program access rules for at least an additional five years and oppose any modifications to the rules that would limit its application to certain types of programming or certain competitors. The Commission should reject proposals to exempt smaller cable operators, competitors exceeding a threshold of subscribers or time-in-market, highly-resourced potential competitors, programming other than regional sports networks, programming in markets where some competition exists. Not only does the record lack an evidentiary basis for concluding these exemptions are warranted, granting them would thwart the intent of Congress to promote and protect competition in the MVPD market.

Further, we endorse the recommendations put forth by the CA2C, the Broadband Service Providers Association, Echostar Satellite LLC and others for improvements in program access complaint procedures.⁴⁴ In order for program access rules to promote competition and diversity of programming, complaint procedures must provide for timely resolution of complaints and meaningful tools, including arbitration, to ensure that programmers affiliated with cable providers negotiate with competitors for program access in good faith. The Commission has previously recognized the value of binding arbitration as a meaningful remedy in resolving program access disputes.⁴⁵ The

³⁹ FCC, Twelfth Annual Report, at ¶21

⁴⁰ FCC, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report, CS Docket No. 01-129, FCC 01-389, at ¶ 159

⁴¹ GAO, *supra* note 14, at 27.

⁴² *Id.*

⁴³ News Release, *Average U.S. Home Now Receives A Record 104.2 TV Channels, According to Nielsen*, Nielsen Media Research, March 19, 2007.

⁴⁴ CA2C Comments, at 21-25; BPSA Comments at 7-14; Echostar Comments at 24-28.

availability of arbitration not only allows for timely resolution of complaints but also creates an incentive for good-faith negotiation by all parties.

We also support proposals for expedited Commission consideration and resolution of program access complaints under tight deadlines and additional evidentiary tools that will allow complainants to initiate discovery. Relief denied through procedural delays and inadequate data is competition denied to consumers. We reject cable commenters assertions that antitrust laws are sufficient to protect competitive MVPD providers from anti-competitive practices. Antitrust actions are time consuming, taking years to resolve, during which time competition will have been stifled. Such a remedy would delay competition even more than the existing glacial complaint resolution process.

We urge the Commission to extend program access rule for a minimum of an additional five years, to reject the exceptions to the rules proposed by cable incumbents and to adopt procedural reforms that will make existing program access rules meaningful and effective. The Commission should be mindful that despite the obvious benefits of program access rules to new entrants and existing competitors, the ultimate beneficiaries of strong and meaningful rules are consumers who have been held hostage by the monopolistic, anti-competitive practices of the dominant cable incumbents that thwart competition and reduce consumer choice.

Respectfully Submitted,

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⁴⁵ Federal Communications Commission, *Application for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, et al, Memorandum, Opinion and Order*, 21 FCC Rcd 8203 (2006), MB Docket No. 05-192, FCC 06-105, at ¶109, 190-91 (adopting a condition to permit the use of commercial arbitration to resolve disputes about commercial leased access, and commercial arbitration similar that imposed in the *News Corp.-Hughes Order*, for use by any RSN unaffiliated with any MVPD that has been denied carriage by Comcast or Time Warner).