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

REPLY COMMENTS OF AT&T INC.

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AT&T Inc. ("AT&T") respectfully submits these reply comments pursuant to the Commission's Notice of Proposed Rulemaking released February 20, 2007, in the above-captioned proceeding.[1]

Introduction and Summary

In its opening comments, AT&T demonstrated that the twin factors justifying the Commission's 2002 extension of the limit on exclusive contracts by cable-owned programmers remain equally applicable today. First, cable operators continue to own "must have" programming that they have the ability to use as a weapon to forestall entry by their MVPD competitors. TNT, Discovery, TBS, C-SPAN, and other cable-owned basic networks remain at the top of any list of "must have" programming, and subscribers place increasing value on other cable-owned programming as well – premium programming like HBO, VOD services like

[1] Notice of Proposed Rulemaking, *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, FCC 07-7 (rel. Feb. 20, 2007) ("NPRM").

iNDEMAND, services targeting important demographic groups like PBS Kids, and cable-owned regional sports networks. Second, cable operators continue to have the incentive to – and, importantly, do – make effective use of that weapon. In fact, as AT&T noted, the case for extension today is in many ways even more compelling than it was in 2002, as new video providers are poised to enter the market to provide consumers with broader choice across a range of services. In particular, the prospect of competition from telco video providers, with their tremendous potential as broadband *and* video alternatives to cable, has dramatically increased the economic incentives for cable incumbents to clamp down on attractive programming and shut out this new source of consumer choice.

Not surprisingly, the only commenters to suggest otherwise are NCTA and two cable MSOs. But in singing the virtues of exclusivity or denying the existence of "must have" programming, these commenters simply recycle arguments the Commission rejected in 2002, and that Congress rejected in adopting Section 628 in 1992. Indeed, the only valuable insight these arguments provide is to show that cable incumbents have every intention of denying key programming to their nascent competitors if the Commission were to permit them to do so.

Commenters also generally agree with AT&T that the Commission should implement procedural reforms to make Section 628 a more effective deterrent to anticompetitive conduct by cable incumbents. These reforms include a firm and short deadline for resolving program access complaints, and reliance on the kind of tried and true discovery, pleading, and decision making process implemented by the Commission in enforcing other provisions of the Communications Act, under the formal complaint procedures administered by the Enforcement Bureau.

Argument

As shown below, the facts of record since the Commission's last consideration of this question in 2002 provide substantial support for AT&T's showing that Section 628's limit on exclusivity by cable-owned programmers remains, by any legal standard, "necessary" to "preserve and protect" competition and diversity in the MVPD market.[2] Indeed, given the mandate of Section 628 "to spur the development of communications technologies"[3] and the emerging deployment of such new broadband technologies by AT&T and others, extending that limit is an even more critical public interest mandate today than it was five years ago.[4]

I. CABLE INCUMBENTS STILL HAVE THE ABILITY TO FORESTALL NEW ENTRANTS BY DENYING THEM "MUST HAVE" PROGRAMMING.

The record contains overwhelming evidence that, as AT&T showed in its opening comments, cable incumbents continue to own "must have" programming at both the regional and national levels – programming that consumers demand from their video providers, and is thus key to the development of alternative platforms.

Regional sports networks. There is virtually no dispute that cable incumbents' control of "must have" regional sports programming gives them the ability to deprive new entrants of

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2 47 U.S.C. § 548(c)(2)(D).

3 *Id.* § 548(a).

4 Thus, just as was the case in 2002, it is irrelevant whether the Commission defines Section 628's use of the word "necessary" to mean "indispensable" or "essential," notwithstanding the considerable energy all three cable commenters expend in trying to promote such stringent readings of the term. There is no definition that would disqualify the rule at issue. Notably, however, since the Commission's 2002 decision, two different courts of appeals have upheld much broader and looser definitions of the term "necessary," even in the context of the pro-competitive mandates of the 1996 Act. *See Cellco Partnership v. FCC,* 357 F.3d 88, 97 (D.C. Cir. 2004) (noting that "necessary" does not always mean "indispensable" or "essential"); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390-95 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005) (upholding a standard under which "necessary" means "convenient, "useful," or "helpful"). And the rule at issue in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 374, 378 (1999), cited by Comcast, has been defined to include as "necessary" any element whose unavailability "precludes [the carrier] from providing the services that it seeks to offer," 47 C.F.R. § 51.317(a)(1), a test that Section 628's protections for must have programming would clearly meet.

program offerings critical to their ability to attract subscribers.[5] Comcast concedes that it has financial interests in eight regional sports networks ("RSNs"): Cable Sports Southeast, Comcast SportsNet Philadelphia, Comcast SportsNet Mid-Atlantic, Comcast SportsNet Chicago, Comcast SportsNet West, SportsNet New York, Fox Sports New England, and Comcast Local (Detroit).[6] And after the Commission's exhaustive analysis on this subject in the recent *Adelphia Order*,[7] there can be very little doubt on the market impact withholding such programming may have.

Only Cablevision seeks to deny the obvious, asserting that "RSNs are not 'must have' programming."[8] Its claim is belied by cable operators' own conduct. As DIRECTV, Verizon, and RCN all showed, Cablevision and other MSOs enter into "cable only" exclusives, or otherwise refuse to negotiate RSN programming deals with competing MVPDs, precisely because the programming *is* uniquely attractive to subscribers.[9] And as AT&T showed, MSOs like Cox openly trumpet the exclusive rights to RSN programming that help them beat back competing MVPDs.[10] That strategy is effective precisely *because* RSN programming *is* "must have": as RCN's survey of its own subscribers found, between 40% and 58% of them would

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5 *See, e.g.,* OPASTCO & ITTA Comments at 5-6; NTCA Comments at 4; RCN Comments at 4; Verizon Comments at 9.

6 Comcast Comments at 13 & n.39.

7 Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp. (and Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable, Inc., et al.*, 21 FCC Rcd 8203 (2006) ("Adelphia Order"); *see, e.g.,* AT&T Comments at 15-18.

8 Cablevision Comments app. B at 21 (declaration of Dr. Scott Wallsten) ("Wallsten Declaration").

9 DIRECTV Comments at 9-10; Verizon Comments at 12-13; RCN Comments at 10.

10 AT&T Comments at 17-18.

refuse to abandon the cable incumbent if a new entrant did not carry such local sports programming.[11]

Cablevision's argument that the *reason* for this "inelastic" demand is the "scarcity" derived from "the sports leagues or teams"[12] is wholly immaterial. The point here is that where a team has attracted a loyal following, the availability of *other* sports programming, featuring other teams, is no substitute in seeking to attract prospective customers. In other words, as AT&T, the Commission, and others have found, for subscribers in a particular market, a particular team's programming *is* a must-have, powerful tool for a new competitor.[13] Thus, as the Commission also found in the *Adelphia Order,* DBS subscription is lower in Philadelphia where Comcast has refused to provide RSN access.[14] Cablevision's suggestion that DBS's relatively low subscribership in markets where it has been denied access to RSN programming may instead be attributable to unique local factors such as signal quality, foliage coverage, or terrain characteristics[15] is both unsupported and implausible: it is inconsistent with the Commission's findings and with the views of local subscribers that supported those findings.[16]

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[11] RCN Comments at n.27.

[12] Wallsten Declaration at 21.

[13] *See, e.g.,* Comments of AT&T at 16, quoting Memorandum Opinion and Order, *General Motors Corp. and Hughes Electronic Corp.*, 19 FCC Rcd 473, 535 ¶ 133 (2004) ("sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game") and the *Adelphia Order*, Separate Statement of Chairman Martin, 21 FCC Rcd at 8365 ("In North Carolina, there is no substitute for Tarheel basketball.").

[14] AT&T Comments at 16 & n.55 (citing *Adelphia Order* at 8271 ¶ 149).

[15] Wallsten Declaration at 25.

[16] *See Adelphia Order*, Dissenting Statement of Commissioner Copps at 8367 ("I have heard from a lot of people residing in the City of Brotherly Love and I feel confident in saying they are not happy about this situation. ... You don't have to take my word for it – read

National programming networks. As USTelecom notes and AT&T explained, vertically integrated cable programming also continues to include "'brand name' news and entertainment networks and well-known 'niche' channels such as CNN, HBO, Discovery, Cinemax, E!, TNT, The Learning Channel, Cartoon Network, Court TV, and The Golf Channel."[17] Other comments confirm that access to these networks remains essential to successful implementation of competitive services. As NRTC puts it, "the 'must haves' remain just that."[18]

The cable incumbents continue to try to change the subject, arguing that the overall percentage of vertically integrated national programming networks has dropped since 2002.[19] This misses the point. As the Commission has found, cable programming is not a "fungible good;" it is a "highly differentiated product for which, in many cases, there simply are no good

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yesterday's *Philadelphia Inquirer*: 'Philadelphia is Exhibit No. 1 for what happens when a cable company uses must-have content to limit consumers' choice.'").

17 USTelecom Comments at 14; AT&T Comments at 10-14.

18 NRTC Comments at 7 (mentioning CNN, HBO, TNT, and Discovery); see also SureWest Comments at 3 ("no MVPD could survive without access to the most popular, 'must-have,' programming channels such as CNN, TNT and HBO."); Qwest Comments at 5 (mentioning CNN, HBO, TNT, iNDEMAND, and Discovery); RICA Comments at 3 (mentioning HBO, CNN, and the "various Discovery channels"); Verizon Comments at 8-9; DIRECTV Comments at 6-7; Echostar Comments at 2 (mentioning CNN, HBO, Discovery, TNT, and E!).

19 NCTA Comments at 5-6; Cablevision Comments at 19; Comcast Comments at 12. In another distraction, Comcast argues for sunset because Section 628 does not address other competitive problems that it alleges arise from "must have" programming owned by *non*-cable operators. *Id.* at 24-25. That question is irrelevant; here, the issue is whether *cable operators* continue to have the ability and incentive to forestall entry by their competitors. Although the argument of the American Cable Association about telcos' ownership of programming is premature, *see* ACA Comments at 8-9, Section 628(j) is intended to address that concern. 47 U.S.C. § 548(j).

substitutes available."[20] It thus is irrelevant that other new, non-integrated programming is now available, if the integrated networks remain "must have" programming that new entrants need in order to have a meaningful opportunity to compete.

Given that seven of the top 20 networks ranked by subscribership remain vertically integrated,[21] there is no question that this is the case. And while NCTA suggests (incorrectly) that the relevant analysis is the prime time ratings of vertically integrated networks, rather than their subscribership, the results ultimately are hardly different.[22] TNT has remained the *number one* prime-time rated cable network for every year since the Commission's 2002 order, and its share has increased every year since then.[23] Ranked by all-day ratings, there are now five cable-owned networks among the top 20 – including two of the top three.[24] Cablevision's own data also show that since 2002, the cumulative ratings of *each* of the cable operators' programming operations have *increased,* as they continue to take viewing hours away from broadcast television and niche cable services.[25] When coupled with RSNs, and with the increasingly valuable premium (HBO), VOD (iNDEMAND), and key niche audience (PBS Kids)

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20 Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12124, 12136-37, 12139 ¶¶ 28 (citing EchoStar comments), 34 (2002) ("2002 Order").

21 AT&T Comments at 12 & n.32.

22 In fact, more recent prime time ratings data than that provided by NCTA now adds Cartoon Network (as well as TNT, Discovery, and TBS) as among the top 20. *See* Kagan Research, LLC, *Economics of Basic Cable Networks - 13th Annual Edition* at 50 (2006) ("Kagan Report").

23 *Id.*

24 TNT, Cartoon Network, TBS, CNN, and the Discovery Channel ranked 2nd, 3rd, 7th, 19th, and 20th respectively in 2005. *Id.* at 51-52.

25 Wallsten Declaration at 16.

programming in which MSOs hold interests,[26] there is no question that cable incumbents continue to have the ability to deprive their emerging competitors of the "must have" programming the Commission has found that subscribers will demand.

II. CABLE INCUMBENTS HAVE DEMONSTRATED THAT THEY WILL WITHHOLD PROGRAMMING TO THE DETRIMENT OF NEW ENTRANTS AND OTHER MVPDS.

As the comments show, the cable incumbents have already demonstrated their intent to use "must have" programming effectively to deny nascent competitors the kinds of program offerings necessary to attract subscribers.[27] The incumbents have exploited the terrestrial loophole and otherwise sought to freeze out their DBS competitors, even as those providers have gained subscribers. The MSOs' conduct is likely to be even more aggressive and intense with respect to new telco video entrants, who stand to introduce not only especially effective video competition, but also broadband competition on all fronts. As to these new providers, cable incumbents' incentive to withhold attractive programming and thus preclude effective entry could not be stronger: the situation is more akin to what Congress foresaw when it first adopted Section 628 than it was even in 2002, when DBS had established an initial foothold.[28] Indeed, the intensity of cable incumbents' arguments in favor of exclusivity, before Congress and the

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26 *See 2002 Order* at 12156 ¶ 69 (HBO recognized to be "marquee programming"; iNDEMAND and other pay per view services also subject to exclusivity limit); AT&T Comments at 14-15 (describing RCN's need for and difficulties in obtaining PBS Kids programming following Comcast's investment in it).

27 AT&T Comments at 14-15, 18-21; RCN Comments at 11; Verizon Comments at 13.

28 As AT&T and DIRECTV pointed out, increased cable system regional clustering also increases cable incumbents' incentive to withhold programming. AT&T Comments at n.62; DIRECTV Comments at 10-11. Such clustering continues apace in response to telco entry. *See* Roger Cheng, *Comcast Buys NJ Cable Provider for $483M*, Dow Jones News Service, Apr. 3, 2007 (announcing acquisition of 81,000 subscriber system in central New Jersey).

Commission, makes plain their intention to expand their current exercise of exclusive programming lock-ups if given the chance.[29]

The cable incumbents are generally careful not to claim otherwise. Although Cablevision asserts that it would not find it profitable "in most cases" to withhold programming from DBS and the telcos,[30] that is precisely what Cablevision and other incumbents have repeatedly done.[31] Cable operators argue that their incentive to do so is reduced, since the number of customers served by incumbents has decreased over the past five years by about 10% of the overall MVPD marketplace.[32] But notably, the increased market share obtained by DBS operators since 2002 has *not* eliminated cable incumbents' incentives to deny them access to critical programming. That fact bodes poorly for all new wireline entrants, who have less than 1.9% share of MVPD subscribers today[33] and thus do not yet provide the prospects of the substantial revenues that might make MSOs share their programming. Although the cable companies argue that AT&T, Verizon, and Qwest have deployed in "hundreds of markets" as "formidable competitors" and

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29 *See, e.g.,* Cablevision Comments; Comcast Comments; *Vertically Integrated Sports Programming: Are Cable Companies Excluding Competition?* Hearing Before the S. Comm. on the Judiciary, 109th Cong. 42-44 (2006) (prepared testimony of David Cohen, Executive Vice President, Comcast).

30 *See* Cablevision Comments at 11.

31 *See, e.g.,* AT&T Comments at 16-18; Verizon Comments at 13; EchoStar Comments at 9-10; DIRECTV Comments at 10.

32 NCTA Comments at 4 (chart showing decline from 75.9% in 2002 to 66.9% in 2006); Comcast Comments at 8 (cable industry's share of the MVPD marketplace has dropped from 78% in 2002 to 67.8% at the end of 2006); Cablevision Comments at 2 (same).

33 *See* AT&T Comments at 4 (citing NCTA Comments, filed in MB Docket No. 06-189, Nov. 29, 2006, at 9).

that telcos hope in the future to offer video service to many millions of customers,[34] the reality is that telco entry is still a new phenomenon: AT&T currently has about 10,000 customers for its IP-video offering.[35] That, combined with the competitive threat new telco entrants' success would pose to cable incumbents video and broadband market positions, creates a serious risk of cable MSO abuse. This is far from speculation: AT&T and Verizon already have experienced the cold shoulder in trying to obtain regional sports programming from incumbent cable operators.[36] The incumbents plainly have every incentive to forego short term profits from providing programming to telco new entrants – and DBS providers – in the hopes of cementing subscribers and precluding meaningful competition.

III. CABLE INCUMBENTS' REMAINING ARGUMENTS IGNORE THE PURPOSES OF SECTION 628.

As the Commission recognized in 2002, Section 628(c)(5) is designed to "preserve and protect … diversity in the *distribution* of video programming,"[37] – i.e. "ensuring that as many MVPDs as possible remain viable distributors of video programming."[38] Section 628 is also intended "to spur the development of communications technologies."[39] As noted above, the exclusivity limitation is critical for both purposes: it will enable new telco entrants to become

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34 Comcast Comments at 8-9; Cablevision Comments at 13.

35 AT&T Comments at 5 & n.11.

36 *Id.* at 17 (Cox's refusal to deal with AT&T about access to its sports network carrying San Diego Padres games); Verizon Comments at 13 (Cablevision/Rainbow's refusal to negotiate carriage of regional sports networks in the New York metropolitan area and New England).

37 *2002 Order* at 12152-53 ¶ 62 (emphasis in original).

38 *Id.*

39 47 U.S.C. § 548(a).

viable competitors over new, multi-faceted broadband platforms; without the limitation, telco entry could be at serious risk.

In a last ditch effort to win the day, the cable industry suggests that other concerns should outrank these considerations. For example, Comcast and Cablevision claim that the availability of video through over-the-air television, videotape and DVD rentals and purchases, mobile devices, and the Internet renders Section 628 unnecessary.[40] But this is irrelevant to the statutory inquiry. Section 628 was designed to promote "new technologies providing *facilities*-based competition to cable."[41] The examples cited by the incumbents are not facilities-based, and are in any event either pre-existing services that did not dissuade Congress from enacting Section 628 in the first instance, or that, as Cablevision itself concedes, "are unlikely to be perfect substitutes for home video viewing in the short run."[42]

Cablevision and Comcast also argue at length about the benefits of exclusivity and vertical integration recognized by the antitrust laws.[43] But as the Commission recognized in 2002, the "primary focus" of Section 628 is the promotion of competition in video delivery *platforms* – not video programming *networks*.[44] With respect to the *platform* market, where "must have" programming is a unique, irreplaceable input,[45] Congress and the Commission

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40 *See* Comcast Comments at 9-11; Cablevision Comments at 14-15.

41 AT&T Comments at 7, quoting H.R. Conf. Rep. 102-862 at 93 (1992).

42 Wallsten Declaration at 10.

43 Cablevision Comments at 27-29; Comcast Comments at 13-18, 23-24.

44 *See 2002 Order* at 12152-53 ¶ 62.

45 The Supreme Court's opinion in *Continental T.V., Inc. v. GTE Sylvania Inc.* – cited by Comcast in support of the value of vertical restraints – is specifically premised on the value of such restraints for "interbrand competition," and in turn on the existence of such competition:

found, and the record here shows, that exclusive contracts are *anticompetitive,* serving only to *deter* new entry. And in any event, whatever benefits the incumbents may ascribe to exclusive contracts with respect to the development of *video programming* are addressed by the specific exception to Section 628 that permits exclusivity where necessary for the development of new programming on an appropriate showing.[46]

Cablevision and Comcast also argue that even if the exclusivity limitation is retained, it should no longer apply in a host of circumstances: to systems outside an MSO's footprint; to small MSOs; to MVPDs who have been in business for longer than five years; to MVPDs with more than 10 million subscribers; to new, low-rated, or regional non-sports programming; to MVPDs with significant market capitalization; or in a variety of other situations (where there are nonaffiliated regional sports networks, or both DBS and telco competitors).[47] The effect of such proposed exceptions is transparent. They would gut the rule precisely where it might be of use to competitors with a viable opportunity to offer consumers a real alternative to cable: those with experience, those with capital, and those with a foothold in the market. Although cloaked in

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"[W]hen interbrand competition exists, . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." 433 U.S. 36, 54-55 (1977). Here, by contrast, the "must have" programming owned by cable operators is, as the Commission has found, uniquely irreplaceable in the marketplace. "In North Carolina," as Chairman Martin has put it, "there is no substitute for Tarheel basketball." *See note* 13 *supra.*

46 *See* 47 U.S.C. § 548(c)(2)(D), (c)(4). Comcast's analogy to the Fin-Syn rules, *see* Comcast Comments at n.66, is well wide of the mark. Those rules "restrict[ed] the [broadcast television] networks' participation in programming." *Schurz Communications, Inc. v. FCC,* 982 F.2d 1043, 1052 (7th Cir. 1992). In contrast, the exclusivity limit in Section 628 simply requires cable operators to make their programming available to competing MVPDs, subject to this statutory exception.

47 *See* Cablevision Comments at 30-32; Comcast Comments at 26.

"competitive neutrality" or First Amendment "narrow tailoring" rationales,[48] these proposals, a number of which the Commission already rejected in 2002,[49] are designed to eliminate any utility in the exclusivity prohibition as a tool to promote concrete and successful competition, by allowing only the least competitively viable MVPDs to make use of the rule in the narrowest possible circumstances. Indeed, these arguments get the equation precisely backwards: it is when viable new entrants like the telcos are poised to gain a foothold in the market that Section 628 is most critical.[50]

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[48] *See, e.g.,* Cablevision Comments at 30. Requiring good faith negotiation on terms and conditions for access to a party's programming neither restricts nor compels any speech by that party. Indeed, as noted above Section 628 permits exclusivity where necessary for new programming on an appropriate showing, and the record indicates no dearth of new programming since enactment of this provision. Thus, as presently written and applied, the rule materially advances an important or substantial governmental interest. *See Satellite Broadcasters & Communications Ass'n v. FCC,* 275 F.3d 337, 356 (4th Cir. 2001), quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989).

[49] *See 2002 Order* at 12140, 12154-57 ¶¶ 37 & n.108, 66-70.

[50] Finally, there is no basis for Cablevision's suggestion that the Commission's 2002 order used up its one opportunity to extend Section 628. Comments of Cablevision at 5 n.13. The statute includes no such one-time limitation, but instead provides that so long as the Commission finds that the provision "continues to be necessary," the Commission should not permit it to automatically sunset. *See* 47 U.S.C.§ 548(c)(5). In 2002, the Commission so found. Cablevision's cramped interpretation would essentially penalize the Commission for taking the approach of limiting the prior extension to five years, subject to a review of the facts in 2007 – a procedure laid out in the 2002 order that Cablevision never questioned. Cablevision cites no authority for its new argument, which is at odds with its prior view that the sunset provision gives the Commission authority to take a more measured course. *See* Ex Parte Presentation of Cablevision, filed May 30, 2002 in CS Docket No. 01-290; *cf. Eldred v. Ashcroft,* 537 U.S. 186 (2003) (far longer set of repeated copyright law extensions did not violate constitutional "limited times" provision).

IV. THERE IS OVERWHELMING SUPPORT FOR STRENGTHENING THE ENFORCEMENT PROCEDURES FOR SECTION 628 VIOLATIONS.

As the comments show, something must be done to make the process for resolving program access complaints swifter and more definitive.[51] CA2C and SBA proposed a 120-day timeframe,[52] while USTelecom proposes three months for denial of programming disputes and six months for all other disputes.[53] But the marketplace demonstrates the critical importance of adopting three months as the maximum for all program access complaints. A new entrant seeking to obtain RSN programming, for example, could miss an *entire* season after a period of failed negotiations *and* a four-month, or longer, complaint process. As the statutory imperative for expedited review makes clear as well, time is of the essence, and a short and concrete deadline is a competitively neutral means of protecting all parties' rights. The Commission accordingly should impose the same 90-day deadline for program access complaints that applies to section 272 complaints under the Act.

Further, the record shows clear support for shoring up the rules governing program access dispute proceedings.[54] RCN, EchoStar, and CA2C support the need for discovery of all program contracts (subject to confidentiality),[55] although, as AT&T noted, the standard discovery rules

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51 Echostar Comments at 25-26, CA2C Comments at 21-22, SBA Office of Advocacy Comments at 7-8, Verizon Comments at 15-16, USTelecom Comments at 25-27.

52 CA2C Comments at 21-22; SBA Office of Advocacy Comments at 8 n.34.

53 USTelecom Comments at 25-27.

54 *See* SBA Office of Advocacy Comments at 8, RCN Comments at 20, Echostar Comments at 26-28, USTelecom Comments at 21-25, CA2C Comments at 22-24.

55 RCN Comments at 20 (rule that requires carriage contracts to be made available upon request of an MVPD and subject to confidential treatment under 47 C.F.R. § 76.9); CA2C Comments at 23-24 (same); EchoStar Comments at 27 (rule that requires provision of at least six

that allow parties to propound their own discovery should be sufficient, if strictly enforced. EchoStar also agrees with AT&T that the Commission's formal complaint rules could be applied to program access disputes.[56] These rules have been applied effectively to myriad disputes, and the Enforcement Bureau can bring its expertise to bear in applying them.

Contrary to Comcast's suggestion,[57] the relative dearth of complaints filed, and the incentives to settle them, do not indicate anything other than that the current Commission remedies provide too little, too late. Reliance on the established formal complaint mechanism that has been proven to be timely and effective in enforcing other provisions of the Act would ensure that telcos and other new entrants would be assured of prompt compliance with the requirements of Section 628, which still remain necessary to ensure the promise of competitive video and broadband markets.

Conclusion

The Commission has the opportunity in this proceeding to side with consumers and protect some of the most significant developments in video platform and broadband competition to emerge in decades. As Congress and the Commission anticipated, the pro-competitive, market-opening provisions of the 1996 Act finally have begun to bear fruit, as telecommunications providers have invested in new technologies and infrastructure capable of providing video and other broadband services to consumers in direct competition with entrenched cable incumbents. But that competition will surely whither on the vine if new telco

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carriage contracts for the network in question from both affiliated and nonaffiliated MVPDs with the answer).

56 EchoStar Comments at 27-28.

57 *See* Comcast Comments at 28.

entrants (as well as existing MVPDs) are denied access to the "must have" programming, including regional sports, that consumers demand. Allowing section 628's limitation on exclusivity to expire thus would deny consumers not only the price competition and programming diversity promised by the 1992 Cable Act, but also the benefits of new broadband services and advanced telecommunications capability promised by the 1996 Act. For these reasons and as set forth above, the Commission should extend the limitation of Section 628(c)(2)(D) for an additional five years, subject to review proceedings to be initiated within the one year period prior to the expiration of the additional five year period. The Commission should also provide for its resolution of program access complaints within 90 days and revise its rules to adopt for such complaints the established formal complaint procedures adopted to enforce other provisions of the Communications Act.

Respectfully submitted,

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