

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

In the Matter of)	
)	
Implementation of the Cable Television)	MB Docket No. 07-29
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)	

**REPLY COMMENTS OF
THE COALITION FOR COMPETITIVE ACCESS TO CONTENT (CA2C)**

CA2C members represented in these comments include: AT&T Inc., Broadband Service Providers Association (BSPA), DIRECTV, Inc., Embarq, Independent Telephone and Telecommunications Alliance (ITTA), Knology, Media Access Project (MAP), National Hispanic Media Coalition (NHMC), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), PrairieWave, RCN, SureWest, US Telecom, WOW! Internet, Cable and Phone.

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Dated: April 16, 2007

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The Coalition for Competitive Access to Content (“CA2C”) hereby submits these reply comments to those comments filed in response to the Notice of Proposed Rulemaking of the Federal Communications Commission (“Commission” or “FCC”) in the captioned proceeding.¹ In the *Notice*, the Commission seeks comment on whether the prohibition on exclusive contracts between vertically integrated satellite cable programming vendors and cable operators contained in Section 628(c)(2)(D) of the Communications Act of 1934, as amended (“Communications

¹ *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, FCC 07-7, MB Docket No. 07-29 (rel. Feb. 20, 2007)(“*Notice*” or “*NPRM*”).

Act”),² continues to be necessary to preserve and protect competition in the distribution of video programming, and should therefore be extended. The Commission also seeks comment on whether and how its program access dispute procedures should be modified.

INTRODUCTION AND SUMMARY

The overwhelming support filed in this proceeding for the further extension of the prohibition on exclusive contracts should make such further extension a very easy decision for the Commission. The arguments in opposition to the effect that the market is “fully competitive,” are predictable, add nothing substantively new, and are no more persuasive today than they were in 2002. Congress, the Commission, and all other parties filing in this proceeding are committed to preserve, protect, and develop competition. The program access provisions related to exclusive contracts have clearly contributed to these objectives and should be preserved.

1. Comcast, Cablevision and NCTA all assert that the current multichannel video programming distribution (“MVPD”) market is “fully competitive” primarily due to the growth of the DBS sector. As CA2C and other commenters have made clear, this assertion is both a misnomer, and, more importantly, misses the point. In the five years since the *Sunset Report and Order*, cable rates have far outstripped inflation and the market is still characterized by huge barriers to entry that have significantly impacted market performance. In response, the Commission is pursuing an aggressive strategy to remove those barriers, particularly to wireline entry, which has been shown to have a constraining effect on cable pricing. It would be truly ironic if at the same time the Commission were taking steps to facilitate entry into the MVPD market through removal of these barriers, it reintroduced what has historically been among the

² 47 U.S.C. § 548(c)(2)(D).

most significant barriers to entry in this sector – access to programming – by allowing the exclusivity prohibition to sunset.

2. There is no question that the exclusivity prohibition has supported the development of competition in the market, and there is no evidence that it has caused any harm.

3. While the cable industry has pointed to a decrease in the relative amount of programming subject to vertical integration, that is not the relevant measure. Rather, the absolute level of vertical integration, and the “must have” programming the cable industry continues to control, provides the cable industry today with the same fundamental ability to impair competition as it had in 1992, when the 1992 Cable Act was passed,³ and in 2002, when the exclusivity prohibition was extended.

4. While there may be situations where certain exclusivity arrangements may not harm competition or be consumer-welfare-enhancing, given the nature of this market, and the clear incentive and ability for cable operators to use exclusive arrangements to harm competition, Section 628 strikes the appropriate balance that such exclusive arrangements generally be prohibited, unless it can be shown that a particular exclusive contract is in the public interest.

5. Once again, the cable industry trots out the argument that if such exclusivity arrangements are anticompetitive, then competitors have a sufficient remedy under the antitrust laws. Of course, this argument fairs no better now than it did in 1992 when Congress rejected it.⁴

³ Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁴ See S. Rep. No. 92, 102d Cong., 1st Sess. 28 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161 (noting the importance of program access procedures to expedited relief without the imposition of undue cost, and the cost and delay associated with antitrust suits). Prior to enactment of the 1992 Cable Act, antitrust suits challenging exclusive arrangements involving programming met with little success, and we are aware of only a single program access antitrust suit that survived even a motion to dismiss, regardless of whether plaintiffs argued that particular

6. Recommendations to change the application and scope of the Program Access rules as proposed by Comcast and Cablevision should be rejected as utterly self-serving proposals intended to strip from the exclusivity prohibition any meaningful application or protection.

7. The fact that the rules do not address all current program access issues does not in any way diminish the value and need to extend the sunset of the exclusivity prohibition given their proven benefit to competition.

8. The exclusivity prohibition not only facilitates MVPD competition but also is critical for the development of broadband deployment and competition.

9. Contrary to assertions by certain Commenters, the Commission has clear authority and discretion to establish procedures for adjudicating program access complaints, and we continue to encourage the FCC to adopt a 120-day deadline for resolving program access complaints, and ensure that parties are able to obtain access to programming contracts necessary to the resolution of discrimination claims.

I. GIVEN THE CURRENT STATE OF THE MARKET, THE COMMISSION MUST CONTINUE TO PURSUE POLICIES TO SUPPORT COMPETITION AND ELIMINATE BARRIERS TO ENTRY IN VIDEO DISTRIBUTION.

The fundamental issue in this proceeding turns on the continued, and indeed renewed, importance of policies that both sustain current levels of competition and foster additional competition to incumbent cable operators. The comments of Comcast, Cablevision, and NCTA to the effect that the MVPD market is “fully competitive” hope to obscure the stark reality that, in markets around the country, particularly in the emerging regional clusters that they have been assembling over the past 5 years, cable operators dominate. Such regional market shares are

programming was an “essential facility” or that such exclusive arrangements were illegal exclusive dealing contracts.

highest in situations where incumbents do not face a wireline competitor, and can range from 65 to 90% share of MVPD subscribers, with sustained price increases at nearly 3 times the rate of inflation. The whole notion of “full competition” is simply a misnomer. What is clear is that the Commission, as it has rightfully done, must continue to pursue policies that create conditions to support existing and expanded competition to incumbent cable operators. Preventing the cable industry from using its control over programming, in this case through exclusive contracts, is a key condition for competition in the industry, and for this reason alone the exclusivity prohibition should continue in force.

II. THE EXCLUSIVITY PROHIBITION HAS BEEN SUCCESSFUL AND NECESSARY, AND HAS CAUSED NO HARM.

Every competitor or party committed to sustaining or bringing additional competition to the market has attested to the critical need for the prohibition on exclusivity in Section 628. At the same time, the cable industry has adduced no substantive evidence that the historical application of the rules has had any negative effect on competition, cable investment, or the development of programming by either the cable industry or others.

Rather, incumbent cable operators have continued to invest in the development of programming and the cable industry continues to acquire interests in existing programming services. These same incumbent cable operators have enjoyed unprecedented financial success in the period since the 2002 extension, and have been able to invest over \$100 billion in network upgrades over the past 10 years.⁵ In addition, the last two years have seen unprecedented new potential wireline entry by telephone companies and others, all of which rely on the exclusivity

⁵ NCTA Comments at 1. Unless otherwise noted, all comments cited herein are to comments filed in the instant docket.

prohibition to ensure their access to programming affiliated with cable operators that is essential to compete. Now is not the time to take away a narrowly-tailored prohibition that is a proven success.

III. ACCESS TO CABLE-CONTROLLED, MUST-HAVE PROGRAMMING REMAINS AS CRITICAL TODAY AS IT WAS IN 1992.

While the cable industry notes that its overall percentage of programming has been on a downward slope, that is simply not the issue at hand. The critical issue is the absolute amount and type of programming controlled by incumbent cable operators. This absolute ownership position is fundamentally unchanged from 1992 and 2002. The cable industry still controls marquee or “must have” programming for which there is no equivalent, and to which access is essential for both existing and new competitive MVPDs. So long as incumbent cable operators with ownership interests in essential content can use that programming to sustain market shares and contain or block competition, assured access to such content will be required, and the exclusivity prohibition must be continued.

Like the proverbial fox in the henhouse, the cable industry argues that it would never use access to programming to harm competitors. For example, Cablevision asserts, “There is no logical or empirical basis for presuming that a vertically-integrated cable programmer has the incentive to use exclusivity in order to foreclose competition from rival MVPDs outside the footprint of the programmer’s distribution affiliate.”⁶ And Comcast notes, that “it is anomalous that Cable Company X cannot have an exclusive agreement for programming that is owned by Cable Company Y. . . . Absent evidence of collusion, . . . there is no reason for prohibiting an exclusive arrangement in that situation while permitting it in the case of programming that is not

⁶ Cablevision Comments at 31.

vertically integrated.”⁷

These self-serving statements fly in the face of the market reality that competitors face daily. The level of cooperation and mutual support over programming distribution among cable incumbents, who have never competed with each other and have no intention of doing so, is undeniable. iN DEMAND is a prime example. Time Warner, Comcast, and Cox Communications jointly own this content company. Without question, iN DEMAND has pursued strategies involving the establishment of proprietary or exclusive content, has offered that content to all non-competing cable incumbents, but tried to deny service to any competitors to incumbent cable. Historically, competitive MVPDs have had to fight for access to expanded iN DEMAND services even though they had established effective business relationships for historical or existing services.

Broadband Service Providers (“BSPs”) were the first MVPDs to offer video on demand (“VOD”) services. The introduction of VOD services by BSPs validated the technology and consumer demand, but failed due to lack of access to relevant content. When major incumbent MSOs entered the VOD market, they used iN DEMAND as their VOD service company, given its existing ability to access content as part of its pay-per-view business.

Because iN DEMAND services are delivered terrestrially to a head-end facility and stored for future delivery to consumers, the cable industry has taken the position that iN DEMAND’s services are not satellite programming subject to Section 628. Thus, when iN DEMAND first launched service, it declined to provide VOD service to BSPs that competed with incumbent cable operators. However, after meetings with the Antitrust Subcommittee of the Senate Judiciary Committee, this policy position was reversed, and iN DEMAND began

⁷ Comcast Comments at 25.

offering VOD service to BSPs.

Still, iN DEMAND continues to seek opportunities to deny service to competing wireline competitors. The most recent example involves Hiawatha Broadband, a small Minnesota-based competitive rural MVPD, which has been denied access to iN DEMAND purportedly based on the distribution technology it is using in parts of its network deployment.

The importance of the iN DEMAND experience is that it shows how, when cable-controlled programming is outside the program access regime, foreclosure and denial of access strategies are both capable of repetition yet evade review and detection. Such market behavior provides clear examples of how incumbent cable operators will pursue exclusive content if permitted to do so, and what can be expected with respect to programming currently subject to the exclusivity prohibition if that prohibition were allowed to sunset.

Finally, Comcast's argument that under the program access regime, competitors get a 'free ride'⁸ on cable content investment, likewise has no basis in reality. Cable operators invest in program development, sell their programming, in some instances at a premium price, and it is certainly not "free." The idea that program access results in competitors getting a free ride is ludicrous.

IV. RECOMMENDATIONS TO CHANGE THE APPLICATION OF THESE RULES AS PROPOSED BY COMCAST AND CABLEVISION SHOULD BE REJECTED.

Recommendations proposed by Comcast and Cablevision should be rejected as utterly self-serving proposals intended to strip the extension of these rules of any meaningful impact. Comcast has recommended that the program access rules, if extended, should not be available to the following competitors:

⁸ Comcast Comments at 16, 20.

1. Any company with over 10 million subs.⁹ (DIRECTV and Echostar)
2. Any company with over \$100 billion capitalization.¹⁰ (AT&T and Verizon)
3. Any company with 5 years of operation.¹¹ (RCN, Knology and most other BSPs)

In other words, Comcast proposes that if the exclusivity prohibition is to be extended, then the Commission should at the same time ensure that the rules have no application to any significant competitor Comcast faces, i.e., Comcast's proposal is to extend the rules, but make sure they are meaningless.

Cablevision has recommended the following:

1. No exclusivity prohibition on smaller MVPDs.¹² (Presumably would not apply to Cablevision.)
2. No exclusivity prohibition if the incumbent is facing both DBS and telephone company- based competition.¹³ (As soon as a telephone company such as Verizon, AT&T or any other, starts any level of service the rules no longer apply, even if they have just begun service to a limited number of customers.)

Like Comcast's proposal, Cablevision's proposal would eliminate application to any significant competitor Cablevision might face, again making sure the rules are meaningless. The Commission should recognize and reject these proposals for what they are: self-serving attempts to dilute all potential benefit that the rules offer.

⁹ Comcast Comments at 26.

¹⁰ *Id.*

¹¹ *Id.*

¹² Cablevision Comments at 31.

¹³ Cablevision Comments at 32.

V. **THESE RULES DO NOT ADDRESS ALL PROGRAM ACCESS ISSUES BUT THEY MUST BE EXTENDED TO SUPPORT BOTH VIDEO COMPETITION AND BROADBAND DEVELOPMENT.**

NCTA has argued that these rules should sunset because they do not cover all current program access issues and are therefore insufficient.¹⁴ This is yet another argumentative feint. That there may be program access issues that transcend the narrow question at issue in this proceeding does nothing to alter the inescapably appropriate conclusion that the FCC should extend the exclusivity prohibition for a reasonable period of time. The Commission has clearly recognized that there are program access issues that go beyond the scope of Section 628 of the Communications Act, as evidenced in its recent decision in the Adelphia transaction ensuring access to regional sports programming.¹⁵ The CA2C also recognizes that there are program access issues that may be beyond the scope of Section 628, that parties will need to address in other fora. The fact that such is the case, provides no support for the notion that the exclusivity prohibition should not be extended until all outstanding issues are resolved. To the contrary, the exclusivity prohibition must remain in force as parties continue to pursue alternatives to current deficiencies in the program access regime.

In addition to the development of video competition, a paramount federal objective today is to promote the rapid deployment of broadband facilities. Congress has embodied this policy in Section 706 of the Communications Act, the President has specifically established an aggressive

¹⁴ NCTA at 8.

¹⁵ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (“*Adelphia Order*”).

policy of encouraging widespread deployment of broadband networks by 2007,¹⁶ and the Commission has repeatedly reiterated that its priority is eliminating regulatory impediments to broadband infrastructure deployment.¹⁷ This was recently reaffirmed in writing and oral testimony on March 14, 2007 during the FCC oversight hearing before the House Commerce Committee, where all five FCC Commissioners addressed the need and national priority to develop broadband networks and restore our national competitiveness in this vital area.

As we stated in our filed comments, the link between broadband penetration and video services has been demonstrated for both rural and urban markets. When bundled together, customers tend to buy more of both, making broadband deployment economically more feasible in more areas. Denied access to “must have” video content that is controlled by incumbent cable operators will have a direct and adverse effect on broadband deployment. As the Commission has recognized, broadband deployment and video entry are inextricably linked – wireline broadband providers cannot justify the massive investments necessary to make advanced telecommunications services available without the protections provided by the program access rules that assure content for a viable video service offering.¹⁸ Policies that support the

¹⁶ See Speech of President Bush, Mar. 26, 2004, available at http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html (“We ought to have . . . universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to [their] broadband carrier”).

¹⁷ See, e.g., *Matter of IP-Enabled Servs.*, NPRM, 19 FCC Rcd 4863, 4865 (2004) (“*IP-Enabled Services NPRM*”) (“we have recognized the paramount importance of encouraging deployment of broadband infrastructure to the American people”); *Matter of Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Sys.*, Report and Order, 19 FCC Rcd 21265, 21271 (2004) (“The deployment of broadband delivery capabilities to provide all Americans with access to affordable high speed Internet and data services is one of the most important challenges currently facing the Commission and the communications industry”); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and NPRM, 20 FCC Rcd 14853, 14900-901 (2005) (“[o]ur primary goal in this proceeding is to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband”).

¹⁸ See 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, FCC 06-180, MB Docket No. 05-311 (rel. March 5, 2007) at ¶ 51 (noting that broadband

investment and successful deployment of next generation networks will positively affect the development of both video competition and broadband deployment. Accordingly, effective implementation of federal broadband and video competition policies requires a further extension of these rules.

VI. AS THESE RULES ARE EXTENDED THE COMMISSION SHOULD ALSO IMPROVE THE PROCEDURES RELATED TO ENFORCEMENT.

CA2C submits that the Commission should both strengthen and clarify procedural rules related to the time to resolve a complaint and discovery available to the parties. Program access issues are very time sensitive and they can have immediate impacts on consumers, market position and financial performance. CA2C therefore urged that the Commission impose a 120-day deadline for resolution of a program access complaint. A critical aspect to resolve any complaint will be having timely access to the information contained in relevant confidential contracts. The Commission has full authority and adequate procedures to protect the confidentiality of this information and there should be an expected and timely provision of this information in connection with program access complaint proceedings.

deployment and video entry are “inextricably linked,” that barriers to entry of video services – in that case the franchising process – “necessarily hampers deployment of broadband services,” that broadband deployment is not profitable without the ability to compete with the bundled services that cable companies provide, and noting the increased likelihood of network build out to the home the greater the potential revenues the network can generate).

CONCLUSION

WHEREFORE, the Coalition for Competitive Access to Content urges the Commission to find that the exclusivity prohibition in Section 628(c)(2)(D) of the Communications Act, 47 U.S.C. § 548(c)(2)(D), continues to be necessary to preserve and protect competition in the distribution of video programming, and respectfully requests that the Commission extend the prohibition for at least an additional five years and strengthen its procedures related to the time to resolve a complaint and discovery.

Respectfully submitted for:

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By: /s/_____

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