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: SUNSET OF EXCLUSIVE CONTRACT PROHIBITION	MB Docket No. 07-29

FURTHER COMMENTS OF DIRECTV, INC.

William M. Wiltshire
Michael Nilsson
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, Inc.

Susan Eid
Senior Vice President, Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, INC.
444 North Capitol Street, NW, Suite 728
Washington, DC 20001
(202) 715-2330

January 4, 2008

<u>SUMMARY</u>

The Commission's *Further Notice* proposes two changes to the rules prohibiting exclusive contracts between cable operators and cable-affiliated programmers. These proposed changes present strikingly different issues for the Commission. One of them – a proposal to expand the prohibition to reach satellite-affiliated programming – is both beyond the Commission's jurisdiction and unnecessary as a matter of policy. But the other – a proposal to address the so-called "terrestrial loophole" – falls well within the Commission's jurisdiction and is long overdue as a matter of policy.

Expansion of Exclusivity Prohibition to Satellite-Affiliated Programming. The Commission should not seek to expand the statutory prohibition on exclusive contracts between cable operators and cable-affiliated programmers to contracts between satellite operators and satellite-affiliated programmers. The Communications Act does not reach exclusive contracts involving such entities. Section 628(c)'s prohibition, of course, by its terms applies only to programming contracts between cable operators and programmers affiliated with cable operators. And, as the Commission acknowledged earlier this month, Section 628(b)'s more general prohibition on "unfair practices" does not extend to non-cable, non-common carrier distributors. Indeed, Congress specifically considered and rejected a ban on exclusive programming arrangements for programmers affiliated with non-cable MVPDs. The Commission cannot invoke ancillary jurisdiction to create a ban that Congress rejected.

Nor is there any need to expand the prohibition to satellite-affiliated programming. Congress prohibited only certain exclusive programming contracts for a good reason. Exclusivity is generally considered pro-competitive. But Congress

understood that, when combined with market power and vertical integration, exclusivity can be used anticompetitively. The Commission has determined that an MVPD must possess market share well in excess of 50 percent in order to engage in anticompetitive behavior with affiliated programming. Cable operators possessed, and still possess, such market power. Satellite operators, by contrast, do not and will not for the foreseeable future. Accordingly, the concern underlying the prohibition on exclusive arrangements is simply inapplicable to DBS-affiliated programmers.

Terrestrial Loophole. The story is very different with respect to proposals to begin addressing the so-called "terrestrial loophole" that allows cable-affiliated programmers to withhold programming delivered terrestrially to cable headends. Here the Communications Act plainly applies both to the parties (cable operators and cable-affiliate programmers) and the conduct (the anticompetitive withholding of key programming) in question. The Commission has stated for years that Section 628(b)'s prohibition on "unfair practices" can apply to the conduct of cable operators and cable-affiliated programmers that is not specifically prohibited by Section 628(c). Thus, terrestrial withholding constitutes an "unfair practice," and may be prohibited by the Commission, if either the "purpose or effect" of the withholding is to "hinder significantly or to prevent" an MVPD from providing satellite-delivered programming.

In the past, the Commission has generally declined to address the terrestrial loophole on the grounds that it could not determine whether the *purpose* of the underlying conduct was to hinder competition. The Commission examined the *effect* of such conduct nearly a decade ago, finding no evidence to demonstrate that it harmed competition. With more evidence from the terrestrial-loophole markets, we know differently today. The Commission has now reviewed additional data – including record evidence with respect to Philadelphia, San Diego, and elsewhere – and found that such conduct has the effect of hindering competitors in their delivery of satellite cable programming. It has, in other words, already determined the "effect" of terrestrial withholding. It thus has ample authority to prohibit such conduct under Section 628(b) and should act expeditiously to do so.

TABLE OF CONTENTS

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: SUNSET OF EXCLUSIVE CONTRACT PROHIBITION	MB Docket No. 07-29

FURTHER COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV") respectfully comments on two proposals set forth in the recent Notice of Proposed Rulemaking in this proceeding.[1] The Commission has neither the jurisdiction nor good reason to expand the prohibition on exclusive contracts to cover programming affiliated with Direct Broadcast Satellite ("DBS") operators. It does, however, have clear jurisdiction and very good reason to close the terrestrial loophole that allows programmers affiliated with dominant cable operators to withhold "must have" programming from their rivals in the multichannel video programming distribution ("MVPD") market.

1 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 17791 (2007) ("*Further Notice*").

I. The Commission Cannot and Should Not Expand the Exclusivity Restriction to DBS-Affiliated Programming.

The Communications Act's prohibition on exclusive programming contracts does not apply to DBS operators or DBS-affiliated programmers.[2] The Commission asks whether the prohibition can and should be expanded to do so. The Commission lacks both jurisdiction to act and a reason for acting in this area. Both the exclusivity prohibition and the "unfair practices" provisions of Section 628 govern the conduct of "cable operators" and programmers affiliated with cable operators.[3] Neither these provisions nor any other provision of the Communications Act grant the Commission authority to regulate satellite-affiliated entities.

Moreover, the Commission has already found that "the economic premise underlying the exclusive contract prohibition . . . is that the cable industry's dominance of the video distribution market enables cable operators to successfully withhold affiliated programming from rival MVPDs in order to limit competition in the distribution market."[4] DBS operators' market shares do not approach the levels that have enabled cable operators to withhold key programming. There is thus no reason for the Commission to extend the rules to programming affiliated with non-dominant MVPDs.

---

2 At the outset, it is important to remember that this proceeding concerns only the possibility of extending the exclusivity prohibition to programming affiliated with non-cable MVPDs, particularly programming affiliated with DBS. The Commission has not proposed, nor has it sought comment on, extending the prohibition to programmers not affiliated with *any* MVPD. As the Commission has concluded on multiple occasions, it lacks both jurisdiction and a public policy rationale to address unaffiliated programming. *See Further Notice*, ¶ 76; *General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, ¶ 127 (2004) ("DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (*e.g.*, NFL Sunday Ticket).").

3 *See* 47 U.S.C. §§ 548(b), (c). Congress has also adopted parallel restrictions on common carriers and open video systems. *See id.* § 548(j) (common carriers or their affiliates that provide video programming by any means to their subscribers); *see also* 47 U.S.C. § 573(c)(1)(A) (Open Video Systems).

4 *Further Notice*, ¶ 77.

A. The Commission Lacks Jurisdiction to Expand the Exclusivity Restriction.

The prohibition on exclusive programming contracts found in Section 628(c)(2)(D) is very specific. It applies only to contracts between, on the one hand, cable operators and, on the other hand, programmers vertically integrated with cable operators.[5] As the Commission acknowledges, the text of Section 628(c)(2)(D) itself provides no authority to regulate exclusive arrangements entered into by other parties, including non-cable affiliated programmers and DBS operators.[6]

The Commission thus asks whether any other provision in the Communications Act – principally the broader "unfair competition" provision of Section 628(b) – might be read to reach DBS-affiliated programming.[7] But Section 628(b) does not prohibit "unfair practices" generally. It prohibits only unfair competition by those entities that had concerned Congress in 1992 – cable operator[s] and programmers affiliated with cable operators.[8]

Indeed, the Commission cited the limited scope of Section 628(b) recently when it declared that exclusive contracts for cable service in multiple dwelling units ("MDUs") constitute prohibited unfair practices under Section 628(b). That prohibition, the

---

5 More specifically, it applies to a "satellite cable programming vendor in which a cable operator has an attributable interest" and to a "satellite broadcast programming vendor in which a cable operator has an attributable interest." 47 U.S.C. § 548(c)(2)(D) (for areas served by a cable operator); *see also* 47 U.S.C. § 548(c)(2)(C) (for areas unserved by a cable operator). Section 628(j) of the Communications Act provides that any provision of Section 628, including the exclusive contract prohibition in Section 628(c)(2)(D), that applies to a cable operator also applies to any common carrier or its affiliate that provides video programming. This is also inapposite to DBS operators, who provide services on a subscription, not a common carrier, basis.

6 *Further Notice*, ¶ 118 ("Programming affiliated with other MVPDs, such as DBS providers, is beyond the scope of the exclusive contract prohibition in Section 628(c)(2)(D).").

7 *Id.*

8 47 U.S.C. §§ 548(b), (j); *see also* 47 U.S.C. § 573(c)(1)(A) (extending prohibition to common carriers and overbuilders).

Commission concluded, "is limited to those MVPDs covered by Section 628(b)."[9] The Commission thus did not prohibit exclusive MDU service contracts entered into by "DBS providers" and others ***"who are not subject to Section 628."***[10] Although the Commission is charged with "specify[ing] particular conduct that is prohibited by [Section 628(b)],"[11] it cannot, by definition, reach conduct that is *not* prohibited by, and entities *not* covered by, Section 628(b).

Nor can expanding the exclusivity prohibition to non-cable affiliated entities be justified under other sources of Commission jurisdiction, such as its ancillary jurisdiction to promulgate rules and regulations or the general Congressional directive to promote the availability of broadband services.[12] This is because Congress specifically considered an

---

9 *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd. 20235, ¶ 32 (2007) ("*MDU Exclusivity Order*").

10 *Id.*, ¶ 61 (emphasis added).

11 47 U.S.C. § 548(c)(1).

12 *Further Notice*, ¶ 118 ("We seek comment on whether to extend the exclusive contract prohibition to non-cable-affiliated programming that is affiliated with a different MVPD, principally a DBS provider, pursuant to Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), 628(b), or 706, or any other provision under the Communications Act."); *see also* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."); 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."); 47 U.S.C. § 303(r) ("[The Commission shall m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ."); 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI (Cable Communications) of the Communications Act is to "promote competition in cable communications"); 47 U.S.C. § 532(g) (stating that when "cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources"); 47 U.S.C. § 536(a) (stating that the "Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors"); 47 U.S.C. § 548(b) ("It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practiced."); 47 U.S.C. § 157 nt, P.L. 104-104 (stating that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment").

exclusivity ban in 1992 that would have applied to all MVPDs but chose instead to impose only a more limited ban.[13] Where, as here, "[a]fter originally entertaining the possibility of providing the FCC with authority to adopt . . . rules, Congress declined to do so," Congress's "silence surely cannot be read as ambiguity resulting in [ancillary] delegated authority to the FCC to promulgate the disputed regulations."[14]

B. Expanding the Exclusivity Prohibition to DBS Would Be Counterproductive.

Congress's decision to limit Section 628 to cable operators and cable-affiliated programmers was no accident. As DIRECTV has stated throughout this proceeding, Congress never considered exclusivity *per se* to be anticompetitive. As a general proposition – and in the absence of market power – exclusivity can be pro-competitive, as

---

13 As the Commission recently observed, "the House of Representatives considered and rejected a proposal, in the context of a more comprehensive amendment, that prohibited 'any video programming vendor [owned or controlled by] a multichannel system operator . . . from refusing to deal with any [MVPD] with respect to *the provision of video programming*.'" *MDU Exclusivity Order*, ¶ 44 n.136, *citing* 138 Cong. Rec. 6550 (July 23, 1992) (emphasis in original). Indeed, Chairman Tauzin, the author of the exclusivity ban ultimately adopted, made the basis for this decision very clear:

> There is an argument against our amendment someone made. The argument is that we no longer allow for exclusive type programs that are important to people who develop a product. Not so. Read the DSG report on our bill. The DSG report clarifies it very well. It says and our amendment says that exclusive programming that is not designed to kill the competition is still permitted.

138 Cong. Rec. 6534 (1992).

14 *Motion Picture Ass'n of America Inc. v. FCC*, 309 F.3d 796, 806-07 (D.C. Cir. 2002) (also refusing to find authority under Sections 2(a) and 4(i), in part because the rules allegedly promulgated under ancillary authority – like the exclusivity prohibition for DBS-affiliated programming proposed here – "significantly implicate program content"); *see also, e.g.*, *AT&T Corp. v. FCC*, 323 F.3d 1081, 1086 (D.C. Cir. 2003) (rejecting the FCC's anti-slamming rules because "the regulations go beyond the anti-slamming statute's express terms," and noting that Congress "would have written the statue to prohibit" the slamming practices in question if it had wanted to empower the FCC to regulate them); *FCC v. Midwest Video Corp*., 440 U.S. 689, 705, 708 (1979) (finding that certain public access rules were outside of the FCC's ancillary jurisdiction because the relevant statutory provisions and legislative history "manifest[] a congressional belief" that such regulation was unwarranted); *cf. American Bar Ass'n v. FTC*, 430 F.3d 457, 468-69 (D.C. Cir. 2005) (finding that the Federal Trade Commission lacked implicit authority to regulate attorneys as financial institutions because the statute in question, the Gramm-Leach-Bliley Act, includes significant detail on the authority delegated to the FTC yet is silent on the FTC's power to regulate attorneys).

it allows competitors to differentiate their products and services.[15] Congress specifically recognized that, in contrast to exclusive arrangements between cable operators and cable-affiliated programmers, exclusive arrangements between entities without market power could be a critical tool to help promote competition. For example, the Senate Commerce Committee, when considering a version of the prohibition at issue in this proceeding, stated that it "believes that exclusivity can be a legitimate business strategy where there is effective competition."[16]

Congress found, however, that *because cable operators possessed market power*, programmers affiliated with those cable operators could harm emerging competition by withholding programming from cable's rivals.[17] Congress thus prohibited exclusive

---

15 *Compare, e.g.*, Economists, Inc., "Competition for Video Programming: Economic Effects of Exclusive Distribution Contracts," at 4, 10, *attached to* Comments of Cablevision, CS Docket No. 01-290 (filed Dec. 3, 2001) (arguing that "[c]ontracts in general and exclusive contracts in particular are absolutely essential to the efficient operation of a competitive market economy" but that "some factors that make exclusivity more or less likely to harm consumers . . . . [include] market definition and market power") *with* Orszag, Orszag, and Gale, "An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers," at 7, *attached to* Reply Comments of DIRECTV, Inc., CS Docket No. 01-290 (filed Jan. 7, 2002) ("In many circumstances, vertical relationships and exclusive distribution agreements improve economic efficiency."). The Commission has specifically recognized this general proposition in the context of video programming, stating that, "[a]s a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized." *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage,* 8 FCC Rcd. 3359, ¶ 63 (1993).

16 S. Rpt. No. 102-92 (June 28, 1991) ("Senate Report").

17 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460, 1461 (1992) ("1992 Cable Act") ("The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. . . . Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and program distributors using other technologies."). More specifically, Congress found cable operators' horizontal market power (evidenced by their dominant share of subscribers controlled within their franchise areas), along with their ownership of many key programmers, created an imbalance of power, both between cable operators and program vendors and between incumbent cable operators and their multichannel competitors. *See also* Senate Report ("Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market. Thus, the dominance in the market of the distributor obtaining exclusivity should be considered in determining whether an exclusive arrangement amounts to an unreasonable refusal to deal. Other factors include the duration of the exclusivity, and the effect on competition or potential competition in the market."); 1992 Cable Act,

arrangements and unfair practices only involving cable operators (that is, entities with market power) and programmers "vertically integrated" with cable operators (that is, entities that would have the incentive to enter into exclusive arrangements for anticompetitive reasons).[18]

When the Commission recently decided to extend the prohibition on exclusive cable-affiliated contracts, it considered this question of market power explicitly. The Commission found that, depending on the circumstances, withholding of affiliated programming can be profitable where a single MVPD controls a substantial majority of subscribers in the relevant market.[19] And it found that cable operators – and only cable operators – possess such market power today. It also found that as cable system "clusters" become ever larger and more prevalent, such high market share levels become more common. Moreover, given that cable operators do not compete against operators in other franchise areas, a "cable only" exclusive can be used to aggregate the cable industry's overall market share in order to limit the economic downside of denying programming to rival MVPDs. The Commission thus rightly concluded that, under current market conditions, cable operators and cable-affiliated programmers continue to

---

§ 2(a)(2) ("For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.").

18 47 U.S.C. §§ 548(c)(2)(C) (for areas unserved by a cable operator), (c)(2)(D) (for areas served by a cable operator).

19 *Further Notice*, ¶ 59 ("The calculations further demonstrate that, using Comcast profitability figures and the Comcast SportsNet Philadelphia RSN profile, withholding becomes profitable when a single MSO reaches homes passing roughly 60 percent of television households in a DMA. Using Time Warner profitability and the Comcast SportsNet Philadelphia RSN profile, withholding would become profitable when a single MSO reaches homes passing at least 80 percent of television households in a DMA.")

possess the ability and incentive to withhold programming in the absence of an exclusivity ban.[20]

DBS operators possess nowhere near that kind of market share, either individually or collectively. In the absence of such market power, they could not successfully implement the anticompetitive strategy used by the cable industry. In these circumstances, the Commission should not deprive DBS operators of an important tool for distinguishing themselves in the MVPD marketplace in order to compete with cable incumbents.

II. The Commission Can and Should Act to Close the Terrestrial Loophole.

As discussed above, the Commission has neither the jurisdiction nor a good reason to expand the program access rules to DBS-affiliated programming. By contrast, it has both clear jurisdiction and compelling reasons to address the terrestrial loophole that allows cable-affiliated programmers to discriminate against competing MVPDs through the expedient of non-satellite wholesale distribution. The Commission has recognized on multiple occasions that Section 628(b)'s prohibition on "unfair practices" can apply to conduct involving terrestrially delivered programming if the "purpose or effect" of such conduct relates to satellite-delivered programming. Prior cases failed to meet this evidentiary burden. Today, the effect of such conduct is clear, and the Commission should act to prevent it.

---

[20] *Further Notice*, ¶ 59.

A. The Commission Has Already Determined that Section 628(b) Can Apply to Terrestrially Delivered Programming.

The Commission asks whether it has "the authority to extend [the] program access rules to all terrestrially delivered cable-affiliated programming . . . in light of the specific authority in Section 628 that limits their scope to satellite programming."[21] But the Commission has already concluded – and the DC Circuit has confirmed – that it has such authority. Section 628(b) prohibits unfair practices by cable operators and cable-affiliated programmers if either the "purpose" or the "effect" of such conduct is to "hinder significantly or to prevent" an MVPD from providing satellite cable programming.[22] The only legal question in this proceeding is whether the withholding of terrestrially-delivered programming meets the second prong of the analysis.

Plainly, one cannot answer this question simply by looking to Section 628(c)'s prohibition on exclusive contracts for "satellite cable" programming (that is, programming delivered by satellite to cable headends). The Commission confirmed only weeks ago that Section 628(b)'s prohibition on unfair practices can extend to conduct not addressed by Section 628(c).[23] Some parties claimed that Section 628(b) could not reach exclusive contracts for MDU service, because, they argued, Section 628(b) only addresses programming contracts governed by Section 628(c). But the Commission rejected this interpretation, finding that "the better reading [of Section 628(b)] is the one based on the clear and complete terms of the provision: any practices that unfairly deny

---

[21] *Id.*, ¶ 116.

[22] 47 U.S.C. § 548(b) (emphasis added).

[23] *MDU Exclusivity Order*, ¶ 44.

MVPDs the ability to provide [satellite-delivered] programming to consumers are prohibited."[24]

This recent holding is consistent with years of earlier Commission decisions. Indeed, the exact question posed in this proceeding – the Commission's jurisdiction to address terrestrially delivered cable-affiliated programming not covered by Section 628(c) – was the subject of dispute in the original "terrestrial loophole" cases.

In those cases, the Commission found that the refusal of Comcast SportsNet Philadelphia ("CSN Philly"), a terrestrially delivered RSN affiliated with Comcast, to negotiate with EchoStar and DIRECTV for distribution rights violated neither Section 628(c)'s prohibition on exclusivity nor Section 628(b)'s prohibition on unfair practices.[25] On appeal, however, a dispute arose over the basis of the Commission's finding.[26] Comcast, for its part, argued that the Commission denied these complaints because Section 628(b)'s unfair practices provision allegedly provided no relief for conduct not also prohibited by Section 628(c).[27] But the Commission argued that Section 628(b) could reach conduct not prohibited by Section 628(c) – although it did not do so in that particular case. It told the D.C. Circuit that "[i]t is quite evident from the Commission and Bureau analysis of the facts that they went beyond the pleadings and rejected EchoStar's 628(b) claim because it did not prove that Comcast's actions were unfair or

---

[24] *Id.*

[25] *EchoStar Communications Corp. v. Comcast Corp., Comcast-Spectator, L.P., Philadelphia Sports Media, L.P.*, 14 FCC Rcd. 2089, ¶ 25 (1999) ("*Terrestrial Loophole Bureau Order*"); *see also DirecTV, Inc., v. Comcast Corp., Comcast-Spectator, L.P., Comcast Sportsnet*, 15 FCC Rcd. 22802, ¶ 12 (2000) ("*Terrestrial Loophole Commission Order*").

[26] *EchoStar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

[27] Brief of Comcast Corp. at 9, *EchoStar Communications Corp. v. FCC* (D.C. Cir. 2001) (No. 01-1032).

deceptive."[28] The Commission added that it "was open to the possibility that Comcast violated Section 628(b) by moving an existing service from satellite to terrestrial delivery."[29] In deciding the appeal, the D.C. Circuit expressly relied on the Commission's description of the basis for its finding in the case.[30]

The Commission's recent ruling in the *MDU Exclusivity Order* thus merely reaffirmed the existing legal standard governing cable operators' unfair practices under Section 628(b). It is immaterial whether a cable operator's *conduct* involves satellite-delivered programming, so long as the purpose or the effect of such conduct relates to satellite-delivered programming. In other words, if an unfair practice involving (for example) CSN Philly has the purpose or effect of hindering an MVPD's delivery of (for example) CNN to its subscribers, such conduct violates Section 628(b).

B. Withholding Terrestrially Delivered Programming Has the "Effect" of Hindering Program Delivery.

The Commission has not yet found that the withholding of terrestrially delivered programming constitutes a prohibited unfair practice. Indeed, it has rejected claims that terrestrial distribution of cable-affiliated programming violates Section 628(b) several times in the past.[31] In those cases, however, the Commission generally focused on the

---

[28] Brief of FCC at 29, *EchoStar Communications Corp. v. FCC* (D.C. Cir. 2001) (No. 01-1032).

[29] *Id*.

[30] *EchoStar*, 292 F.3d at 755.

[31] *E.g., Terrestrial Loophole Commission Order*, 15 FCC Rcd. 22802, ¶ 13; *RCN Telecom Services v. Cablevision Systems Corp.*, 16 FCC Rcd. 12048, ¶ 18 (2001). The Commission also refused to address withholding of terrestrially delivered programming in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12158, ¶ 73 (2002). That decision, however, did not specifically address unfair practices under Section 628(b). It referenced only Section 628(c)'s prohibition on exclusivity. *See id.* ("[T]he Commission has concluded that the language of Section 628(c) expressly applies to satellite cable programming and satellite broadcast programming, and that terrestrially delivered programming is outside of the direct coverage of Section 628(c). We have been presented with no basis to alter that conclusion in this proceeding.") (internal quotations omitted); *see also Implementation of Section 302*

alleged "purpose" of terrestrial withholding, not its "effect." The Commission found insufficient evidence in each case to conclude that the withholding in question was specifically intended to evade the program access rules. Such an inquiry would be unnecessary, however, if such conduct were shown to have the "effect of" hindering the delivery of satellite cable programming.

The Commission examined the effect of terrestrial withholding nearly a decade ago. In the *1998 Program Access* proceeding,[32] several commenters (including DIRECTV) argued that the withholding of terrestrially delivered programming was an unfair practice under Section 628(b) the effect of which was to hinder significantly the delivery of satellite-cable programming. The Commission found no evidence of such effect at that time:

> The record developed in this proceeding fails to establish that the conduct complained of, *i.e.*, moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules, is significant and causing demonstrative competitive harm at this time. The Commission has received only two complaints against the same vertically-integrated programmer related to moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules. . . . While the record does not indicate a significant anti-competitive impact necessitating Commission action at this time, we believe that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace.[33]

---

of the Telecommunications Act of 1996, 11 FCC Rcd 18223, ¶ 197 n.451 (1996) ("[W]e do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs.").

32 *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd. 15822 (1998) ("*1998 Program Access Order*").

33 *Id.*, ¶ 71.

Thus, having found no "significant anti-competitive impact," the Commission felt no need to address terrestrial withholding under Section 628(b).

A decade later, things are different. The Commission now has ample evidence of the effect of withholding cable-affiliated programming. In the *Further Notice*, the Commission cited numerous instances in which terrestrially delivered programming, including CSN Philly and Channel 4 San Diego, has been withheld.[34] The Commission specifically found that there is "factual evidence that cable operators have withheld this programming from competitors and, in two instances – in San Diego and Philadelphia – there is empirical evidence that such withholding has had a material adverse impact on competition in the video distribution market."[35]

Indeed, with respect to these two channels, the Commission explicitly found that the effect of withholding was to reduce DBS subscribership by more than 40 percent in Philadelphia and 33 percent in San Diego.[36] The Commission has thus determined that "withholding can have a significant impact on subscribership to the rival MVPDs" and that this, "in turn, predictably harm[s] competition and diversity in the distribution of video programming, to the detriment of consumers."[37] This is more than sufficient for the Commission to conclude that, today, unfair practices involving terrestrially delivered

---

34 *Further Notice*, ¶ 49 (also referencing overflow sports programming in New York, RSNs affiliated with Cablevision in New York and New England, HD feeds of RSNs affiliated with Cablevision, NECN, PBS Kids Sprout, iN DEMAND, CN8, and channels sought by NRTC).

35 *Id.*, ¶ 39.

36 *Id.*; *see also id.*, App. B, ¶ 4 ("The regression equation contains dummy variables for the three markets, Philadelphia, San Diego, and Charlotte, in which local RSNs were not made available to DBS. The estimated coefficients on these dummy variables are negative in all three cases and statistically significant in the case of Philadelphia and San Diego. The magnitude of the coefficients indicates that in Philadelphia, DBS penetration is 40.5% lower than it would be if the local RSN were available to DBS. The corresponding figure for San Diego is 33.3%."); *see also Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, ¶¶ 146-149 (2006) (same).

37 *Further Notice*, ¶ 40.

programming have the "effect" of hindering the delivery of satellite cable programming. And it is more than sufficient for the Commission to, once and for all, close the terrestrial loophole.

CONCLUSION

The Commission is faced with two proposals to amend the program access rules. One is a solution in search of a problem, as there is neither jurisdiction nor a policy basis for precluding exclusive arrangements involving programmers affiliated with DBS operators who lack market power. The other is a long overdue remedy for a problem that for years has cried out for redress and will prevent cable operators from evading limitations intended to curb their exercise of market power. Accordingly, the Commission should reject the first proposal and implement the second one.

Respectfully submitted,

/s/______________________________
Susan Eid
Senior Vice President, Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, INC.
444 North Capitol Street, NW, Suite 728
Washington, DC 20001
(202) 715-2330

William M. Wiltshire
Michael Nilsson
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, Inc.

January 4, 2008