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	
REVIEW OF THE COMMISSION'S PROGRAM ACCESS RULES AND EXAMINATION OF PROGRAMMING TYING ARRANGEMENTS	MB Docket No. 07-198

FURTHER REPLY COMMENTS OF DIRECTV, INC.

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SUMMARY

The Commission decided several months ago to extend the prohibition on exclusive contracts between cable operators and cable-affiliated programmers. In its initial comments, DIRECTV argued that the Commission should not expand that prohibition to DBS-affiliated programmers, but should, at long last, address the terrestrial loophole. No commenter has persuasively suggested otherwise. Nor has the cable industry persuasively explained why the Commission should revisit its recent decision and sunset the cable exclusivity provision on a market-by-market basis – much less how such a scheme might be made to work.

Expansion of Prohibition to DBS-Affiliated Programming. The initial comments confirmed what DIRECTV has argued throughout this proceeding – the Commission lacks both jurisdiction and a policy basis for prohibiting exclusive arrangements between DBS operators and DBS-affiliated programmers. With respect to jurisdiction, the Commission has now confirmed that Section 628 of the Communications Act simply does not apply to "DBS providers" and programmers affiliated with "DBS providers" (much less programmers unaffiliated with *any* MVPD). Commenters seeking to expand the prohibition are thus left to concoct theories based on ancillary jurisdiction. But none of these theories explain how the Commission can do what Congress explicitly refused to do. And all of these theories, at most, suggest (incorrectly) that expanding the prohibition would serve some of the Communications Act's thematic goals, such as expanding broadband or promoting competition. None comes close to explaining how such expansion is ancillary to a specific statutory directive.

Nor do commenters fare any better with respect to the merits of such expansion. From the beginning, the exclusivity ban was designed to address cable operators' market power, and the control such market power gave cable operators over affiliated, "must-have" programming. The Commission confirmed this through a detailed economic analysis just last year. DBS operators have never possessed such power in any cognizable geographic or product market. Facile claims that "regulatory parity" demands changes to the rules are unavailing precisely because DBS operators are not similarly situated to cable operators. The Commission thus has every reason to treat DBS-affiliated programmers differently.

Terrestrial Loophole. Comcast and Time Warner persist in arguing that Section 628(b)'s "unfair practices" provision prohibits only those activities listed in Section 628(c). But the Commission and the courts have both repeatedly concluded otherwise over the last decade. The cable industry also claims that the Commission cannot address the terrestrial loophole without a finding that failure to do so will drive DBS operators out of business. That is not the relevant legal standard. Section 628(b) requires only that a particular practice "hinder significantly" the delivery of satellite cable programming. The Commission has found that, when terrestrially delivered cable-affiliated programming is withheld from DBS operators, DBS market share is thirty to forty percent lower than it would be expected to be had the programming been made available. No more is required.

Market-by-Market Sunset. Lastly, the cable industry argues that the Commission can – indeed, must – sunset the cable exclusivity ban in markets where cable faces what is termed "durable competition." Of course, cable starts from an unenviable legal position in this regard, as the statute itself says nothing about a market-by-market sunset. It says only that the ban shall not sunset if its continuation is necessary to preserve and protect competition and diversity of programming. This is what the Commission has found, and this is all the statute, or the First Amendment, requires. (In this regard, a statute designed to "preserve and protect" competition certainly does not require the ban to sunset everywhere a modicum of competition exists.)

Even if the statute were somehow construed to permit a market-by-market sunset, there would still be good reasons for the Commission not to go down this road. To begin with, cable's DBS competitors do not purchase cable programming on a DMA basis. They purchase national programming nationally, and regional programming regionally. Thus, market-by-market exclusivity would create "Swiss cheese" in DBS distribution, significantly reducing the value of even the remaining non-exclusive distribution. This would very likely lead to de facto exclusivity in markets for which the remedy was not intended. In any event, cable's proposed tests for "durable competition" would sunset the exclusivity ban practically everywhere – exactly what the Commission decided *not* to do just three months ago .

TABLE OF CONTENTS

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<u>FURTHER REPLY COMMENTS OF DIRECTV, INC.</u>

DIRECTV, Inc. ("DIRECTV") respectfully submits these reply comments concerning several proposals set forth in the most recent Notice of Proposed Rulemaking in this proceeding.[1] As described further below, DIRECTV continues to believe that the Commission should not expand the exclusivity prohibition to non-cable-affiliated programming, but should close the terrestrial loophole. And, contrary to the suggestions of the cable industry, it should not sunset the existing prohibition on a market-by-market basis.

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

I. The Commission Should Not Expand the Exclusivity Prohibition to Non-Cable-Affiliated Programming.

The Commission has now confirmed that Section 628 of the Communications Act – both the specific prohibition against exclusive programming contracts and the general prohibition against unfair practices – does not apply to "DBS providers."[2] Rather, it applies only to cable operators and programmers vertically integrated with cable operators.[3] The record here provides no basis upon which the Commission could, much less should, try to expand the ambit of Section 628 to apply to other entities.

A. There Is No Basis in the Record for Regulating Programmers Affiliated with No MVPD.

The Commission has sought comment on a proposal to extend the exclusivity prohibition only to programmers affiliated with DBS providers. 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.[4]

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[2] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd. 20235, ¶ 61 (2007) ("*MDU Order*") (discussing DBS providers and others "who are not subject to Section 628").

[3] 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.

[4] *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).").

Yet a number of commenters suggest that the Commission should nonetheless extend the exclusivity prohibition to all programmers, regardless of affiliation.[5]

Setting aside for the moment the complete lack of jurisdiction for such an expansion of the program access rules, no commenter presents even a plausible policy basis for applying these rules to programmers unaffiliated with any MVPD.[6] The telephone coops, for example, assert that such an expansion is justified because "DirecTV has announced an exclusive deal to televise all out-of-market Major League Ball Games."[7] Although DIRECTV had announced such an arrangement last winter, the arrangement never went into effect. ACA, for its part, would expand the program access rules "[t]o reach some of the largest and most powerful media conglomerates."[8] Yet neither the National Football League nor Major League Baseball – the unaffiliated programmers most often cited by commenters seeking expanded regulation – is a media conglomerate. Without a more compelling rationale than that presented on the record, the Commission simply cannot regulate the activities of unaffiliated programmers.

B. There Is No Basis in the Record for the Commission to Expand the Exclusivity Prohibition to DBS-Affiliated Programmers.

In the *Further Notice*, the Commission questioned whether it had jurisdiction to expand the prohibition on exclusivity to DBS-affiliated programming, and sought

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5 Comments of the American Cable Association at 21, MB Docket No. 07-198 (filed Jan. 3, 2008) ("ACA Comments"); Comments of the Broadband Service Providers at 16, MB Docket No. 07-198 (filed Jan. 4, 2008) (urging the Commission to prohibit enforcement of new sports agreements); Comments of the National Telecommunications Cooperative Association at 13, MB Docket No. 07-198 (filed Jan. 4, 2008) ("NTCA Comments"); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, *et al.* at 7, MB Docket No. 07-198 (filed Jan. 4, 2008).

6 For a discussion of the jurisdictional issues, please see Part I.B, below.

7 NTCA Comments at 13.

8 ACA Comments at 21.

comment on the need for such an expansion. In response, no commenter provided either a convincing basis for Commission jurisdiction or a convincing policy rationale for such action.

DIRECTV's initial comments supported the Commission's finding that Section 628 simply does not apply to DBS operators. A number of commenters agreed with DIRECTV – including several not normally found in DIRECTV's camp on program access issues.[9] Only one commenter argued otherwise. The telephone coops assert that DBS operators "*are* MVPDs subject to the Section 628(b) prohibitions on unfair and anticompetitive conduct."[10] Yet they do not support this curious statement. Instead, they argue that DBS operators *should be* subject to Section 628(b) because they can avail themselves of its protections.[11]

This cannot be right. The legislative language quite clearly distinguishes between parties that Section 628 seeks to protect ("any multichannel video programming distributor aggrieved by conduct" violating the provision[12]) and those from whom they are protected (cable operators and programmers vertically integrated with cable operators[13]). The Communications Act makes such distinctions all the time. Dominant carriers are subject to rate regulation of their tariffs, while non-dominant carriers are

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9 *See* Comments of the National Cable & Telecommunications Association at 3, MB Docket No. 07-198 (filed Jan. 4, 2008) ("DBS providers also are not subject to the requirements of Section 628, so they have no program access obligations.") ("NCTA Comments"); Comments of Comcast Corp. at 13-14, MB Docket No. 07-198 (filed Jan. 4, 2008) ("For the same reasons discussed in the previous section of these comments, the Commission does not have the authority to apply program access rules to non-cable affiliated programming. Only Congress can rewrite the law.") ("Comcast Comments").

10 NTCA Comments at 15.

11 *Id.* ("DBS providers are protected MVPDs and, as such, have the right to avail themselves of the protections from unfair and anticompetitive conduct prohibited by Section 628(b).").

12 47 U.S.C. § 548(d).

13 47 U.S.C. §§ 548(b) ("unfair or deceptive acts or practices"), (c)(2)(D) (for areas served by a cable operator), (c)(2)(C) (for areas unserved by a cable operator).

not.[14] Likewise, television stations can demand carriage from MVPDs, but MVPDs cannot compel television stations to be carried.[15]

Commenters seeking to expand the exclusivity prohibition to DBS-affiliated programmers are thus forced to fall back on theories of ancillary jurisdiction. Of course, "[t]he FCC, like other federal agencies, 'literally has no power to act . . . unless and until Congress confers power upon it.'"[16] Ancillary jurisdiction thus exists only if the subject of regulation is "reasonably ancillary to the effective performance of the Commission's statutorily mandated responsibilities."[17]

Faced with this high hurdle, commenters resort to platitudes. The Commission should exercise its ancillary jurisdiction, they argue, in order to further "[c]ompetition and the goals of the Act,"[18] to promote the public interest and spur innovation,[19] to increase the diversity of information services,[20] and to promote broadband.[21] But these are mere recitations of certain underlying *goals* of the Communications Act. They are not substantive delegations of authority to which expansion of the exclusivity prohibition might be thought "ancillary." Thus, for example, Section 706 of the Telecommunications

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14 *Compare* 47 C.F.R. Part 61, Subpart C ("General Rules for Nondominant Carriers") *with id.* Subpart E ("General Rules for Dominant Carriers.").

15 *See* 47 U.S.C. § 325(b)(1)(A) (prohibiting MVPDs from carrying stations without consent); 47 U.S.C. §§ 338, 614, and 615 (requiring MVPDs to carry stations upon request).

16 *Am. Library Assoc. v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (quoting *La. Pub Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

17 *Id.* at 692. Ancillary jurisdiction also exists only with respect to "'interstate and foreign communications by wire and radio.'" *Id.*

18 NTCA Comments at 8; ACA Comments at 51.

19 NTCA Comments at 9; ACA Comments at 50.

20 ACA Comments at 50.

21 ACA Comments at 52.

Act directs the Commission to promote broadband access for all Americans.[22] But nobody would argue that Section 706, without more, gives the Commission authority to require Verizon to provide free broadband to every home in America – even though doing so would advance the provision's underlying goals.[23] Likewise, Sections 706, 4(i), 201(b), 303(r) and the rest do not give the Commission *carte blanche* to expand the exclusivity prohibition without some affirmative indication that Congress contemplated such expansion.[24]

In this case, not only is there no indication that Congress intended to give the Commission ancillary jurisdiction to expand the exclusivity prohibition to DBS-affiliated programming, there is actually an explicit Congressional decision to the contrary. Specifically, Congress considered *and rejected* a revision of Section 628 that would have covered DBS-affiliated programming.[25] As DIRECTV pointed out in its Further Comments, where "[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

22 47 U.S.C. § 157 nt. (providing 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").

23 The Commission itself has held that Section 706 "does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24011, ¶ 69 (1998).

24 *See, e.g.*, *Motion Picture Ass'n of America Inc. v. FCC, 309 F.3d 796*, 806 (D.C. Cir. 2002) (quoting *Implementation of Video Description of Video Programming*, Separate Statement of Commissioner Michael K. Powell, 15 FCC Rcd. 15230 (2000)) ("[S]ection 4(i) is not a stand-alone basis authority and cannot be read in isolation."); *id.* ("The FCC must act pursuant to *delegated authority* before any 'public interest' inquiry is made under § 303(r).") (emphasis in original).

25 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 [video] system operator . . . from refusing to deal with any [MVPD] with respect to *the provision of video programming*.'" *MDU Order*, ¶ 44 n.136 (citing 138 Cong. Rec. H6550 (July 23, 1992)) (emphasis in original).

promulgate the disputed regulations."[26] Not one commenter addresses this implicit Congressional directive, and not one commenter explains how ancillary authority could exist in spite of it.

Perhaps as importantly, no commenter seriously grapples with the merits of expanding the exclusivity prohibition to DBS-affiliated programming. In deciding twice to extend the duration of the cable exclusivity prohibition, the Commission both times examined whether cable-affiliated programmers possessed the incentive and ability to withhold key programming. And both times, the Commission determined that cable operators have such incentive and ability because of the market power they now wield where key programming is delivered.[27] When clustered, they possess overwhelming market share within the geographic "footprint" of key regional programming. When

[26] *Motion Picture Ass'n*, 309 F.3d at 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).

[27] 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. *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."). 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.

combined through “cable only” exclusives, they collectively wield overwhelming market share nationally.

As DIRECTV observed in its initial comments, DBS operators do not possess, and have never possessed, such power in any cognizable geographic or product market. DBS operators with a dispersed nationwide subscriber base maintain a relatively modest market share both nationally and regionally that cannot be aggregated in a “DBS only” exclusive because DBS operators compete head-to-head throughout the country. No commenter disputes this.

This is why facile claims that “regulatory parity” requires expansion of the exclusivity ban to DBS-affiliated programming are unavailing.[28] Regulatory parity demands that similarly situated entities be treated similarly. DBS operators are not similarly situated to incumbent cable operators. On the only relevant criterion – market power – DBS has never been in the same position as cable operators. There is no reason to treat them the same.

II. The Commission Should Close the Terrestrial Loophole.

In its initial comments, DIRECTV suggested that the Commission has both the jurisdiction and good reason to close the terrestrial loophole that allows programmers affiliated with dominant cable operators to withhold “must have” programming from their rivals. Cable operators, not surprisingly, claim that neither is the case.[29] But these claims are wrong as a matter of both law and policy.

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[28] NTCA Comments at 15 (“A fair application of the Section 628 remedies is needed to ensure that similarly situated providers are held to the same standard. . . .”).

[29] Comcast Comments at 6; NCTA Comments at 12; Comments of Cablevision Systems Corp. at 13, MB Docket No. 07-198 (filed Jan. 4, 2008) (“Cablevision Comments”).

To begin with, Comcast and Cablevision persist in arguing that nothing can be an unfair practice under Section 628(b) that is not also proscribed by Section 628(c).[30] Comcast and Cablevision have never satisfactorily explained why, if that were the case, Congress would have bothered writing Section 628(b) at all.[31] More importantly, the Commission and the D.C. Circuit found otherwise nearly ten years ago. As DIRECTV explained in its initial comments, the Commission did not conflate the two provisions in ruling in Comcast's favor in the original terrestrial loophole cases. Rather, the Commission (and, later, the D.C. Circuit) held that Section 628(b) *could* reach conduct not prohibited by Section 628(c), though it did not do so under the facts of those particular cases.[32] The Commission thus merely confirmed this longstanding interpretation of Section 628 when it found last November that "*any* practices that unfairly deny MVPDs the ability to provide [satellite-delivered] programming to consumers are prohibited [by Section 628(b)]."[33]

Cable fares no better with respect to the "effect" of terrestrial withholding. Cablevision asserts that, unless competitors literally cannot "'offer a viable video

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30 Comcast Comments at 12 ("Thus, because terrestrially-delivered programming is clearly outside the scope of the exclusivity provision of Section 628(c), the Commission cannot use Section 628(b) to fashion a new exclusivity provision that applies to terrestrially-delivered programming."); Cablevision Comments at 14 ("The plain language of the program access provisions of section 628 of the Communications Act limits their reach to programming that is delivered by satellite….").

31 *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (stating that a court must construe statutes to give effect, if possible, to every provision); *Moskal v. United States*, 498 U.S. 103, 109-111 (1990) (same); *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, 18 FCC Rcd. 8428, ¶ 33 (2003) (same).

32 *See 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*"); *EchoStar Communications Corp. v. FCC*, 292 F.3d 749, 755 (D.C. Cir. 2002); Brief of FCC at 29, *EchoStar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2001) (No. 01-1032) (stating that the Commission "was open to the possibility that Comcast violated Section 628(b) by moving an existing service from satellite to terrestrial delivery").

33 *MDU Order*, ¶ 44 (emphasis added).

service'" without access to terrestrially delivered programming, the Commission cannot act.[34] But "ability to offer a viable video service" is not the relevant standard set forth in Section 628(b). Rather, unfair practices are prohibited so long as their "effect" is to "hinder significantly" the delivery of satellite cable programming.[35] Twice now, the Commission has determined that terrestrial withholding indeed has such an effect.[36]

It is thus immaterial that DBS operators have not gone out of business, or withdrawn from the Philadelphia or San Diego markets, because Comcast and Cox have withheld key programming.[37] It is also immaterial that DIRECTV offers many channels other than the ones being withheld from it.[38] And it is immaterial even that some DBS operators have more subscribers than some incumbent cable operators.[39] All that matters is that, when terrestrially delivered cable-affiliated programming is withheld from DBS operators, DBS market share is thirty to forty percent lower than it would be expected to be had the programming been made available.[40] The Commission has already determined that this hinders significantly DBS's ability to provide satellite cable programming to its viewers. It should act now to remedy the situation.

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[34] Cablevision Comments at 17, *citing Further Notice*, ¶ 116. Comcast seems to make a similar suggestion. *See* Comcast Comments at 5 ("In this intensely competitive environment, it is difficult to comprehend the Commission's decision to extend the program access rules.").

[35] 47 U.S.C. § 548(b).

[36] *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).

[37] *See* NCTA Comments at 7-9.

[38] *Id.* at 5 ("When the marketplace has reached a point where new and established competitors claim that they have better programming than incumbent cable operators, it is almost impossible to justify retention of the existing regulation of cable-affiliated programming, let alone expansion of those regulations.").

[39] Comcast Comments at 3 (describing DBS subscribership).

[40] *Further Notice*, ¶ 39; *see also Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, ¶¶ 146-149 (2006) (same).

III. The Commission Should Not Sunset the Exclusivity Prohibition in Individual Markets.

Several commenters, Cablevision chief among them, urge the Commission to sunset the exclusivity prohibition for satellite-delivered cable programming in local markets where sufficient competition could be established.[41] Cablevision goes so far as to argue that the Commission *must* do so under the First Amendment and Section 628(c)(5), which requires the Commission to sunset the prohibition unless it finds that an extension is necessary to preserve and protect competition.[42] But neither the statute, the Constitution, nor any cognizable public policy supports a market-by-market sunset of the exclusivity prohibition.

To begin with, Section 628(c)(5) says nothing about a market-by-market sunset.[43] It states simply that the Commission must keep the exclusivity ban in place if doing so is necessary to "preserve and protect" competition.[44] The Commission has, of course, already done so. Nothing more is required.

Cablevision nonetheless argues that the Commission should repeat its analysis on a more granular basis and eliminate the ban anywhere that what it calls "durable and substantial" competition exists.[45] Even if a granularity requirement were anything more than an invention of Cablevision's lawyers, "durable and substantial competition"

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[41] Cablevision Comments at 3; Comcast Comments at 5-6; NCTA Comments at 5.

[42] Cablevision Comments at 4-7.

[43] Nor is the existing franchise-by-franchise determination of "effective competition" found in Section 623 of the Act linked in any way to the Program Access Rules. 47 U.S.C. § 543(a)(2) (providing only that, "[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under *this section*.") (emphasis added).

[44] 47 U.S.C. § 548(c)(5).

[45] Cablevision Comments at 13 ("Establishment of the petition mechanism described here would, however, limit the per se exclusivity ban to markets where it is a competitive necessity, a result that more closely adheres to the legal standard for application of the ban set forth under section 628(c).").

provides no basis for eliminating the exclusivity ban. Obviously, the mere presence of competitors does not render Section 628 inoperative, as the sunset provision requires consideration of whether the exclusivity ban remains necessary to "preserve" or "protect" competition. Far from being inapplicable in markets where competition has developed, Section 628 affirmatively anticipates its applicability in such markets. Cablevision's reading turns the legal standard on its head.

Nor do First Amendment considerations compel the Commission to engage in a market-by-market competition analysis. Cablevision's First Amendment argument was answered ten years ago when the D.C. Circuit upheld the program access rules against First Amendment challenges.[46] Contrary to Cablevision's assertion, the D.C. Circuit, presented with the very arguments Cablevision advances here, did *not* conclude that "[t]he First Amendment rights of cable operators and programmers require that the Commission apply the exclusivity ban with more precision" than written by Congress.[47] It concluded instead that the First Amendment permits the ban to work exactly as it is written – and exactly as the Commission has interpreted it.

Even setting aside legal arguments, there are strong public policy reasons not to engage in a market-by-market sunset analysis. Of most immediate concern to DIRECTV, a market-by-market sunset mechanism would not comport with the realities of how cable's rivals purchase programming. Cable operators purchase programming for distribution within their franchise areas. DBS operators, by contrast, distribute

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46 *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 979 (D.C. Cir. 1996) ("Given the attenuated nature of the connection between the overreach of these provisions and Time Warner's speech, we therefore conclude that Time Warner has failed to show that the provisions burden 'substantially more speech' than necessary. For purposes of Time Warner's facial challenge, the 'program access' provision and the prohibition against exclusive contracts thus satisfy the intermediate scrutiny test's 'narrow tailoring' requirement.").

47 Cablevision Comments at 5.

programming both nationally and regionally. Were the Commission to allow exclusivity on a market-by-market basis, it would make “Swiss cheese” of a DBS operator’s distribution capabilities, creating a logistical, marketing, and customer relations nightmare.

Suppose, for example, Time Warner were to obtain exclusive rights to HBO within one or more of its franchise areas. DIRECTV could in theory still distribute HBO in other areas. But DIRECTV could no longer market HBO nationally. Thus, the value of HBO to DIRECTV would be dramatically lower on a per-subscriber basis, even if measured against a smaller potential subscriber base. In many such cases, DIRECTV would choose not to distribute such programming at all. Thus, the sunset of the exclusivity ban in one region would effectively become a sunset even in areas without “durable and substantial competition.”

And even if market-by-market sunset made sense in the abstract, no commenter has come up with a reasonable proposal for determining whether (and where) a particular cable operator faces sufficient competition such that an affiliated programmer[48] should be allowed to offer exclusive programming. Cablevision’s proposal is obviously overinclusive. Cablevision suggests that, where a cable operator faces “durable competition from DBS and AT&T or Verizon in a DMA served by that operator,” the exclusivity ban should be lifted. But DBS operators provide service in every DMA. So Cablevision would have the exclusivity provision sunset in every DMA in which Verizon or AT&T provide video service – even if they provide service to only a few thousand subscribers in a small portion of that DMA. This is not a real proposal for change: it is

[48] No cable commenter specifies whether, under the market-by-market sunset mechanism, programmers *affiliated with the cable operator subject to competition* could offer exclusive programmers or programmers *affiliated with any cable operator* could do so.

an invitation for the Commission to revisit a decision to extend the program access rules made only three months ago.

More fundamentally, "durable and substantial competition" expressed in anything other than market share misses completely the real issue here – a cable-affiliated programmer's incentive and ability to withhold marquee programming from cable's rivals. Any test based on mere market *presence* would be grossly insufficient.[49] It would also have the perverse effect of allowing cable-affiliated programmers to withhold "must have" programming in exactly those markets where nascent competition from terrestrial broadband systems (Verizon and AT&T) is beginning to challenge the cable incumbent.

Comcast's suggestion that the Commission simply import the "effective competition" rules is no better. Comcast would have the Commission sunset the exclusivity prohibitions in DMAs where cable's competitors control a mere 15 percent of the market.[50] Of course, cable's competitors already control more than fifteen percent in most, if not all, DMAs – including Philadelphia, where Comcast has a near stranglehold on the market due to its use of the terrestrial loophole.[51] But, as the Commission's own economic analyses confirm, this is not nearly sufficient to counter a cable operator's incentive and ability to withhold key programming.[52]

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49 This is why the Commission sought comment on a proposal to sunset the exclusive contract prohibition "if, after two years . . . , a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in the DMA." *Further Notice*, ¶ 114.

50 Comcast Comments at 14.

51 As of November 2007, cable systems served approximately 81.1% of all MVPD households in the Philadelphia DMA. *See* TVB Online, Cable and ADS Penetration by DMA, http://www.tvb.org/rcentral/markettrack/Cable_and_ADS_Penetration_by_DMA.asp (last visited Feb. 12, 2008).

52 *See Further Notice*, *supra* note 26, ¶ 59.

CONCLUSION

For the reasons described above, the Commission should not extend the exclusivity ban to entities other than cable operators and cable-affiliated programmers, should close the terrestrial loophole, and should not sunset the exclusivity ban on a market-by-market basis.

Respectfully submitted,

/s/_____________________________

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