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FILED ELECTRONICALLY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation
MB Docket Nos. 07-29 and 07-198

Dear Ms. Dortch:

It has been reported that the Commission is considering permitting MVPDs to file complaints for access to terrestrial programming pursuant to section 628(b). That section expressly requires that a complainant demonstrate, among other things, that a "cable operator . . . [or] satellite cable programming vendor" has engaged in "unfair or deceptive acts or practices" or "unfair methods of competition." While section 628(c)(2) "specif[ies] particular conduct that is prohibited by subsection (b)," the plain language of subsection (c)(2) makes clear that the enumerated prohibitions apply only to the provision of *satellite* cable programming. As demonstrated below, it would be arbitrary for the Commission to hold that conduct prohibited by subsection (c)(2) is automatically unfair when it involves terrestrially-delivered programming.[1/]

First, there is a difference between satellite- and terrestrially-delivered programming in terms of the need for a sharing requirement. Congress prohibited exclusive contracts and the other conduct enumerated in subsection (c)(2) with respect to satellite cable programming because it believed that giving cable's then-fledgling competitors access to such programming was necessary to "create some competition" by enabling these entities "to get off the ground."[2/] "Satellite video programming" was a proxy for the cable-owned national programming networks that Congress believed were key to fostering competitive distribution.[3/] The FCC likewise

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1/ *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd. 2089, 2099 ¶ 21 (1999) (section 628(b) "cannot be converted into a tool that, on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate").

2/ 138 CONG. REC. H6533 (daily ed. July 23, 1992) (remarks of Rep. Tauzin).

3/ *See id.* H6536 (remarks of Rep. Synar) (the program access provisions are a positive step toward ensuring access for competitors to cable programming services such as HBO, TNT, and CNN); 138

understood this to be Congress's intent.[4/] The ban on exclusive contracts for satellite-delivered programming and the other prohibitions in subsection (c)(2) reflected Congress's conclusion that the sum of all cable-affiliated satellite services constituted an essential input for any entrant's service. Congress was concerned that the withholding of that input would bar entry. By contrast, the average MVPD carries only a small handful of terrestrial services. Thus, the sum of all terrestrial services does not constitute an essential input and a blanket ban on withholding such services was therefore not required to promote entry.

Second, there is a difference in terms of investment incentives. Any compelled sharing requirement makes it less likely that incumbents will invest because such a requirement denies incumbents the upside of successful investments. Satellite-delivered services typically are nationally marketed and created by national content producers. Even when cable operators own a stake in such firms, these content producers generally create new services with a view to generating earnings through the sale of programming. Thus, even if such national programming must be shared, some new programming likely will still come into existence. By contrast, terrestrially-delivered services commonly are regional services created by cable operators in large part to establish customer loyalty or promote the sale of cable service. Such services are far less likely to be created if a cable operator is forced to share the fruits of its investment with competitors.

Finally, there is a difference in terms of downstream market power. Congress's determination that withholding satellite-delivered programming was "unfair" was predicated on its finding that cable operators had a monopoly on the retail end.[5/] As the D.C. Circuit recently determined, however, and as we have shown throughout this proceeding, monopoly no longer exists.[6/] It makes no sense to impose a sharing duty absent downstream market power: the absence of downstream market power demonstrates that a sharing duty is unnecessary to foster competition.[7/] For that reason, the prohibitions on conduct relating to satellite programming

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CONG. REC. S737 (daily ed. Jan. 31, 1992) (remarks of Sen. Gore) ("program services like ESPN, CNN, USA, and others, must be made available").

[4/] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 3359, 3366 ¶ 21 n.6 (1993) (referring to House and Senate reports citing "popular cable programming services" and "nationally delivered cable networks").

[5/] 138 CONG. REC. H6533-34 (daily ed. July 23, 1992) (remarks of Rep. Tauzin); *id*. H6533 (remarks of Rep. Williams); *id.* H6536 (remarks of Rep. Synar); *id.* H6539 (remarks of Rep. Shays).

[6/] *Comcast Corp. v. FCC,* 579 F.3d 1, 8 (D.C. Cir. 2009) (finding that cable operators face "ever increasing competition" from DBS operators and phone companies that "have entered the market and grown in market share since the Congress passed the 1992 Act" and that there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers).

contained in section 628(c)(2) do not imply that Congress would have deemed analogous conduct involving terrestrial programming "unfair" today.

For these reasons, it would be arbitrary for the Commission to hold that conduct of the kind prohibited by subsection (c)(2) is *per se* unfair when it involves terrestrially-delivered programming. Rather, the complainant in each proceeding should be required to demonstrate that the conduct complained of was undertaken other than in pursuit of legitimate business or competitive purposes.

In evaluating showings in individual complaint proceedings, the Commission should draw guidance from the Federal Trade Commission's Unfairness Policy Statement, in which the FTC interpreted its authority to police "unfair" practices under the Federal Trade Commission Act. The FTC uses a three-part test for unfairness: a practice (1) must present an imminent, substantial, non-speculative threat of injury *to consumers* (as opposed to competitors); (2) must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) must impose an injury that consumers could not reasonably avoid by "survey[ing] the available alternatives, choos[ing] those that are most desirable, and avoid[ing] those that are inadequate or unsatisfactory."[8/] The Commission's test for unfairness should similarly turn on harm to consumer welfare; there is nothing "unfair" about conduct that does not harm consumers.[9/]

7/ *See* 3B AREEDA AND HOVENKAMP, ANTITRUST LAW, ¶ 773b, at 240-41 ("The plaintiff must show that the desired resource is not just helpful but vital to its competitive viability."); *see also Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991) (no essential facilities claim unless withholding input confers "power to *eliminate* competition in the downstream market") (emphasis in original).

8/ *See* FTC Unfairness Policy Statement, Dec. 17, 1980, *reprinted in Int'l Harvester Co.*, 104 F.T.C. 949 (1984). The FTC Unfairness Policy Statement was later codified at 15 U.S.C. § 45(n).

9/ While section 628(b) prohibits conduct based on its "*purpose or* effect," the purpose element comes *after* the predicate requirement that the act itself be unfair or deceptive. Thus, purpose is relevant only if conduct is unfair. As noted above, unfairness should be analyzed by the effect that conduct has on consumers. Without the predicate effect on consumers required to make conduct itself unfair, the "purpose" of the conduct is irrelevant because there is no unfairness where there is no effect on consumers. This view finds support in the antitrust laws, which are concerned primarily with consumer effects. *See, e.g.*, *United States v. Microsoft*, 253 F.3d 54, 59 (D.C. Cir. 2001) (focus of monopolization analysis is upon market effect, not on intent); *Schachar v. Am. Acad. of Opthalmology*, 870 F.2d 397, 400 (7th Cir. 1989) ("Animosity, even if rephrased as 'anticompetitive intent,' is not illegal without anticompetitive effects.").

Even with respect to antitrust claims for which intent is an express element, such as attempted monopolization, intent is relevant only when there is proof that the *likely effect on the market* would be anticompetitive, and even then the intent element requires specific intent to remove competition through unlawful means in order to raise prices, as opposed to the simple intent of a competitor to provide a more

Pursuant to section 1.1206(b) of the Commission's rules, a copy of this letter is being filed electronically with the Office of the Secretary and served electronically on the Commission participants in the meeting.

Should there be any questions regarding this matter, please contact the undersigned.

Sincerely,

Howard J. Symons

cc: Austin Schlick
Stuart Benjamin
Marilyn Sonn
Susan Aaron
William Lake
Robert Ratcliffe
Nancy Murphy
Steven Broeckaert
Mary Beth Murphy
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Jamila Bess Johnson
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Rick Kaplan
Rosemary Harold
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attractive product and thereby win customers from other competitors. *See, e.g.*, *Microsoft*, 253 F.3d at 80-84 (holding that there can be no liability for an alleged attempt to monopolize in the absence of market analysis showing a dangerous probability of anticompetitive effects); *Ass'n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 585 (D.C. Cir. 1984) (the specific intent required for an attempted monopolization claim is not satisfied by a "malevolent" motive, but rather requires a showing that the defendant intended to acquire monopoly power by driving its rival from the market by exclusionary or predatory means).