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January 13, 2010

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

Re: *Notice of Ex Parte Communication*, MB Docket Nos. 07-29, 07-198

Dear Ms. Dortch:

On January 13, 2010, Alexandra M. Wilson, Vice President of Public Policy and Regulatory Affairs, Cox Enterprises, Inc., Lauren Van Wazer, Chief Policy and Technology Counsel, Cox Enterprises, Inc., and the undersigned, acting as counsel for Cox Communications, Inc. ("Cox"), met with Austin Schlick, General Counsel, and Susan Aaron of the Office of General Counsel, Nancy Murphy, Associate Bureau Chief, Mary Beth Murphy, Policy Division Chief, Steven Broeckaert, Senior Deputy Policy Division Chief, David Konczal, Assistant Policy Division Chief, and Diana Sokolow of the Media Bureau, and Stuart Benjamin, Distinguished Scholar in Residence, of the Office of strategic Planning & Policy Analysis. The parties discussed the issues addressed in Cox's reply comments in this matter, a copy of which is attached.

Cox reiterated its position that neither Section 628 nor any other provision of the Communications Act provides authority for regulating programming agreements involving terrestrially-delivered cable programming. Indeed, Cox noted that longstanding Commission precedent explicitly holds that the express language of Section 628 covers satellite-delivered, as opposed to terrestrially-delivered programming. Cox also explained that if, however, the Commission now concludes that Section 628(b) covers terrestrially-delivered programming offered by cable operators, it must, at the same time, create a level competitive playing field by also regulating exclusive programming contracts entered into by DBS providers.[1] This would

[1] The scope of the Commission's authority to combat potentially anticompetitive acts by DBS providers and their affiliates currently is under consideration in two proceedings. In 2007, in this proceeding, the Commission asked whether Section 628(b) provided authority for it to extend the ban on exclusive programming deals to programmers that are vertically integrated with DBS providers. Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, 17861 ¶ 118 (2007). Inquiring whether an entity can be covered by Section 628(b) merely by virtue of its affiliation with a DBS provider inherently raises the issue of whether DBS providers are themselves covered by Section 628(b). In response to the *NPRM*, the Broadband Service Providers Association argued that the Commission has ample authority to prohibit any MVPD, including DBS providers, from enforcing exclusive contracts for live sports programming. *See*

permit MVPDs to challenge exclusive DBS programming arrangements like DirecTV's NFL Sunday Ticket package on the grounds that they hinder significantly or prevent competing MVPDs from providing satellite programming service to customers and those complaints should be judged based on the same standards and principles applied to complaints against cable operators' exclusive programming arrangements. Cox was encouraged to set forth legal authority for applying Section 628(b) to DBS providers.

Section 628(a), which sets forth the overarching congressional policy favoring fair competitive practices in the entire MVPD market, directs the Commission to increase the availability of satellite cable programming and satellite broadcasting programming in the MVPD market. Section 628(b) prohibits satellite broadcast programming vendors, among others, from engaging in "unfair or deceptive acts or practices" that have the purpose or effect of significantly hindering competition or entry into the market for distribution of satellite-delivered programming.

DBS providers are "satellite broadcast programming vendor(s)" within the meaning of the Section 628. Section 628(i)(4) defines a "satellite broadcast programming vendor" as "a fixed service satellite carrier that provides service pursuant to Section 119 of Title 17, United States Code, with respect to satellite broadcast programming." DBS providers plainly are satellite carriers that beam satellite programming from established orbital slots to stationary satellite ground receivers.[2] DBS operators also provide service pursuant to the compulsory

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Comments of Broadband Service Providers Association, MB Docket No. 07-198 at 18 & n.42 (filed Jan. 4, 2008); Reply Comments of the Broadband Service Providers Association at 16-21 (filed Feb. 12, 2008). The scope of the Commission's authority to extend Section 628's restrictions on anticompetitive conduct to DBS providers pursuant to Section 335 and/or Section 4(i) of the Act also is an open issue in the Commission's *Further Notice of Proposed Rulemaking* in its exclusive MDU service contracts proceeding. Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, 22 FCC Rcd 20235, 2064-65 ¶¶ 61-62 (2007) ("*MDU Order*").

[2] The two largest DBS providers offering service today, DirecTV and Echostar, unquestionably are "fixed service satellite carriers" within the meaning of Section 628(b) because each uses Part 25 Fixed Service Satellite ("FSS") licenses as part of its satellite systems for delivering programming to its customers. *See, e.g.*, DirecTV Enterprises, LLC, *Order and Authorization*, 21 FCC Rcd 8028 (2006); Echostar Satellite Operating Corporation, *Order and Authorization*, 21 FCC Rcd 14780 (2006). Even if they were not using FSS licenses as part of their satellite systems, reading Section 628(b)'s reference to "fixed service satellite carriers" to exclude today's dominant DBS carriers would reverse the result Congress sought to achieve. At the time of passage of the 1992 Act, the only providers offering DBS services used Part 25 FSS licenses. In recognition of the fact that the Commission also intended to license additional DBS providers under Part 100, Congress imported the Commission's distinction between fixed service DBS providers and Part 100 DBS providers into the 1992 Act. *See* 47 U.S.C. § 335(b)(5)(A) (defining "provider[s] of direct broadcast satellite service" as including both Part 100 and Part 25 licensees). The first DBS services using licenses issued under Part 100 of the Commission's rules were not launched, however, until 1994, well after enactment of the 1992 Act. By referring

copyright license under Section 119 of Title 17; indeed, they are among the very few parties operating under this provision. They use Section 119 specifically to provide "satellite broadcast programming."[3] Moreover, nothing in Section 628(b) suggests that its application is limited to satellite broadcast programming vendors that are vertically integrated or are dealing with vertically integrated programmers.

In the *Program Access Reconsideration Order*, the Commission decided that Section 628(b) provided it with the authority to invalidate exclusive programming contracts entered into by DBS providers if those agreements restrain competition.[4] Indeed, in that case, NRTC and DirecTV challenged a number of exclusive programming contracts entered into by an early DBS rival, arguing that Section 628(c)(2)(C) banned all MVPDs, including DBS providers, from entering into exclusive contracts with vertically integrated programmers.[5] Stating that Section 628(c)(2)(C) banned only contracts between cable operators and cable and satellite programmers, the Commission concluded that DBS providers aren't prohibited *per se* from entering into exclusive programming arrangements.[6] More importantly, however, the Commission decided

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to "fixed service satellite carriers," Section 628(b) covered all the DBS providers that were then providing service. Since the passage of the 1992 Cable Act, however, DirecTV and EchoStar, originally licensed under Part 100, have become dominant, while the Part 25 FSS operators that provided the first direct broadcast satellite service and tried to compete with DirecTV and EchoStar are now defunct. Moreover, the Commission itself eliminated distinction between Part 100 and Part 25 licensees found in Section 335(b)(5)(A) of the Act by eliminating Part 100 and folding its DBS rules into Part 25. *See* Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, 17 FCC Rcd 11331 (2002). The result of these changes is that today, reading Section 628(b) as excluding DirecTV and Echostar would transform a statute that covered all DBS providers when enacted into one that covers no DBS providers at all. The Commission is required to avoid a construction of the statute that would reach such an absurd result. *See, e.g.*, High I-Q Radio, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 7225 ¶ 38 and n. 28 (2004) (citing *States v. American Trucking Associations*, 310 U.S. 534 (1940)).

[3] Section 628(i)(3) defines "satellite broadcast programming" as "broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster." DBS providers that offer broadcast signals pursuant to the Section 119 compulsory copyright license and Section 76.64(b)(2) and (3) of the Commission's rules provide "satellite broadcast programming" because they transmit those signals without the specific consent of the broadcaster.

[4] Implementations of the Cable Television Consumer Protection & Competition Act of 1992: Development of Competition & Diversity in Video Programming Distribution & Carriage, *Memorandum Opinion and Order on Reconsideration of the First Report and Order*, 9 FCC Rcd 3126, 3126-27 ¶¶ 40-41 (1994).

[5] *Program Access Reconsideration Order*, 9 FCC Rcd at 3111 ¶ 11.

[6] *Id.* at 3131 ¶ 33. The Commission noted that the consequence of adopting this argument would be that any DBS exclusive programming arrangements with non-vertically integrated programmers could be invalidated within the Section 628(c)(2)(C) *per se* rule. *See id.* n.86.

that it did possess authority under Section 628(b) to review and invalidate exclusive DBS programming agreements, finding that "where future contracts cause a restriction in the availability of programming to alternative distributors and their subscribers, an aggrieved MVPD could seek redress by filing an unfair practices complaint."[7] While the objection by NRTC and DirecTV did involve vertically-integrated cable programming and the Commission noted this in a few places in the decision, in other places the Commission's analysis of exclusive DBS programming did not focus on the vertically-integrated nature of the programming at issue. This makes sense because the Commission already had determined that satellite broadcast programming vendors and their practices are covered by the Act regardless of whether they have any vertically-integrated connection.[8]

In the *MDU Order*, the Commission noted, without any analysis or explanation, that Section 628(b) does not apply to DBS carriers.[9] Nonetheless, the Commission continued to seek other statutory bases for leveling the playing field by taking jurisdiction over anticompetitive conduct by DBS providers. As the analysis above shows, Section 628(b) does indeed apply to DBS. Accordingly, the Commission should recognize that it has full authority to address alleged

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[7] *Id.* at 3126-27 ¶ 40. The Commission reconfirmed the applicability of Section 628(b) to DBS operators two years later in its proceeding establishing rules governing Open Video Systems. Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, *Second Report and Order*, 11 FCC Rcd 18223 ¶¶ 183-185 (1996).

[8] The Commission's original *Program Access Order* did not specifically discuss the applicability of Section 628(b) to DBS providers, limiting its discussion of the scope of the term "satellite broadcast programming vendor" to recognize that Section 628(b) applies to all parties that fit the statutory definition regardless of whether they are vertically integrated with programmers or other MVPDs. *See* Implementations of the Cable Television Consumer Protection & Competition Act of 1992: Development of Competition & Diversity in Video Programming Distribution & Carriage, *First Report and Order*, 8 FCC Rcd at 3371-72 ¶¶ 34-35 (1993) (the "*Program Access Order*"). Again, that the Commission did not focus on DBS in its initial order is unsurprising. The early DBS providers using Part 25 FSS licenses were relatively small and new DBS services using Part 100 licenses did not launch until June 1994, well after passage of the 1992 Cable Act and the release of the *Program Access Order*. Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *First Report*, 9 FCC Rcd 7442 ¶¶ 62-70 (1994).

[9] *MDU Order*, 22 FCC Rcd at 20251, 20264 ¶¶ 32, 61; *see also* Annual Assessment of the Status of Competition for the Delivery of Video Programming, *Thirteenth Annual Report*, 24 FCC Rcd 542, 580 ¶ 74 (2009). As shown above, the Commission's statement was at odds with the language of the statute and previous Commission precedent and as such should not bind the Commission going forward. The issue of whether DBS is covered by Section 628(b) was not addressed by the Court in the appeal of the *MDU Order*. *See National Cable and Telecommunications Association v. Federal Communications Commission*, 567 F.3d 659 (2009) ("*NCTA*").

unfair practices by DBS providers on the same basis and according to the same rules and procedures the Commission applies to cable operators.[10]

Cox explained that this approach would be consistent with both the statute and the Commission's sound policy of maintaining a platform-neutral level competitive playing field when consistent with the Act. DBS providers now are the second and fourth largest MVPDs, collectively making up nearly 30% of the MVPD market nationwide. In an MVPD industry where most incumbents' market shares are shrinking, the market share of DirecTV, which aggressively pursues and markets exclusive sports programming arrangements, including NFL Sunday Ticket and its Mega March Madness NCAA basketball package, continues to grow. Due to DBS providers' national footprint, their exclusive programming arrangements deny many viewers in every market access to programming.

Surely if local agreements like Cox's single exclusive programming arrangement with the San Diego Padres warrant Commission review under Section 628(b), then DirecTV's nationwide exclusivity with respect to out-of-market carriage of some of America's most popular sporting events should be subject to the same scrutiny. Cox has no ownership interest in the San Diego Padres, and like DirecTV's agreement with the NFL, Cox's telecasting arrangement with the Padres was negotiated at arm's length. Given the already great and growing importance of DBS providers to the MVPD market, there is no basis for exempting their business practices alone from scrutiny under Section 628(b). Such an omission would leave a gaping hole in the Commission's ability to police anticompetitive practices in the MVPD market and ensure the widest possible distribution of programming to consumers as Congress directed it to do in Section 628(a).

Even if the Commission determines it lacks direct authority to apply Section 628(b) to DBS providers, these strong policy concerns would support applying other grants of Commission authority to review DBS practices that pose anticompetitive concerns across the MVPD landscape. Section 335 of the Act gives the Commission broad authority to impose on DBS providers "public interest or other requirements for providing video programming."[11] Prohibiting anti-competitive DBS exclusive programming arrangements would fit squarely within this congressional grant of authority over DBS video programming. The Commission's ancillary authority under Section 4(i) of the Act, read together with Sections 335 and 628(a) and (b), also would provide a basis for ensuring a level competitive playing field between DBS providers and other MVPDs. Section 335 grants the Commission general jurisdictional authority over DBS providers. The Commission has specific authority under Section 628(a) to ensure fair competition in the MVPD industry. Section 628(b) provides the agency with "a clear repository of Commission jurisdiction" to "promote the public interest through increased competition and

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[10] Indeed, the *MDU Order* refutes the proposition that vertical integration is a necessary trigger for applying Section 628. In that case, the Commission interpreted Section 628(b) as granting it general authority to police any unfair or anticompetitive practices that significantly hinder competition in the MVPD market, including a practice – exclusive MDU agreements – unrelated to vertically-integrated programming. *MDU Order*, 20 FCC Rcd at 20256 ¶ 44.

[11] 47 U.S.C. § 335.

diversity in the MVPD market."[12] And, ensuring that DBS is subject to the same competitive restrictions as other MVPDs is reasonably ancillary to the Commission's exercise of each of those jurisdictional grants.[13]

Pursuant to Section 1.1206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), a copy of this notice is being filed electronically and a copy is being provided to each Commission participant in the meeting.

Please contact me if you have any questions regarding the foregoing.

Respectfully submitted,

/s/

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cc: Austin Schlick
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[12] *MDU Order*, 22 FCC Rcd at 20259-60 ¶¶ 49-50 (quoting *Program Access Order*, 8 FCC Rcd at 3373-74 ¶¶ 40-41), *aff'd*, *NCTA*, *supra* n.9.

[13] *See, e.g.*, *Building Owners and Managers Association International, et al. v. Federal Communications Commission*, 254 F.3d 89 n.7 (D.C. Cir. 2001) (FCC satellite over-the-air reception device rules reasonably ancillary to Commission's fulfillment of "Congress's explicit (and exclusive) grant of jurisdiction to the Commission over direct-to-home satellite services and its broad responsibility to make communications services available to all individuals").

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox")[1] hereby files these reply comments to rebut the arguments by competitive MVPDs in this proceeding about Cox's San Diego-based, terrestrially delivered local programming channel, Channel 4 San Diego ("Channel 4 SD"). These competitive MVPDs argue that multichannel video competition in the San Diego market is thwarted because Cox does not make Channel 4 SD available to some MVPDs and that this in turn justifies expanding the Commission's program access rules to require cable operators like Cox to make terrestrially delivered channels like Channel 4 SD available to all competitors.[2]

Cox's franchise areas in the San Diego market are intensely competitive. Indeed, competition in the San Diego market has surpassed the tipping point at which Congress has directed the Commission to remove significant regulations, not impose new ones.[3] In the current highly competitive environment, there is no merit to the argument that access to Channel 4 SD is

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[1] Cox serves the San Diego market through its affiliate CoxCom, Inc., d/b/a Cox Communications San Diego. Channel 4 San Diego is a division of Cox Media, L.L.C., which is a subsidiary of CoxCom, Inc.

[2] *See* Comments of Verizon at 5-7; Comments of AT&T, Inc. at 1-3; Comments of the Coalition for Competitive Access to Content (CA2C) at 8-10; Comments of the United States Telecom Association at 6-8 (collectively, the "Alternative MVPDs"). The Commission's current rules, promulgated pursuant to Section 628(c) of the Communications Act, 47 U.S.C. § 548(c), require cable operators to make vertically integrated satellite-delivered programming networks available to competitors. 47 C.F.R. § 76.1000, *et seq.*

[3] *See* CoxCom, Inc. d/b/a Cox Communications San Diego, Petition for Determination of Effective Competition, CSR No.-_____ (filed January 28, 2008) (the "Cox Petition").

necessary to ensure the full benefits of competition. No basis exists, therefore, for the Alternative MVPDs' argument that the Commission should search the Communications Act to find authority to expand the program access rules. The Commission instead should reaffirm that terrestrially delivered channels like Channel 4 SD are not subject to the program access rules.

Background

Cox serves a large portion of the city of San Diego, the unincorporated portions of San Diego County, and a number of other incorporated municipalities within the San Diego market.[4] In addition to Cox, the San Diego market features video competition from no fewer than eight wireline, direct broadcast satellite ("DBS"), and telecommunications company competitors, including Time Warner Cable, DirecTV, Dish Network, AT&T, and several smaller cable overbuilders and satellite master antenna television providers. Though the market already has a large number of providers, it continues to remain attractive to new entrants. In June 2007, AT&T began providing its U-Verse Internet Protocol TV ("IPTV") service in San Diego and it is aggressively marketing the service throughout the market.[5]

Since 1996, Cox has provided the San Diego market with local entertainment, public affairs, and sports programming on Channel 4 SD. The Alternative MVPDs focus on Channel 4 SD because it has exclusive rights to transmit most San Diego Padres regular season baseball games in the market.[6] Channel 4 SD, however, is not exclusively a local sports channel. Instead,

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[4] The municipalities include: Chula Vista, El Cajon, Encinitas, Escondito, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Marcos, Santee, Solana Beach, and Vista.

[5] *See* Cox Petition at 26-27 and Exhibits 14-16, 22.

[6] DBS and other cable providers have access to these games outside the San Diego market through Major League Baseball's Extra Innings package. Channel 4 SD also carries a limited number of sporting events from area universities San Diego State University and the University of San Diego, when those schools' primary telecasting affiliates choose not to televise the games. The remainder of Channel 4 SD's sports programming consists of: second-run rights to some San

it carries a number of locally-themed entertainment shows such as *Sam the Cooking Guy* (a local cooking show), *Brain Wave* (a local high school quiz show), *So You Made a Movie* (which showcases short films produced by San Diegans), and *Forefront* (which highlights successful San Diegans and unlocks the secrets to their success).[7] Moreover, Channel 4 SD airs several shows that concentrate on local issues, such as *Insider*, which examines issues of local importance such as recycling, volunteerism, redevelopment, and exercise, and *A Salute to Teachers*, which honors the best of San Diego's educators.

While Channel 4 SD carries sports programming in the San Diego market, the channel is only one of many options for local sports programming in San Diego. It has the rights to the regular season games of one professional sports team. All Chargers games and most of the major college sports in the area air on channels other than Channel 4 SD. Moreover, Channel 4 SD is not exclusive to Cox. Cox makes Channel 4 SD available to other traditional wireline cable competitors in the San Diego market, though it reserves the right to exclude any MVPD, including DBS or telephone company MVPDs from its distribution model.[8]

Argument

Despite the prevalence of competition of all kinds in the San Diego market, several commenters in this proceeding claim that Cox's so-called "practice" of restricting distribution of

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Diego Chargers preseason football games, local high school sporting events, and programs providing local sports news.

[7] *See* http://www.4sd.com/4SD_New/.

[8] Cox's model of providing programming to competitive cable overbuilders contrasts with the sports programming strategies of some other MVPDs. Most notably, DirecTV stridently uses its exclusive NFL Sunday Ticket package to claim that it is the only operator positioned to serve dedicated professional football fans. The company always has acknowledged that it uses NFL Sunday Ticket as a "programming differentiator" that "sets [DirecTV] apart from [its] competition." See Barry Wilner, *Picture-perfect: the NFL's television future is bright, starting with the newly launched NFL Network*, FOOTBALL DIGEST (Dec, 2003) (quoting former Vice Chairman of DirecTV, Eddy Hartenstein), available at http://findarticles.com/p/articles/mi_m0FCL/ is_4_33/ai_110312195.

Channel 4 SD to other terrestrial wireline cable operators is inhibiting competition in the market. The Alternative MVPDs' argument for extension of the program access rules rests on the Commission's finding in the *Adelphia Order* and the *Program Access Order* that, as of 2005, DBS penetration was significantly lower in San Diego than it would be if Cox were required to provide all competitors access to Channel 4 SD.[9] This finding led the Commission to conclude that a limit on access to Channel 4 SD was creating relevant competitive distortions in San Diego.[10] The Alternative MVPDs add little to the Commission's previous analysis, merely repeating that Cox's practices in San Diego are unfairly limiting competitive entry and penetration in San Diego. As the Commission long has held, the program access restrictions under Section 628(c) do not require cable operators to make terrestrially delivered cable channels available to MVPD competitors.[11] Nonetheless, the Alternative MVPDs argue that the

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9 *See* Adelphia Communications Corp., *Memorandum Opinion and Order*, 21 FCC Rcd 8203, 8269-72 ¶¶ 145-151 (2006) ("*Adelphia Order*"); Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution; Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, MB Docket Nos. 07-29, 07-198, *Report and Order and Notice of Proposed Rulemaking,* FCC 07-169 at ¶¶ 39-42 & Appendix B (rel. Oct. 1, 2007) ("*Program Access Order*"), *appeal pending sub nom. Comcast Corp. v. FCC*, Case No. 07-1487 (D.C. Cir. filed Dec. 3, 2007). The Commission also examined the Philadelphia and Charlotte markets, which have vertically integrated cable channels, but it failed to establish any significant effect on competition stemming from the absence of access to the cable channel in Charlotte and therefore discounted this finding in making its conclusions. The Commission also discounted evidence that DBS growth in Philadelphia had tripled between 2000-2006 because cable penetration figures are lower in other metropolitan areas of similar population like Dallas, Phoenix, and San Antonio. Cable and DBS penetration, however, are affected by a number of factors, including (but not limited to) population density, the number of persons living in multiunit dwellings (MDUs), and the historical development of cable systems in the area. For example, according to the U.S. Census Bureau, Philadelphia is by far the most densely populated of the metropolitan areas the Commission mentioned and residents of San Diego are considerably more likely to live in MDUs (44%) than residents of Dallas (31%), Phoenix (35%), or San Antonio (32%). These factors are at least as likely to explain the lower (though growing) DBS penetration in Philadelphia and San Diego as the availability of a programming channel.

10 *See id.*

11 *See* Cablevision Comments at 14 & n.36 (collecting cases).

Commission should stretch its authority under one or more of eight statutory provisions to require competitive access to channels like Channel 4 SD.[12]

Since the *Adelphia Order* and the *Program Access Order* were released, however, Cox completed an extensive analysis showing that the San Diego market is robustly competitive, with levels of competitor penetration that surpass the statutory thresholds for effective competition contained in Section 623 of the Communications Act.[13] In the unincorporated areas of San Diego County and five Cox-served municipalities in the San Diego market, DBS penetration alone exceeds the statutorily mandated 15% threshold that denotes effective competition under the Competing Provider Test established by Section 623(*l*)(1)(B) of the Act.[14] In four other municipalities, DBS penetration coupled with competition from other wireline cable operators satisfies the Competing Provider Test.[15] All of Cox's franchised cable communities in San Diego County also are subject to effective competition under the LEC Test, based on AT&T's introduction of its U-Verse IPTV service.[16]

Competition in the San Diego market therefore is flourishing. The depth and breadth of competition in the San Diego market exposes the shortcomings of the Alternative MVPDs' argument that access to Channel 4 SD is necessary for competition to continue to grow. That argument is based entirely on the Commission's analysis of Nielsen DBS penetration estimates

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12 These sections include 47 U.S.C. §§ 154(i), 201(b), 303(r), 521(6), 532(g), 536(a), 548(b), or 606.

13 47 U.S.C. § 543.

14 47 U.S.C. § 543(*l*)(1)(B). *See* Cox Petition at 14 & Exhibit 11. These municipalities include Chula Vista, Escondito, Oceanside, San Marcos, and Vista.

15 *See* Cox Petition at 14 & Exhibit 11. These municipalities include Encinitas, National City, Poway, and Solana Beach. The Commission should note that competitive penetration in these ten franchise areas exceeds the statutory threshold despite AT&T's refusal to provide Cox with subscriber numbers for those communities contrary to the requirements of Section 76.907 of the Commission's rules. *See* 47 C.F.R. § 76.907(c); Cox Petition at n.8 & Exhibit 1.

16 *See* 47 U.S.C. § 543(*l*)(1)(D). *See also* Cox Petition at 15-31.

from 2004-2005, a largely hypothetical regression analysis performed by the Commission in the *Adelphia Order*,[17] and the Commission's recitation of those results in the *Program Access Order*. Cox's showing of DBS penetration in its San Diego franchise areas, on the other hand, is based on actual data – DBS subscriber numbers provided by the Satellite Broadcasting and Communications Association, current as of October 4, 2007.[18] The methodologies Cox used have repeatedly been approved by the Media Bureau[19] and reliably show that, whatever the DMA-wide DBS penetration level, numerous communities within the DMA exhibit DBS subscribership that exceeds the 15% statutory threshold. Therefore, DBS penetration is thriving despite the absence of Channel 4 SD. Given that showing, the argument that DBS subscribership is lagging due to the unavailability of Channel 4 SD is unsustainable.

Other developments since the *Adelphia Order* also militate against adopting the Alternative MVPDs' arguments. First, the Nielsen DMA data for 2007 shows that DBS penetration in San Diego has jumped nearly 40% higher than the 2004-2005 data used by the Commission in the *Adelphia Order*, from 9.5% to 13.2%.[20] Growth of that magnitude suggests a healthy competitive market, not one stunted by the unavailability of "must-have" programming. Moreover, AT&T, which has carefully chosen its roll-out markets for its IPTV service, decided to introduce U-Verse in San Diego even though it must have known that Channel 4 SD would be unavailable to it. That is hardly the behavior of a sophisticated competitor that believes the availability of Channel 4 SD is crucial to marketplace success. Thus, the continued unavailability of Channel 4 SD to DBS and telephone company competitors is neither inhibiting

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17 *See Adelphia Order*, 21 FCC Rcd at 8270.

18 *See* Cox Petition at Exhibit 9.

19 *See id.* at 9-14.

20 *Compare Adelphia Order*, 21 FCC Rcd at 8270 (citing 2004-2005 Nielsen data) *with* http://www.tvb.org/rcentral/markettrack/Cable_and_ADS_Penetration_by_DMA.asp (chart illustrating Nielsen data regarding cable and DBS penetration as of November 2007).

the growth of existing competition in San Diego, nor is it retarding market entry by formidable new competitors.

Cox also is in full agreement with NCTA, Comcast, and Cablevision, which have demonstrated that the Commission lacks authority under the Act to extend its program access rules to terrestrially-delivered cable channels.[21] As they note, and as the Commission repeatedly has found, Section 628 of the Act specifically excluded terrestrially delivered programming from the coverage of program access requirement.[22] None of the statutory provisions identified in the NPRM provides any hint that Congress intended to give the Commission generalized authority over cable programming practices sufficient to override the specific exclusion of terrestrially delivered cable channels from Section 628.

The flourishing competition in communities such as San Diego also shows the folly of scouring the Communications Act searching for authority to expand the program access rules. Despite the presence of Channel 4 SD, competition in the San Diego market has reached the point at which Congress has instructed the Commission to begin removing regulations from incumbent cable operators, not adding them.[23] The Commission would defy logic to expand the program access requirements to include terrestrially delivered channels like Channel 4 SD without hard evidence of concrete negative competitive effects. No such evidence exists. To the contrary, the evidence shows that lack of access to Channel 4 SD does not impede competitor penetration or market entry in San Diego.

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21 *See* Comments of Cablevision Systems Corp. at 13-19; Comments of Comcast Corporation at 6-13; Comments of the National Cable and Telecommunications Association at 10-13.

22 *See, e.g.*, Cablevision Comments at 14 & n.36 (collecting cases).

23 Cable operators that demonstrate effective competition are free of rate regulation as well as a host of related rules, including the tier buy-through prohibition, the uniform geographic rate requirement, the cable-MMDS cross-ownership rule, and the requirement of placing broadcast signals on the basic service tier.

Conclusion

For the foregoing reasons, the Commission should reject the arguments of the Alternative MVPDs and reaffirm that cable operators like Cox are not required to make terrestrially delivered channels like Channel 4 SD available to all competitors.

Respectfully submitted,

Cox Communications, Inc.

By: /s/

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February 12, 2008

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