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	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF CABLEVISION SYSTEMS CORP.

Of Counsel:

Robert S. Lemle
Vice Chairman and General Counsel
Lisa Rosenblum
Senior Vice President - Government Relations and Education
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-1005

David Deitch
General Counsel
Rainbow Media Holdings, Inc.
200 Jericho Quadrangle
Jericho, NY 11753
(516) 803-2569

Howard J. Symons
Thomas G. Krattenmaker
Christopher J. Harvie
Tara M. Corvo
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

December 3, 2001

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 2

I. ALLOWING VERTICALLY-INTEGRATED CABLE PROGRAMMERS TO HAVE THE SAME OPPORTUNITY TO UTILIZE EXCLUSIVITY AS OTHER MEDIA AND ENTERTAINMENT COMPANIES WILL SPUR COMPETITION AND ENHANCE CONSUMER WELFARE 5

A. Exclusivity Is A Common Business Tool that Promotes Consumer Welfare, Particularly in the Media and Entertainment Business. 5

B. The Exclusivity Ban Unjustifiably Burdens the Ability of Rainbow and Cablevision to Compete in the Programming Marketplace 10

C. Consumers and Programmers Will Benefit From A Sunset of the Exclusivity Restriction. 15

II. EXCLUSIVITY RESTRICTIONS ARE UNNECESSARY TO PRESERVE AND PROTECT COMPETITION IN THE DISTRIBUTION OF VIDEO PROGRAMMING 19

A. The Video Programming Distribution Marketplace is Now Vigorously Competitive 20

1. By Any Statistical Measure, the MVPD Market Is Vigorously Competitive. 21

2. The Behavior of MVPDs Bears All the Hallmarks of a Fully Competitive Marketplace. 25

B. Permitting Vertically-Integrated Cable Programmers to Engage in Exclusive Contracting Poses No Particular Threat to Competition in the Distribution of Video Programming. 29

C. The Strength of MVPD Competition Negates the Ability of Cable Operators to Reap Gains from Anticompetitive Exclusivity Strategies. 31

D. The Competitiveness and Diversity of the Programming Marketplace Diminishes the Prospect that Exclusivity by Any Programmer Could Harm Competition in Video Programming Distribution. 35

E. The Antitrust Laws Are Sufficient and Appropriate Means of Policing Anticompetitive Exclusivity Strategies. 37

III. THE BAN ON EXCLUSIVE CONTRACTS VIOLATES THE FIRST AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 40

CONCLUSION 43

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	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF CABLEVISION SYSTEMS CORP.

Cablevision Systems Corporation ("Cablevision"), by its attorneys, submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1/] Through various subsidiaries and affiliates, Cablevision provides cable television service, telephony and other product and service offerings to subscribers and customers located principally in New York, New Jersey and Connecticut. Cablevision's affiliate Rainbow Media Holdings, Inc. ("Rainbow") provides a wide array of regional and national cable programming services, including American Movie Classics, Bravo, Women's Entertainment, Independent Film Channel, MSG Network, Fox SportsNet (in partnership with Fox), News 12, and Metro.

1/ *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*, Notice of Proposed Rulemaking, CS Docket No. 01-290 (rel. Oct. 18, 2001) ("*Notice*").

INTRODUCTION AND SUMMARY

Congress directed that the exclusivity restriction in Section 628(c)(2)(D) be eliminated after ten years, unless the Commission found that it was "necessary to preserve and protect competition and diversity in the distribution of video programming." In light of the substantial growth and strength of competition in multichannel video distribution since 1992, it would be impossible for the Commission to find that re-enacting the ban is "necessary." Following the mandate of Section 628(c)(5), therefore, the Commission must decline to re-enact the restriction. Retaining the aberrational ban on exclusive arrangements between cable operators and programmers will hamper investment in new programming services and inhibit competition among multichannel video programming distributors ("MVPDs").

In virtually every segment of the American economy other than vertically-integrated cable programming, the opportunity to enter into exclusive distribution arrangements is the norm rather than the exception. Exclusivity is generally favored because it strengthens investment incentives, promotes efficient distribution arrangements, and fuels more vigorous competition among distributors -- all of which result in generating more choices and better prices for consumers. Exclusivity is a particularly common tool in the broader information and entertainment business in which cable operators and programmers compete. Outside of the cable industry, the antitrust laws are considered sufficient to guard against anticompetitive abuses.

The exclusivity ban impedes competition and innovation in programming. Rainbow has been at the forefront of innovation in the video programming marketplace, launching several national and regional cable networks during the 1980s, including American Movie Classics, Bravo, and the News12 regional news service. While Rainbow continues to offer innovative new services, such as Metro and the new, niche digital offering, Mag Rack, the exclusivity ban precludes Rainbow from employing the full range of business strategies available to its competitors to build on this track record to attract investment and negotiate distribution arrangements. Unlike non-vertically integrated cable programmers, for instance, Rainbow cannot use exclusivity to help fill geographic gaps in the carriage of its existing services or to jump-start new services. Moreover, the ban constrains Rainbow throughout the country, even though Cablevision operates systems only in the New York City metropolitan area.

The ban on exclusivity also dampens the incentives of Cablevision and other cable operators to increase their investments in such programming by forcing them to bear all of the risks of program development yet share the fruits of those investments with distributors that are now formidable competitors with national scale and scope. The costs and risks of developing new programming are significant. A regulatory regime that insulates cable's competitors from these risks while socializing the associated benefits has the perverse effect of discouraging innovations in programming by all MVPDs.

Letting the exclusivity ban expire will foster competition in the multichannel video programming marketplace in at least two important ways. First, it will reestablish a regulatory environment that rewards risk-taking and innovation in programming by cable operators. Second, it will eliminate the "free-rider" dependency of other MVPDs on cable-supplied programming services, giving those MVPDs the incentive to develop their own program offerings. In both instances, consumers will benefit from greater choice and diversity as MVPDs compete on the basis of the programming and service packages that they offer.

The time for the ban on exclusivity has come and gone. The video distribution marketplace of today bears little resemblance to the landscape of 1992 when Congress enacted the program access requirements. The fledgling new competitors to cable that Congress sought to nurture in 1992 have grown into strong, viable competitors with deep pockets that have little need for government-guaranteed access to programming. Competition is so well-established that by next year, the largest distributor of multichannel programming in the country may be a DBS provider, and not a cable operator.

The last ten years also have witnessed a diminution of cable operator power in the programming marketplace. There are nearly four times as many cable programming networks as there were ten years ago, but a significantly lower percentage of those networks are vertically-integrated. The number of vertically-integrated networks among the top 15 most watched cable programming services has been cut in half since 1992. Whatever ability cable operators may have had ten years ago to use exclusive agreements with affiliated programmers to harm competition from alternative MVPDs has long since vanished.

As the attached paper from Economists, Inc. concludes, today's competitive market means that "vertically integrated cable operators would have much to lose and nothing to gain" from anticompetitive exclusivity strategies. Given the competition from DBS and other MVPDs, a cable operator attempting anticompetitive foreclosure through exclusivity would lack the power to raise prices to recover the lost profits and higher costs associated with withholding programming. The dramatic increase in the number of cable programming networks available to distributors in the last ten years, and the ability of MVPDs themselves to produce additional programming, also doom the prospects for any foreclosure strategy. If an operator nonetheless sought to undertake anticompetitive exclusive arrangements, the antitrust laws are available to remedy such conduct.

In the 1992 Cable Act, Congress made clear its preference for policies that "rely on the marketplace, to the maximum extent feasible, to achieve . . . the availability to the public of a diversity of views and information through cable television and other video distribution media."[2/] A decision by the Commission to re-enact the current ban on exclusivity would contravene this Congressional policy by unnecessarily departing from marketplace norms and inhibiting programming diversity. It also would raise constitutional concerns by unnecessarily constraining speech by cable operators, discriminating against cable operators, and involuntarily forcing vertically-integrated cable programmers to speak through outlets and distributors not of their choosing, notwithstanding the existence of less restrictive means to accomplish the competitive policy objectives of Congress.

I. ALLOWING VERTICALLY-INTEGRATED CABLE PROGRAMMERS TO HAVE THE SAME OPPORTUNITY TO UTILIZE EXCLUSIVITY AS OTHER MEDIA AND ENTERTAINMENT COMPANIES WILL SPUR COMPETITION AND ENHANCE CONSUMER WELFARE

The prevailing norm in the media and entertainment businesses is that content rights holders may enter into exclusive arrangements with distributors and licensors. That regime is generally understood to most efficiently promote investments in new and diverse content. Sunset of the exclusivity restriction in Section 628(c)(3)(D) will similarly spur new programming investment and intensify competition among distributors. The result will be to provide consumers with new services and new benefits that will emerge as the result of eliminating artificial restrictions on the operation of market forces.

A. Exclusivity Is A Common Business Tool that Promotes Consumer Welfare, Particularly in the Media and Entertainment Business.

The prevailing rule in competitive segments of the economy is that product makers and service providers are free to choose their distributors and determine for themselves the manner in

[2/] Cable Television Consumer Protection and Competition Act of 1992, § 2(b)(1), (2), 47 U.S.C. § 521 nt.

which their offerings will be marketed and sold to the public.[3/] Exclusive agreements are a common tool used by entrepreneurs, and, as noted by Economists, Inc. in the study on program exclusivity appended hereto, they are "absolutely essential to the efficient operation of a competitive market economy."[4/] The antitrust laws generally grant product makers and service providers wide latitude in choosing their distributors, and eschew blanket restrictions on exclusive arrangements.[5/] Likewise, intellectual property law has long recognized the rights of inventors and creators to control the commercial distribution and use of their works.[6/] Indeed, the protection of content creators' "exclusive right" to exploit their works is enshrined in the Constitution.[7/]

Section 628(c)(2)(D)'s ban on exclusivity is a stark exception to this general rule of commerce.[8/] The limitations imposed upon vertically integrated cable programmers by the

---

3/ *See Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) ("[a] manufacturer of course generally has a right to deal or to refuse to deal with whomever it likes as long as it does so independently"); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1358 (Fed. Cir. 1999); *Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial Inc.*, 919 F.2d 1517, 1522 (11th Cir. 1990); *Suzuki of Western Mass., Inc. v. Outdoor Sports Exp., Inc.*, 126 F.Supp.2d 40, 46 (D. Mass. 2001).

4/ Economists, Incorporated, "Competition for Video Programming: Economic Effects of Exclusive Distribution Contracts," (Dec. 3, 2001) ("EI") at 4 (attached hereto).

5/ *See Winter Hill Frozen Foods and Servs, Inc. v. Haagen-Dazs Co., Inc.*, 691 F. Supp. 539, 545-46 (D. Mass. 1988) (noting that manufacturers generally have "wide latitude" to determine the profiles of their distributorships and to engage in vertical nonprice restraint and explaining the many pro-competitive benefits of allowing such conduct), *aff'd* 888 F.2d 1380 (3rd Cir. 1989) (table); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1226 (10th Cir. 1986) ("Sound economic theory supports the cases that have allowed suppliers wide latitude in selecting their distributors."); *Lubonski v. UIC, Inc.*, 1990 WL 175689, *7 (E.D. Pa. 1990).

6/ *See In re Independent Serv. Orgs. Antitrust Litig. CSU, LLC v. Xerox*, 203 F.3d 1322, 1325 (Fed. Cir. 2000), *cert. denied sub nom. CSU, LLC v. Xerox Corp.*, 531 U.S. 1143 (2001); *id.* at 1328 ("[T]he owner of a copyright, if it pleases, may refrain from vending or licensing and content [itself] with simply exercising the right to exclude others from using its property"); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1187 (1st Cir. 1994) ("an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers").

7/ U.S. Const., art. I, § 8, cl. 8.

8/ While Section 628(c)(4) offers a mechanism for obtaining a waiver of the exclusivity ban, the costs, uncertainties, and timing of the pre-approval process -- as well as the presumption against exclusivity

Commission's rules are particularly unusual, because exclusivity is an especially common feature of the media and entertainment business.[9/] Newspapers enter into exclusive arrangements with columnists for the right to distribute op-ed pieces in a particular market or group of markets. Most network programming shown by broadcasters is made available to viewers pursuant to exclusive distribution arrangements.[10/] Movies generally are distributed only through a particular studio and often exhibited only in particular theaters within a given geographic area.[11/] Recording artists typically enter into exclusive arrangements with music labels and music publishers.

DBS providers have taken full advantage of their freedom to enter into exclusive arrangements. DirecTV's satellite-exclusive package of out-of-market professional football

---

itself -- defeat its efficacy as a realistic business option. *See 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*, First Report and Order, 8 FCC Rcd 3359, 3384 ¶ 63 (1993) ("*Program Access Order*") (exclusivity for vertically-integrated cable programmers "is not favored"); *In the Matter of Outdoor Life Network and Speedvision Network, Petition for Exclusivity pursuant to 47 C.F.R. § 76.1002(c)(4) and (5)*, 13 FCC Rcd 12226, ¶ 13 (1998) (programmer seeking to enforce exclusivity must demonstrate that the benefits of the proposed exclusivity outweigh "the presumptively anticompetitive effect on competing distributors"). Tellingly, in ten years, only five petitions for exclusivity have been filed at the Commission, and only two were granted. Both grants involved small, geographically-limited, regional news services. *New England Cable News*, 9 FCC Rcd 3231 (1994); *NewsChannel, A Division of Lenfest Programming Services, Inc.*, 10 FCC Rcd 691 (1994).

[9/] EI at 4-5.

[10/] *See id.* at 5; *see also* Howard Fendrich, "Networks Get Catty in Scramble To Sell Sporting Event Advertising," *Associated Press* (May 18, 2001) (noting Fox's $2.5 million dollar deal for exclusive rights to postseason baseball for the next six years and NBC's $3.5 billion contract for the U.S. rights to the Olympics from 2000 to 2008); Matther Doman, "WWF Ring Grows with WCW Buy," *Hollywood Reporter* (Mar. 26, 2001) (describing exclusive deal between the World Wide Wrestling Federation and Viacom); Brian Lowry, "Frasier Has a Deal to Cheer TV, Paramount and NBC Agree to a Three-Year Extension That Gives the Series a Run Equaling That of Its Parent Comedy," *Los Angeles Times* (Mar. 7, 2001) (noting NBC's $400 million dollar deal to retain exclusive rights to "Frasier").

[11/] *See, e.g.*, *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir. 1996) (upholding film distributor's grant of exclusive license for certain first-run films to film exhibitor); *Three Movies v. Pacific Theaters, Inc.*, 828 F.2d 1395 (9th Cir. 1987) (upholding summary judgment where defendant allowed only one of two competitors first-run movie rights); *West Boylston Cinema Corp. v. Paramount Pictures Corp.*, 12 Mass. L. Reptr. 530, 2000 WL 1468513, *10-16 (Mass Super. 2000) (granting summary judgment against plaintiff asserting antitrust violations under Massachusetts antitrust law -- which mirrors federal antitrust law -- stemming from exclusive licensing of first-run films).

games, "NFL Sunday Ticket," has been widely credited with boosting DirecTV's subscribership and visibility in the marketplace.[12/] And until last year, DirecTV had exclusive arrangements to offer out-of-market games from the National Basketball Association, National Hockey League, and Major League Baseball, as well as out-of-market games during the NCAA Championship basketball tournament.[13/]

The fundamental benefits of exclusivity in the media and entertainment business are that it can enhance output and it intensifies competition among both content creators and content distributors.[14/] Since the prospect of exclusivity enables content creators to obtain featured billing, favorable placement, and marketing assistance from distributors, they will compete more intensively against one another to produce compelling content. Distributors that license or purchase unique content on an exclusive basis do so in order to distinguish themselves from their competitors and to enhance their presence and visibility in the marketplace.[15/] Exclusivity fuels a virtuous cycle of output production, as both content creators and distributors respond to the exclusivity strategies of their rivals by producing and distributing distinct content offerings that

---

[12/] *See* "Pegasus' Anti-Churn Plan Gets Kudos," *Satellite News* (Oct. 29, 2001) (indicating the "power" of the NFL Sunday Ticket package's contribution to Direct TV's improved subscriber retention); R. Thomas Umstead, "Will VOD Fill the Unkept Promise? (Video on Demand)," *Multichannel News* (Sept. 18, 2000) (noting that "the launch of NFL Sunday Ticket . . . altered the PPV landscape and put direct-broadcast satellite technology on the map" and that it ultimately spurred similar exclusive DirecTV arrangements with Major League Baseball, the NBA, and NHL" which provided an important competitive advantage for DBS).

[13/] *See* "Taking on Satellite Sports; PPV defends cable's goal in hockey and basketball," *Cablevision* (Nov. 27, 2000) ("For years, DirecTV has been able to effectively siphon sports fans away from cable with its exclusive hold on popular pay-per-view sports programming such as NFL Sunday Ticket, NBA League Pass and NHL Center Ice"); "DirecTV Extends Mega March Madness," *Multichannel News* (Oct. 23, 2000) (discussing extension of DirecTV's exclusive arrangement with NCAA tournament through the 2001 season, as well as its other exclusive deals for premium sports programming).

[14/] EI at 5-7.

[15/] *Id.* at 14.

enable them to maintain a unique presence in the marketplace. The end result is to enhance consumer welfare by providing consumers with more choices at better prices.[16/]

Program exclusivity also discourages competitors from "free riding" on a rival distributor's promotional and marketing efforts.[17/] Free riding reduces the return a distributor receives from its promotional efforts and therefore reduces the incentives the distributor has to undertake such efforts at all. By discouraging free riding and encouraging more marketing and promotional activity, exclusivity not only enhances consumer awareness of unique service offerings and differential choices, it spurs the marketplace to produce more such choices.[18/]

This is not to say that program production and distribution will always be attended by exclusivity. Any grant of exclusivity is usually limited in time and in geographic space. And where non-exclusivity will lead to wider distribution, that may well occur. The point is that in all other media, the decision whether or not to employ exclusive distribution outlets is made by the parties themselves -- subject to antitrust oversight -- and not by a blanket government policy.

Finally, exclusivity also promotes diversity by enabling a distributor to take account of, and respond to, not only the aggregate preferences of a distributor's customer base, but also the intensity of those preferences. A content provider with a potential audience base that is limited in size but intensely loyal may be able to use exclusivity as a carrot to encourage a distributor to reach as many members of that limited audience to subscribe.[19/]

[16/] *See id.* at 5-7, 14.

[17/] *Id.* at 8, 14 .

[18/] *Id.*

[19/] *See, e.g., Three Movies*, 828 F.2d at 1399-400 (finding a legitimate business reason to limit exhibition of first-run movies to one theater to recoup investment, avoid free riding, and to reach the largest number of viewers with the smallest number of movie prints).

The Commission itself has noted the benefits of exclusivity in connection with the production of video programming.[20/] In fashioning rules to enable broadcasters to uphold syndicated exclusivity rights against duplicate programming imported via distant signals, the Commission noted that exclusivity can:

- enhance competition in the video marketplace;
- increase incentives to supply the programs viewers want to see;
- encourage the development of a pattern of distribution system that makes best use of the particular advantages of different distribution outlets;
- encourage the promotion of programming; and
- expose television viewers to richer and more diverse programming.[21/]

Virtually the only segment of the communications and media business saddled with a presumptive prohibition against exclusivity is vertically integrated cable programming. These restrictions severely limit the ability of vertically-integrated cable programmers to pursue elemental strategies used by other businesses, including their primary competitors, to maximize growth, investment, and innovation. The restrictions not only are now unnecessary to preserve and protect competition, they are in fact a hindrance to competition.

B. The Exclusivity Ban Unjustifiably Burdens the Ability of Rainbow and Cablevision to Compete in the Programming Marketplace.

The Commission has stated often that market forces are superior to government regulation in promoting investment, optimizing resource allocation, and maximizing consumer

---

[20/] *See In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules relating to Program Exclusivity in the Cable and Broadcast Industries*, *Report and Order*, 3 FCC Rcd 5299, ¶¶ 49-89 (1988) (subsequent history omitted) ("*Syndicated Exclusivity Order*"); *Program Access Order* ¶ 63 ("As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized.").

[21/] *Syndicated Exclusivity Order* ¶ 89.

welfare.[22/] The exclusivity restrictions unquestionably impose unnecessary and counterproductive burdens on the ability of Rainbow and Cablevision to compete in the video programming marketplace.

Investment in cable programming entails substantial risks, both for new services and new content for existing networks. Up-front expenses in the form of development and production costs are significant. Those up-front costs are often unrecoverable because the shortcomings of a particular idea or program may not be apparent until after production. Additional costs and risks arise with respect to marketing and distribution of programming. And the ultimate measurement of success -- viewer response and audience share -- is difficult to predict, and often requires a gestation period to enable a new show or service to gain and build an audience.

The prohibition against exclusivity, however, requires Rainbow to compete in the programming marketplace with one hand tied behind its back. While Rainbow has continued to develop new and innovative programming services over the last ten years -- such as the MetroChannels and the recently-launched MagRack digital offering[23/] -- the exclusivity restrictions have unquestionably prevented it from maximizing the value of its programming assets and expertise.

For example, the Commission's exclusivity restrictions hamper Rainbow's ongoing

---

22/ *See, e.g., Access Charge Reform/Price Cap Performance Review for Local Exchange Carriers*, 12 FCC Rcd 15982, 16001, 16007 (1997), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) ("Regulation cannot replicate the complex and dynamic ways in which competition will affect the prices, service offerings, and investment decisions of [service providers]. A market-based approach . . . should produce, for consumers . . . a better combination of prices, choices, and innovation than can be achieved through [regulation]").

23/ Created and distributed by Rainbow's Sterling Digital, Mag Rack offers on-demand video magazines on a range of topics focused on the hobbies, lifestyles and special interests of Cablevision viewers. Initial topics will include: Motorcycles (Motorcycle Freedom), Wine (Wine World), Automotive (Classic Cars), Birding (BirdSight), Science (Maximum Science), Photography (Photography Close Up), Catholicism (American Catholic), Weddings (Bridal), Vegetarian Cooking (Club Vegetarian) and Health (Natural Health).

efforts to broaden the base of its existing programming networks. A number of Rainbow's national services -- such as the Independent Film Channel (IFC) and Women's Entertainment (WE) -- are relatively new networks with specialized target audiences and modest subscriber bases.[24/] At the same time, the niche audiences served by these networks are valued by a segment of advertisers, and also are an important component of any distributor's customer base. In these circumstances, exclusivity can be a particularly useful tool in facilitating Rainbow's ability to fully exploit the value of these networks. Exclusivity could help both in raising the visibility of these networks in markets where they are already carried, and in gaining distribution in new markets. Rainbow's inability even to proffer to distributors the prospect of exclusivity for these networks precludes Rainbow from maximizing the value of these networks to advertisers and distributors and puts it at a disadvantage relative to other programmers.

A similar dynamic is at work with respect to the development of new programming services by Rainbow. The national programming market is highly competitive and channel capacity or "shelf space" is limited. In order to have value for distributors, new programming services must be able to stand out amid the clutter of the hundreds of cable networks already in the crowded programming market. Here again, the exclusivity restrictions hobble Rainbow's efforts to take steps that are necessary to compete in today's highly competitive programming marketplace.

By denying Rainbow the ability to employ exclusivity in appropriate circumstances, the exclusivity restrictions artificially constrain the company's ability to maximize its exposure and viewership, which translates into artificial constraints on its networks' distribution and advertising revenues. This, in turn, places Rainbow at a disadvantage relative to other

---

[24/] Of the top 75 national cable programming networks, WE ranks 55th and IFC ranks 61st. *Cable* competitors in terms of ensuring and strengthening the continued high quality of its programming. The decline in advertising revenues[25/] makes it even more imperative for programmers to maximize their geographic reach, but the exclusivity ban precludes Rainbow from fully competing for distributor shelf space. Moreover, the ban constrains Rainbow throughout the country, even though Cablevision operates cable systems only in the New York City metropolitan area. Because of Cablevision's relatively small subscriber base and concentrated geographic footprint, Rainbow's networks are even more dependent upon carriage by unaffiliated distributors than are other vertically-integrated programmers.

In addition, Rainbow's services lack the advantages that come with being affiliated with broadcast networks. Broadcast-affiliated cable networks have been able to boost distribution by having their carriage tied to a grant of retransmission consent for local, over-the-air network owned and operated affiliate stations, which all cable viewers expect to receive. Broadcast-affiliated national cable networks not only have the advantage of riding the coattails of network broadcast stations, but they also, unlike Rainbow, can offer distributors exclusivity.

The exclusivity restrictions also harm Rainbow by dampening Cablevision's incentives to invest in programming. This is significant because cable operator investment in programming has been critical to the proliferation of program networks and service choices now available to multichannel subscribers.[26/] The television business did not evolve into the multichannel video programming marketplace because cable operators offered consumers merely another means of

---

Program Investor (Oct. 5, 2001).

[25/] *See* "Cable Network Singing the Madison Avenue Blues," *Cable Program Investor* (Oct. 5, 2001) at 1.

[26/] *See In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, ¶ 78 (1990) ("*1990 Competition Report*") (vertical integration "increased both the quality and quantity of program services available to the viewing public"); *id.* ¶¶ 82-85 (vertical integration has led to investment in better programming and resulted in more viewing options for consumers).

obtaining the same programming fare available from broadcasters. Rather, the transformation took place because cable pioneers like Charles Dolan and Cablevision introduced a whole new range of programming services that were distinct from the offerings of broadcast distributors. The explosion of new cable programming services in the 1980s -- HBO, Showtime, AMC, MTV, CNN, Bravo, BET, Comedy Central, Discovery, TNT -- was funded principally by cable operator investment at a time when the extraordinary ban on exclusivity was not in effect.[27/]

Because of cable operators' proximity to subscribers, they are also particularly well-positioned to develop programming that responds to local and regional interests. Cablevision, for instance, has invested over $100 million in its four News12 services and its Metro regional entertainment and information channels (both of which are terrestrial services and therefore not subject to the exclusivity restrictions). By forcing vertically-integrated programmers to share the rewards -- but not the risks -- of programming investments, the exclusivity restriction reduces the willingness of operators to make those investments in the first place. Unsurprisingly, the evidence suggests that programming investment by cable operators -- after rising at an accelerated rate in the 1980s -- has declined in the 1990s, while the exclusivity restrictions have been in effect.[28/]

[27/] *See id.* ¶¶ 79-81 (noting the increase after 1984 in vertically owned programming services, and those services' high viewership ratings).

[28/] The percentage of vertically integrated programming, relative to total, national cable programming, declined by one-third between 1994 and 2000, from 53% to 35%. *Compare Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442 (1994) ("*First Video Competition Report*") *with Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, Table C-1 (2001) ("*2001 Video Competition Report*"). In the five years following enactment of the 1984 Cable Act, 64% of the 33 new channels launched were vertically-integrated, and cable operators took equity interests in some additional channels as well. *1990 Competition Report* ¶ 80. In 1998, the Commission found that "77 services reportedly intended to begin offering new programming service, most of which do not have MSO affiliations." *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, ¶ 163 (1998).

Perversely, the exclusivity ban also discourages other MVPDs from investing in new programming. Those MVPDs can sit idly while cable operators absorb the costs associated with unsuccessful cable operator programming investment, and can enjoy the benefits of those cable operator programming investments which do pan out.[29/] The result is reduced program output, by all MVPDs, which reduces consumer welfare and limits competition among distributors.

C. Consumers and Programmers Will Benefit From A Sunset of the Exclusivity Restriction.

Eliminating the exclusivity restriction and allowing the unfettered operation of market forces to once again shape investment, development and distribution of cable programming services would have several salutary effects for programmers and consumers. *First*, overall investments in programming will rise. Cable operators have repeatedly demonstrated their willingness to invest in new services, new programming and new infrastructure following the elimination or relaxation of regulatory constraints burdening investment.[30/] There is ample basis for assuming that the removal of the exclusivity prohibition will spur additional investment by cable operators to support new and existing programming networks.[31/] The Commission itself also has recognized the positive effects of exclusivity in terms of promoting programming investment and output.[32/]

[29/] EI at 25.

[30/] For example, cable operators added new programming to their channel line-ups after the Commission released the "Going Forward" rules, which reduced regulatory disincentives against the addition of new programming. *See* Testimony of Leo J. Hindery Jr., President, Tele-Communications, Inc. Before the Senate Judiciary Committee, Antitrust, Business Rights and Competition Subcommittee (Oct. 8, 1997). Similarly, cable operators invested heavily in infrastructure upgrades following the 1996 Act's enactment of the CPST rate regulation sunset.

[31/] *See* EI at 25-26.

[32/] *See New England Cable News*, 9 FCC Rcd 3231 at ¶ 34 (exclusivity may "attract investment, carriage and support of [a programming] service"); *id.* ¶ 40 ("exclusivity may promote diversity in the programming market when used to provide incentives for cable operators to promote and carry a new and untested programming service").

Second, removal of the exclusivity restriction will foster programming investment by DBS and other non-cable MVPDs. As Economists, Inc. notes:

> the practical effect of the current rule is to make it cheaper on the margin for DTH operators to duplicate existing program options than to develop new ones. Clearly, this acts to discourage an expansion of program supply and diversity.[33/]

DBS providers have the financial wherewithal to develop their own unique program offerings, but *they have not done so*. EchoStar is raising over $5.5 billion in the capital markets to fund its purchase of DirecTV, which has itself enjoyed the financial backing of GM and Hughes for many years.[34/] Clearly, these companies possess the resources to develop their own programming, but they have chosen not to do so. Instead, they have opted to free-ride on programming investments made by Cablevision and others.

Tellingly, the one new program offering which has been developed by a DBS operator -- NFL Sunday Ticket -- is only available on a DBS-exclusive basis. DBS providers obviously recognize and take full advantage of their freedom to use exclusivity as a marketing tool and a competitive strategy vis-à-vis cable operators.[35/] By contrast, Cablevision -- which is half the size of EchoStar and has only one-third the subscribers controlled by DirecTV -- is restricted from using exclusivity in the same manner as its competitors.

Allowing cable operators to have the same freedom to engage in exclusive arrangements as DBS and other competitors is particularly appropriate and necessary now that EchoStar and

---

[33/] EI at 25.

[34/] "EchoStar Communications Corporation Announces Financing for Hughes Electronics Acquisition," EchoStar Press Release (Nov. 5, 2001).

[35/] DirecTV's web site advertises that "NFL Sunday Ticket" is "not available on cable or any other digital service," <www.directv.com/programmmingpages/0,1093,161,00>, and its advertising campaign is similarly focused. *See* "DirecTV Unveils Fall National Promotion and Advertising Campaign," DirecTV Press Release (Jul. 30, 2001) ("NFL SUNDAY TICKET is not available on cable or through any other mini-dish satellite service").

DirecTV are proposing to create the largest MVPD in the country. EchoStar and DirecTV frequently have claimed that their small size in relation to the large cable MSOs justifies the disparate imposition of exclusivity restrictions and other regulations on cable operators. Now, however, EchoStar and DirecTV propose to become larger than any other cable MSO even as they continue to be the chief beneficiaries of one-way government rules that give them special advantages in the acquisition of their chief product input, programming. There is scant justification for continuing to provide such strong and durable competitors with special advantages in the programming marketplace.[36/]

The exclusivity restrictions have acted as a disincentive against programming investment by non-cable MVPDs, rendering it more profitable for them to rely on programming developed by others than to make investments of their own.[37/] Permitting cable operators to enter into exclusive contracts will intensify competition, by spurring DBS and other competitors to make programming investments of their own. Such a competitive dynamic not only would preclude anticompetitive conduct, but also would actually benefit consumers, by providing them with more choices and more programming.

Third, by declining to re-impose the exclusivity restrictions, the Commission will promote new and more vigorous forms of competition between cable operators and other MVPDs. Limitations on exclusivity diminish the ability of cable operators and DBS providers to compete through product differentiation.[38/] The exclusivity restriction is tantamount to a

---

36/ *See* EI at 22-23.

37/ *See Warren's Cable Monitor* (Nov. 12, 2001) at 3 (noting EchoStar official's statement that "'there aren't really plans' for merged company to become programmer, so he expressed interest in FCC's extending its rules prohibiting exclusive contracts between cable companies and affiliated programmers").

38/ EI at 22 ("Denying cable operators (or any MVPD) the opportunity to differentiate their products by acquiring exclusive rights to distinctive programming shifts the focus of competition to non-program dimensions which may be of less benefit to consumers").

prophylactic rule against inter-brand competition; such a rule actually thwarts consumer welfare.[39/]

By contrast, program exclusivity also allows a distributor to differentiate its programming packages from other distributors in the crowded video distribution marketplace. Product differentiation "represents a useful and desirable part of the competitive process" that "includes such clear public benefits as product diversity, genuine innovation, responsiveness to consumers, attention [and] service[.]"[40/]

The benefits of this form of competition are evident from the frequency with which other market actors employ it, particularly in the areas of the video programming marketplace where exclusivity is permissible. Broadcast channels market and promote their offerings by emphasizing content and shows that they have obtained on an exclusive basis. NBC will emphasize the availability of ER on Thursdays at 10 PM, and competing networks will respond in kind by advertising shows that appeal to viewers that might not be interested in ER. Likewise, DBS providers have emphasized their exclusive NFL Sunday Ticket package, and their unique ability to provide consumers with a full roster of out-of-market sports packages.[41/]

The result of this sort of competition not only benefits consumers by heightening viewer awareness of the different choices that are available to them, but also increases consumer welfare by applying competitive pressure on programmers and distributors to continually supply more content choices to the marketplace.[42/]

[39/] *See Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977).

[40/] Phillip Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1612c2 (1989) at 170.

[41/] *See* n.35, *supra*.

[42/] EI at 8, 14.

Fourth, exclusivity will fuel more program diversity. Exclusivity can enhance distribution opportunities for niche programming services with unique content that may be of strong interest to a small, albeit strong and loyal, target audience.[43/] The Commission has previously suggested that a programmer needs 20 million subscribers in order to have a reasonable prospect of survival.[44/] If, however, an exclusive arrangement with some distributors increases the likelihood that a programmer will actually be viewed by a larger share of the distributor's subscribers (due to marketing and promotion), then that programmer may be able to launch and survive with a smaller potential subscriber base. In these instances, exclusivity promotes consumer welfare by increasing the store of programming services and bringing forth additional choices that might not otherwise be available to consumers.[45/]

Exclusivity also can enhance the universe of potential distribution outlets for programmers. If a DBS provider enters into an exclusive arrangement with programmer A, then channel capacity that might otherwise have been reserved for programmer A by the DBS provider's cable competitors is now available for programmers B-D. Here again, the end result of eliminating the exclusivity restriction is to generate more opportunities for programmers and more choices for consumers.

II. EXCLUSIVITY RESTRICTIONS ARE UNNECESSARY TO PRESERVE AND PROTECT COMPETITION IN THE DISTRIBUTION OF VIDEO PROGRAMMING

The last ten years have witnessed the transformation of the video programming distribution marketplace. Fledgling new entrants with only a toehold in the market have grown

---

43/ *See Syndicated Exclusivity Order* ¶ 64 (noting that exclusivity increases the viability of programs with small audiences).

44/ *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, 14 FCC Rcd 19098, ¶¶ 40-42 (1999).

into strong and durable competitors that match or exceed the size and strength of most cable MSOs. Competition has taken firm hold in the MVPD marketplace, and it cannot be uprooted. The question now before the Commission is not whether the present rules shall sunset. Congress has decreed that they must. The issue the Commission confronts is whether it is necessary to re-enact those rules to ensure that competition and diversity in the video programming marketplace does not disappear.[46/] On the facts, no such conclusion is possible. In today's marketplace, it would be uneconomic for any vertically-integrated cable programmer to enter into exclusivity arrangements solely to raise rivals' costs or foreclose competing distributors. And as in other sectors of the economy, the antitrust laws provide a backstop against exclusive arrangements that harm competition and consumer welfare.

A. The Video Programming Distribution Marketplace is Now Vigorously Competitive.

The nascency of DBS and other alternative technology competitors to cable operators was frequently cited in the years preceding enactment of Section 628 as justification for restricting the ability of vertically-integrated programmers to engage in exclusive contracts with cable operators.[47/] In contrast to the market conditions of 1992 -- when DBS providers had not secured their first customer -- alternative MVPDs that compete with cable today are now established fixtures in the video programming marketplace. DirecTV and EchoStar are the third and seventh largest MVPDs in the nation respectively,[48/] and they aspire to be consolidated into

---

45/ EI at 8, 14.

46/ *Cf.* 47 U.S.C. 548(c)(5) (mandating sunset of exclusivity restriction unless "necessary to preserve and protect competition and diversity in the distribution of video programming").

47/ *See*, *e.g.*, *1990 Competition Report* ¶ 14.

48/ *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, Comments of the National Cable & Telecommunications Association (filed Aug. 2, 2001) at 7-8 ("NCTA Video Competition Comments"); *2001 Video Competition Report* ¶ 64.

the country's largest MVPD.[49/] They do not need government-guaranteed access to programming or special assistance to ensure that they have sufficient bargaining power in program licensing negotiations.

The program access restrictions were designed to address a perceived "competitive imbalance" that no longer exists today.[50/] As of July 2001 there were over 20 million non-cable MVPD subscribers nationally -- more than 22 percent of all MVPD subscribers.[51/] For the last five consecutive years, DBS providers have outpaced cable operators with respect to signing up new customers.[52/] Not only does Cablevision face competition from DBS in each of its markets, but the company also battles for customers with numerous SMATV operators serving the multitenant buildings that make up a substantial portion of the subscriber base in the New York metropolitan area. In addition, streaming video programming over the Internet looms as an increasingly potent competitive threat, with companies like Microsoft, Sony, Disney and others investing capital to facilitate the provision of movies, sports programming and other video content over the Internet. Significantly, none of these firms is encumbered by a ban on exclusivity in distribution.

1. By Any Statistical Measure, the MVPD Market Is Vigorously Competitive.

When Congress enacted the exclusivity ban in 1993, cable operators served over 95 percent of all MVPD subscribers, MMDS less than 1 percent, SMATV operators less than 2

[49/] *See, e.g.*, "Ergen's Message to DC: I'm Best Hope vs. Cable," *Multichannel News* (Nov. 5, 2001) ("the new company would serve 16.7 million video subscribers, more than any single cable company in the U.S.").

[50/] *See 2001 Video Competition Report* ¶ 6.

[51/] *See* NCTA Video Competition Comments at 7.

percent and DBS operators only 0.12 percent.[53/] The most recent data show that cable operators' share of the market has dropped nearly 20 points, to 77 percent of MVPD customers, while DBS operators alone serve over 18 percent of such customers.[54/] The share of the marketplace held by alternative MVPDs has more than tripled since enactment of the 1992 Cable Act, while cable's share "continues to decline" on an annual basis.[55/] As the Commission has recognized, "competitive alternatives and consumer choices continue to develop,"[56/] and all cable operators are subject to at least two formidable DBS competitors whose services are available to any home in the country. Current and future marketplace players thus ensure that there will be ample competition and diversity in the distribution of video programming.

DBS Competition. DBS service has emerged as "the principal competitor to cable television service" with a national share of MVPD households of over 18 percent.[57/] With 10 million subscribers, DirecTV is three times larger than Cablevision, while, at 6 million subscribers, EchoStar is twice as large.[58/] Each year, DBS makes dramatic strides in gaining additional customers.[59/] By the satellite industry's own estimates, DBS gains over 8,000 subscribers per day and had an annual subscriber growth rate of 31 percent in 2000, which is

---

[52/] *2001 Video Competition Report*, Table C-1; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, 24418, Table C-1 (1998).

[53/] *First Video Competition Report*, Appendix G, Table 1.

[54/] NCTA Video Competition Comments at 7.

[55/] *2001 Video Competition Report* ¶ 5.

[56/] *Id.* ¶ 5 & Table C-1.

[57/] *Id.* ¶ 61; NCTA Video Competition Comments at 7.

[58/] *2001 Video Competition Report* ¶ 63. Cable also competes with other DBS operators, such as Pegasus Communications, the tenth largest MVPD with 1.5 million subscribers in 41 states, and Dominion, which offers SkyAngel, a Christian, family-oriented service.

[59/] From June 1999 to June 2000, DBS services gained almost three million subscribers to reach a total of 12,987,000 subscribers -- an increase of over 28 percent in just one year. *2001 Video Competition* more than 20 times the annual growth rate for cable television in 2000.[60/] In the New York metropolitan area Cablevision serves, DBS providers have added many thousands of new subscribers each month -- nearly 14,000 in July 2001 alone -- and have doubled their market share in the last two years.[61/] Indeed, in recent months, stories featuring cable -- and Cablevision's -- competition from DBS have appeared in *Newsday* and *The New York Times*.[62/]

SMATV Competition. Satellite Master Antenna Television Systems ("SMATV") providers continue to be a competitive force, serving over 1.5 million subscribers nationwide.[63/] SMATV competition is particularly significant in Cablevision's New York metropolitan service area, because of the prevalence of subscribers residing in multiple dwelling units ("MDUs").

Cable Overbuilders and OVS Providers. In most major metropolitan areas in the country, video service is available from wireline providers other than a cable operator, such as a cable overbuilder or Open Video System ("OVS") provider. In the New York area, Cablevision faces competition from RCN, which continues to trumpet its "substantial growth" in the New York market.[64/] Overbuilders continue to gain ground in other markets as well. For example, WideOpen West ("WOW") is now the thirteenth largest cable operator in the United States,

---

Report ¶ 61. From July 2000 to July 2001, DBS subscribers grew to over 16 million, another 28 percent increase. *See* NCTA Video Competition Comments at 7.

[60/] *2001 Video Competition Report* ¶ 65.

[61/] Berkowitz, Harry, "Tug of War," *Newsday* (Aug. 20, 2001).

[62/] *See id.*; Balk, Alfred, "More is More (Mostly): From Cable to Satellite TV," *New York Times* (Aug. 9, 2001). This growth reflects the fact that DBS has evolved from a service primarily serving rural areas to one sought in urban and suburban communities as well. DirecTV reports that two-thirds of its new subscribers live in urban counties, and its subscribers are now distributed evenly throughout the U.S., with half residing in rural areas and half in more urban areas. *2001 Video Competition Report* ¶ 66.

[63/] NCTA Video Competition Comments at 7.

[64/] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Initial Comments of RCN Corporation at 6 and Appendix B (filed Aug. 3, 2001) ("RCN Video Competition Comments").

serving over 310,000 subscribers principally in cities in the West and Midwest.[65/] Knology has several hundred thousand overbuild customers in the Southeast, and added over 15,000 customers in the second quarter of 2001 alone.[66/]

Competition From Gas/Electric Utilities. A number of electric and gas utilities have also entered into competition with cable operators to provide video programming. Although relatively new entrants, the Commission has noted that utilities "generally possess characteristics, such as ownership of fiber optic networks and access to public rights-of-way, that potentially could make them competitively significant."[67/] Seren Innovations, a subsidiary of Xcel Energy Inc., launched a bundled cable, telephony and high-speed Internet service in March of 2000, and recently passed the 10,000 subscriber mark in the St. Cloud, Minnesota area, representing nearly 40% of all homes passed by the company's network.[68/] RCN also provides integrated voice, video and data service in the Washington, D.C. and Boston areas in conjunction with local utilities there.[69/]

[65/] "SBC Sells Americast Cable Overbuild Systems to Wide Open West," *Warren's Cable Regulation Monitor* (May 28, 2001); "WideOpenWest Wrangles Place as Cable Competitor," *Multichannel News* (Nov. 5, 2001).

[66/] "West Point, Ga.-Based Cable, Internet Company Gains Customers Quickly," *Columbus Ledger-Enquirer* (Aug. 3, 2001).

[67/] *2001 Video Competition Report* ¶ 132.

[68/] "*Astound Broadband Reaches 10,000-Customer Milestone in St. Cloud Area,*" Seren Press Release (July 13, 2001). Seren's service also has 5,000 customers in Concord, California, which represent nearly 30% of the homes passed by its network. "*Astound Broadband Reaches 5,000-Customer Milestone in Concord*," Seren Press Release (Aug. 23, 2001).

[69/] *See* RCN Video Competition Comments at 6 and Appendix B; "Starpower Wins Approval in Prince George's County, Maryland to Provide Competitive Cable Television Service," <www.starpower.net/news/11-00/11-22-2000> (discussing Starpower, a joint venture between the electric utility (PEPCO) and RCN serving Washington DC and suburban Maryland and Virginia). In other areas of the country, Sigecom, a facilities-based joint venture between Vectren Corporation and Utilicom Networks, offers service (through TOTALink), and advertises that "[b]ase prices for all services will be consistently lower than what is currently being charged by incumbent providers." "*What is Sigecom*," <www.sigecom.net> (visited Nov. 14, 2001); *see also "TOTALink Granted Competitive Cable Television Franchise By Louisville Board of Aldermen,*" Sigecom Press Release (Nov. 14, 2000).

Competition From Internet Video. Internet video content "continues to become more widely available"[70/] and can be expected to play a significant role in the delivery of video programming. In particular, streaming sports programming already has taken hold in the Internet marketplace. Major League Baseball has announced that it will stream real-time video of dozens of its games in their entirety over the Internet next season through an exclusive deal with RealNetworks,[71/] and the NBA was the first major professional sports league to webcast a live game in streaming video in an experiment last April, and plans to expand its Internet video content.[72/] Video streaming is also popular in entertainment programming: Sony Pictures is considering expanding its current Internet video-on-demand offerings to include not just movies, but same-day downloads of popular soap operas, and has indicated that it believes that computers are a better technological means of reaching customers than cable or satellite.[73/]

2. The Behavior of MVPDs Bears All the Hallmarks of a Fully Competitive Marketplace.

While statistics measure the growth of competition over the last ten years, the vigor and vibrancy of that competition is most aptly illustrated by the behavior of the marketplace itself. The ongoing efforts of cable operators and other MVPDs to win and retain customers clearly demonstrates the strength of competition in the distribution of video programming. In every market in the country, consumers have an opportunity to choose among multiple distributors of multichannel video programming. The benefits of competitive choice are available to all

---

70/ *2001 Video Competition Report* ¶ 107.

71/ Hu, "*Baseball officials plan live video streaming*," Cnet.com (Oct. 30, 2001).

72/ "NBA to Webcast First-Ever Live Game on NBA.com and Real.com," RealNetworks Press Release (April 9, 2001); "NBA Brings Games Home Through Its Virtual Arena," *Multichannel News* (Nov. 12, 2001).

73/ "Add Soap Downloads to Sony's VOD," *Multichannel News* (Oct. 8, 2001).

multichannel subscribers, regardless of the penetration rates of any one provider in any particular market.

The national availability of DBS and the presence of other alternative multichannel providers render every local market not just contestable, but contested. They also exert significant competitive pressure on cable operators regardless of competitor "take rates" in particular local markets.[74/] Indeed, as Chairman Powell has recognized:

> the key measure [of successful competition] is availability of the service, not adoption rates. I emphasize availability, because there are many questions that remain as to what services consumers will value, and to what degree they will be willing to subscribe. I am hesitant to let adoption rates drive government responses, for a developing market needs the cues provided by consumer free choice.[75/]

The growth and strength of alternative MVPDs have caused cable operators in all markets to devote substantial efforts to improving services and rolling out new offerings in order to retain, win back, or gain new subscribers to their service.

For instance, EchoStar and DirecTV both focus their marketing on luring customers away from cable service, and have offered cable customers free installation, free equipment, and lower cost service to switch from cable to DBS.[76/] Ads by DirecTV lure customers with the slogan "$31.99 a month for the privilege of never having to complain about cable again."[77/] EchoStar

---

74/ *See Time Warner Entertainment Co., L.P. v. Federal Communications Commission*, 240 F.3d 1126, 1134 (D.C. Cir. 2001), *citing AT&T Corp. v. Federal Communications Commission*, 236 F.3d 729, 736 (D.C. Cir. 2001) ("a company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the availability of competition. If an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch.").

75/ Remarks of Michael K. Powell, Chairman, Federal Communications Commission at the National Summit on Broadband Deployment, Washington, D.C. (Oct. 25, 2001).

76/ "Some Cities Turning Their Backs on Cable," *Times* (May 21, 2001).

77/ "When Wire gets higher," *San Antonio Express-News* (July 22, 2001).

customers that pay for satellite equipment receive one year of service for $9 per month.[78/] As noted above, DirecTV also has emphasized its exclusive "NFL Sunday Ticket" offering, as well as other out-of-market sports packages not available from cable operators.[79/] These efforts have had considerable success: four out of five new MVPD subscribers choose DBS over cable, even though 70 percent of new DBS subscribers reside in areas where cable service is available.[80/]

In New York, DirecTV and EchoStar specifically have targeted Cablevision subscribers in their marketing efforts. For example, EchoStar's DISH network's recent ad campaign featured print ads, direct mail, door hangers, and radio live-reads offering direct rate and service comparisons between EchoStar and Cablevision. DirecTV's "Cable Bites" print ads feature side-by-side comparisons of tier pricing and number of channels. And subscribers appear to be responding, as DBS penetration in Cablevision's service areas continues to increase.

Cable operators have responded vigorously to DBS competition, spending billions upgrading their facilities in order to roll out new broadband and digital service offerings, particularly in communities targeted by DirecTV and EchoStar.[81/] Cahners In-Stat Group reports that in the past five years, cable operators "have spent about $75 billion upgrading their networks

---

78/ *See* "Tug of War," n.61, *supra*.

79/ Lawrence Johnson, "Considering Future of Satellite TV," *Gannett News Service* (Oct. 7, 2001) (noting that "satellite's ambitious sports programming has become a strong selling point" and citing the "popular" NFL Sunday ticket as an example); Vanessa O'Connell, "About Advertising: DirecTV Dishes Up Marketing Push," *Wall Street Journal Europe (*July 31, 2001) (noting that DirecTV hopes to defend its competitive position by making "a big push for its National Football League 'Sunday Ticket' program," which contributed strongly to DirecTV's "extremely successful" performance in the 1990s).

80/ "Satellite Television Services Provide Competition for Cable Providers," *The Times Leader* (Oct. 29, 2001) (citing NCTA statistic); *see also* "Cable Still in Lead with New Mexico Viewers, but Satellite is Coming Up Fast," *Albuquerque Journal* (Oct. 18, 2001) (from 1996-2000, the number of satellite subscribers more than tripled, while cable TV subscribership grew less than three percent); "In Direct-to-Home Satellite, the Best is Still to Come," *Cahners Business Information* (Jan. 6, 2001).

81/ *See, e.g.,* "Some Cities Turning Their Backs on Cable," n.76, *supra* (Charter upgrading system in Big Bear Lake from 35 to 175 channels and adding high-speed Internet access, and will attempt to "undercut [DirecTV] in price").

to better compete with the satellite TV providers"[82] and that "[w]hen cable started to lose upper-tier subscribers to satellite, that lit a fire under the industry . . . And they've responded."[83] Where EchoStar and DirecTV have launched major campaigns to win away cable customers, cable operators have dropped prices and offered to buy back satellite dishes so that customers can avoid losing money if they switch providers.[84]

Cablevision has hardly been immune to these competitive pressures, launching a major advertising and consumer marketing campaign specifically targeted at winning back subscribers from DBS.[85] Cablevision has also continued to upgrade its networks in order to be able to offer its subscribers leading-edge services, and has begun to roll out Sony digital set-top boxes to customers on Long Island. Dubbed iO: Interactive Optimum, Cablevision's new digital service offers subscribers a comprehensive suite of digital services available, including video-on-demand, digital programming, interactive television, a "click-to-view" programming guide, e-mail service through the television, and select niche video content from Mag Rack.

Measured both quantitatively and qualitatively, the video programming distribution marketplace is now highly competitive. Such competition removes any conceivable justification for retaining special exclusivity restrictions for vertically-integrated cable programmers that are inapplicable to all other competitive segments of the economy.

---

[82] "More Minneapolis Customers Turning to Satellite in the Pay-TV Industry," *Knight-Ridder Tribune Business News* (Nov. 12, 2001).

[83] *Id.*

[84] *See* "Satellite TV Providers Target South Florida Customers with Pricing Specials," *The Miami Herald* (Nov. 11, 2001); "More Minneapolis Customers Turning to Satellite in the Pay-TV Industry," n.82, *supra*; "Time Warner Knocks on Doors to Win Back Satellite Customers in Wisconsin," *The Milwaukee Journal Sentinel* (Sept. 9, 2001).

[85] *See* "Tug of War," n.61, *supra*.

B. Permitting Vertically-Integrated Cable Programmers to Engage in Exclusive Contracting Poses No Particular Threat to Competition in the Distribution of Video Programming.

While the Commission has frequently recognized the benefits of vertical integration in the video programming marketplace,[86/] concerns that cable operators could harm competition by withholding affiliated programming from competing distributors helped prompt enactment of the exclusivity restrictions.[87/] Whatever relevance this concern may have had under the competitive conditions of ten years ago, it no longer has any merit in today's competitive marketplace.

First, the strength and size of competing distributors to cable operators are simply too large for any programmer -- vertically integrated or otherwise -- to shun. As Economists, Inc. notes: "DTH [direct-to-home satellite] today is simply too attractive a market and has too many alternatives for program suppliers to profitably ignore."[88/] Competing distributors account for over 20 million of the nation's multichannel video programming subscribers. A vertically-integrated programmer that attempts to use exclusivity to facilitate foreclosure of competition from rival MVPDs, "sacrifices the potential profits" from the sale of its programming to those competitors.[89/] While those foregone revenues may have been of less consequence in 1992 when competing MVPDs accounted for only a small segment of the marketplace, "[t]he lost profits from foreclosure clearly grow larger as the size of the competing program buyer increases."[90/]

86/ *See*, *e.g.*, *1990 Competition Report* ¶¶ 82-86 ("vertical integration produces significant benefits for cable subscribers [because it] enable[s] companies to ... foster investment in more and better program sources, which lead[s] to more investment in programming, more original programming and a wealth of new viewing options for consumers").

87/ *See* Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(5), 47 U.S.C. § 521 nt.

88/ EI at 21.

89/ *Id.* at 1.

90/ *Id.*

Entering into exclusive arrangements solely to thwart competition would be self-defeating. Competition among distributors benefits vertically-integrated programmers and competition among programmers ensures that any effort by a vertically-integrated network to foreclose such competition would fail.[91/]

Second, vertically-integrated cable companies like Cablevision and AOL/Time Warner own multiple programming networks, some of which are more niche-oriented or less well-established than others. Any effort by a such an entity to pursue an anticompetitive exclusivity strategy with respect to one of its better-known or well-established networks would undoubtedly have ramifications with respect to distribution of its other newer or more niche-oriented networks. Not only do the costs to a programmer of a vertical foreclosure strategy rise as the size of the competing MVPD base expands, but those costs also multiply if other programming services owned by that programmer are rejected by the competing MVPD.

Third, even if some vertically-integrated programmers did opt for exclusivity, competing MVPDs would still have access to an ample supply of programming. In contrast to ten years ago, vertically-integrated programming networks constitute a minority of cable programming services available for distribution. The percentage of vertically integrated networks in the cable industry has declined sharply, from 53 percent in 1994 to 35 percent last year.[92/] In 1994, 12 of the top 15 most watched cable programming networks (measured by prime time rating) were vertically integrated; by 2000 that number had been cut in half.[93/] Likewise, in 1994, 14 of the top 20 largest national cable networks (measured by subscribership) were vertically-integrated;

91/ *See* Section II.D, *infra*.

92/ *See 2001 Video Competition Report* ¶ 173; *First Video Competition Report* ¶ 161.

93/ *See 2001 Video Competition Report*, Table D-7; *First Video Competition Report* ¶ 162.

last year, that number had fallen to 9, and should now be even less, since AT&T has completed its spin-off of Liberty Media.[94/]

Cable programming services that are unaffiliated with cable operators constitute a much larger and more visible segment of the marketplace than ten years ago. The four major broadcast networks – leveraging their own integration of program production and program distribution assets – are a particularly powerful presence in the cable programming marketplace.[95/] Further, as reflected in the discussion below in Section II.D, most cable programming networks face vigorous competition from substitute or comparable services.

Fourth, as detailed more fully below, the prospect of reaping potential gains from vertical foreclosure for the cable distribution side of the business is highly improbable, given the competitiveness of today's video programming marketplace.

C. The Strength of MVPD Competition Negates the Ability of Cable Operators to Reap Gains from Anticompetitive Exclusivity Strategies.

The increase in the number of viable distributors of multichannel video programming raises the risks and penalties associated with pursuing anticompetitive exclusivity strategies that fail to enhance consumer welfare. Concerns about the use of exclusive agreements with affiliated programmers to foreclose competition in distribution are predicated upon outdated assumptions concerning cable's market power in the distribution of video programming and do

---

94/ *See 2001 Video Competition Report* ¶ 175; *First Video Competition Report*, Appendix G, Table 7; "AT&T Completes Split Off of Liberty Media," AT&T Press Release (Aug. 10, 2001).

95/ CBS/Viacom's affiliated cable networks include MTV, VH1, Nick at Nite, TV Land, BET, Country Music Television, VH1, TNN: The National Network, and Showtime. *See* <www.viacom,com/thefacts.tin>. Fox's affiliated cable networks include Fx, Fox News Channel, Fox Sports Net, and National Geographic Channel. *See* Fox Entertainment Group Annual Report (2001). NBC's affiliated cable networks include CNBC, MSNBC, ShopNBC, Arts & Entertainment Network, and the History Channel. *See* <www.nbc.com/nbc/corporate info5>. ABC's affiliated cable networks include ESPN, ESPN2, the not adequately reflect the ability of DBS and other alternative multichannel providers to deter and penalize distributors that engage in conduct that thwarts consumer welfare.

Anticompetitive foreclosure through withholding of affiliated programming from a competing MVPD can succeed only if the foreclosing cable operator has sufficient market power to raise its rates in order to recover the costs associated with the foreclosure. Foreclosure can be a profitable strategy only if the vertically-integrated cable operator has assurance that its distribution arm could recover the costs of the revenue that the programming side of its business foregoes by not licensing its service to the competing MVPD.[96/] Whatever ability cable operators might have possessed to successfully execute such a strategy ten years ago -- when competition among distributors was in its infancy -- has long since vanished.

Because DBS is available on a national basis, and, at least in Cablevision's markets, other competing MVPDs also are available to provide multichannel service to subscribers, cable operators are subject to competitive pressure in every local market. As demonstrated above, the contestability and competitiveness of local cable markets exacerbates the costs and risks of any effort by a cable operator to engage in a vertical foreclosure strategy. Under these circumstances, no cable operator can raise rates above competitive levels without risking driving its customers into the arms of its rival.[97/] Indeed, the rival distributor might cut its prices (to reflect the programming costs associated with the exclusive service which it does not incur), or seek to counter the cable operator's strategy by acquiring other programming on an exclusive

---

Disney Channel, Toon Disney, Soapnet, E! Entertainment Television, and style. *See* <disney.go.com/ corporate/investors/financials/annual/ 2000/key/32>.

[96/] EI at 19-21.

[97/] An operator might also seek to recoup the foreclosure costs by reducing the amount paid for other programming it carries, but denigrating the quality of its overall service offerings to fund foreclosure carries the same risk of making the service of its rival more attractive.

basis, as occurs frequently in the broadcast market.[98/] Thus, any effort at anticompetitive foreclosure would be met with a competitive response from the foreclosing distributor's rival(s).[99/]

In Cablevision's case, the likelihood of being able to profitably foreclose competition through anticompetitive exclusive arrangements is particularly remote. In contrast to other vertically-integrated cable companies -- as well as DirecTV and EchoStar -- Cablevision's subscriber base is relatively small and its geographic footprint is highly concentrated. As Economists, Inc. points out, the costs of foreclosure rise in proportion to the size and scope of excluded buyers.[100/] A small cable operator attempting to foreclose competition through anticompetitive exclusive arrangements must recover a higher amount of foreclosure costs from a smaller base of subscribers, thereby enhancing the likelihood of driving customers into the arms of its rivals.

The only sure way for a cable operator to successfully foreclose "access to programming on a scale sufficient to exclude competitors or significantly raise their costs" would be to control the bulk of available programming in the marketplace.[101/] The costs of such an undertaking would be prohibitive – particularly in the 100+ channel programming marketplace of today

---

98/ EI at 22 ("An attempt by cable operators to exclude competing MVPDs or to raise their costs through exclusive contracts would simply create profitable new opportunities for both MVPDs and program suppliers. DirecTV, EchoStar (and possibly RCN given its backing from utilities) surely have sufficient access to capital to make their own programming investments, and even if they did not their vertical integration could be facilitated by merger transactions with Hollywood or other programming interests").

99/ *See* EI at 12, 20-22.

100/ *Id.* at 11, 20-22.

101/ *Id.* at 20.

compared to the 30-channel marketplace of ten years ago[102/] -- and no cable company could conceivably "corner" the critical mass of programming necessary to execute such a strategy.

From an economic standpoint, the fact that no cable operator has been able to foreclose competition from rival distributors by obtaining a critical mass of exclusive agreements with non-vertically integrated programmers that are not subject to the ban in Section 628(c) sheds light on the improbability of successfully executing such a strategy via exclusivity arrangements with affiliated programmers. Economists, Inc. observes that it is actually no more cost-effective and efficient for a distributor to attempt anticompetitive foreclosure via exclusive agreements with unaffiliated programmers than by integrating vertically with programming services and withholding them from competitors.[103/] In either instance, the distributor must still be able to raise its rates sufficiently on the distribution side of its business in order to recover the costs of the foreclosure (foregone revenues from competing distributors):

> If anticompetitive foreclosures were a serious threat, an effective ban would need to prohibit exclusivity in the sales of *all* program rights to MVPDs, no matter who owned those rights. . . .Indeed, the fact that MVPD competition has grown rapidly over the ten-year life of the current ban despite the fact that the ban applies only to about half of the subscriber-weighted programming sold to MVPDs demonstrates the lack of need for such a ban. Put differently, if cable MSOs had thought that foreclosing of MVPDs would be profitable they need only have spun off their programming interests to independent owners and entered into exclusive contracts with them back in 1992. The current ban therefore can have no benefits, only the costs associated with an artificial constraint on efficiency-enhancing transactions.[104/]

[102/] *See First Video Competition Report* ¶ 20.

[103/] *See* EI at 16-17 ("[A] contract can achieve the same effect as vertical integration. Vertical integration could be required as a necessary means of foreclosing programming to competitors only if exclusivity costs the programmer more than the miscreant distributor is willing to pay in a market transaction, so that the programmer must be *ordered* to engage in foreclosure against its own interest. But in that case, of course, vertical integration simply assures that the programmer's lost profits attributable to uneconomic or anticompetitive exclusivity fall entirely on the programmer's owner, the distributor. It makes no sense to imagine that the distributor can profitably gain through vertical integration what it cannot profitably pay for in an arms length transaction with program suppliers. Otherwise, a man could pick himself up by his bootstraps.").

[104/] *Id.* at 17.

This analysis suggests not only that it would make little business sense for a vertically-integrated cable operator to attempt foreclosure by withholding affiliated programming, but also that, in fact, the primary impetus for cable operators vertically integrate with programmers is to achieve objectives that enhance consumer welfare, such as lowering costs and expanding output.[105/]

D. The Competitiveness and Diversity of the Programming Marketplace Diminishes the Prospect that Exclusivity by Any Programmer Could Harm Competition in Video Programming Distribution.

The growth of vigorous competition among cable programming networks in the last ten years further precludes any programmer from having the ability to use exclusivity to harm competition in video programming distribution. At the end of 1990, there were 77 national cable programming networks. Ten years later that number had nearly quadrupled to 281 national cable programming networks.[106/] With such an ample supply of programming, exclusivity for one or more cable networks cannot harm competition.

There are far more programming services today competing with one another for "shelf space" on the distribution platforms of MVPDs than there were ten years ago. Moreover, the programming business is a broad and dynamic marketplace, in which new programming services are launched regularly and entry barriers are not high. Under these circumstances, it makes little sense to limit the availability of exclusivity as a business and marketing tool to any class of programmers. Cable network exclusivity is no more harmful -- and, in fact, just as helpful -- to competition than is exclusivity for programs carried by broadcasters.[107/]

[105/] *Id.*

[106/] *Compare First Video Competition Report*, Appendix C, Table 4 *with 2001 Video Competition Report* ¶ 173.

[107/] EI at 5, 25.

In contrast to ten years ago, there are ample substitutes and competing programming services to most of the major, national video programming networks. There are multiple news channels (CNN, Fox News, MSNBC), children's channels (Nickelodeon, Disney, Toon Disney, Cartoon Network), networks featuring national sports (ESPN, Fox Sports, CNN/SI – as well as the sports available on TNT and TBS), and music channels (VH-1, MTV, CMT, MuchMusic). There are also multiple educational programming services (Learning Channel, Discovery Channel, History Channel), multiple premium movie channels (HBO/Cinemax, Showtime/Movie Channel, Encore/Starz) and multiple general entertainment networks (USA, TNT, Fx). Competition among cable programming networks has now penetrated into a variety of specialty categories, such as financial news (CNBC, CNN/FN, BloombergTV), independent films (IFC, Sundance Channel), and even classic movies (AMC, Turner Classic Movies). Much of the programming listed above also has competitive counterparts in the broadcast area.

Local and regional cable programming networks also are subject to competition and substitutes that render foreclosure via exclusivity highly improbable.[108/] Rainbow's regional news service, News12, faces competition from the various local news programs featured on over-the-air broadcast stations in the New York metropolitan area. Likewise, New York metropolitan area sports fans have ample sources of professional and college sports programming. Some of this programming is available on Rainbow's regional sports services, MSG and Fox Sports New York. Other professional and college sports programming is

[108/] It is by no means clear that exclusive distribution of any single regional programming service could ever, by itself, provide a cable operator with an unfair advantage that harms competition. MVPDs are in the business of providing to multichannel subscribers packages of programming services, the great majority of which are national in scope. While local and regional services can help a distributor differentiate its offerings in the marketplace, Cablevision is unaware of any empirical data suggesting that the availability of local and regional programming services constitutes a dispositive criterion in the purchasing decision of a material portion of multichannel video subscribers in any particular market.

available from national cable services such as ESPN, ESPN2, Fx, TNT and TBS, as well as network-affiliated and independent local over-the-air television stations. During the 2001 season, hundreds of professional games were available from these national cable services and local over-the-air broadcast stations, including numerous games played by New York area teams. Even though some local games are available exclusively on Rainbow's Metro service -- a terrestrially-delivered suite of three local programming services designed to serve as an electronic newspaper -- the vast majority of professional and college sports programming in the New York area (including most games played by the teams that are periodically shown on Metro) remains available to all MVPDs.

E. The Antitrust Laws Are Sufficient and Appropriate Means of Policing Anticompetitive Exclusivity Strategies.

The antitrust laws are wholly capable of addressing and remedying any potential anticompetitive use of exclusive contracts by vertically-integrated cable programmers.[109/] Since antitrust rules and remedies are adequate for deterring anticompetitive exclusive contracts, continued imposition of the program access exclusivity restriction serves no useful purpose and in fact harms the public interest by denying consumers and the marketplace the benefits of pro-competitive exclusive contracts.

Under antitrust law, an exclusive dealing contract that functions solely to deprive a competitor of a resource necessary to compete and which has no potential pro-competitive or efficient or cost-saving value to the excluding firm may be condemned by some courts out of

[109/] Indeed, Chairman Powell has often noted that valuable Commission resources are wasted by duplicating the work of the antitrust enforcement agencies. *See*, *e.g.*, "Opening Statement of Michael K. Powell, Commissioner, Federal Communications Commission Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce on the Telecommunications Merger Act of 2000," (March 14, 2000) at 5-6.

hand.[110/] Exclusive contracts are commonplace, however, precisely because the vast majority of contracts that give a distributor exclusive rights (over a program or other intellectual property) almost always serve at least some efficient purpose.

In assessing the validity of an exclusive contract challenged under antitrust law, courts and Federal agencies examine three factors: first, whether the exclusivity feature significantly increases the costs of rival distributors; second, whether any such increase in rivals' costs leaves the excluding distributor with market power (the ability to profitably and persistently charge supra-competitive prices) that it would not have possessed absent the exclusive arrangement; and third, whether, notwithstanding these first two factors, the exclusivity is nevertheless permissible because its pro-competitive and efficiency-enhancing features far outweigh its anticompetitive tendencies.[111/]

Antitrust law seeks to uphold the same basic competitive values the Commission is charged with protecting and preserving under Section 628(c)(5).[112/] The basic inquiry into an exclusive arrangement performed by antitrust agencies and courts focuses on whether the pro-competitive effects of a proposed exclusive arrangements outweigh any potential adverse competitive consequences.[113/] The inquiry focuses chiefly on the asserted competitive benefits of the exclusive arrangement, and the extent to which the contract enhances the likelihood that

---

[110/] *See Klor's, Inc. v. Broadway-Hale Stores, Inc. et al.*, 359 U.S. 207, 211-13 (1959); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. et al.*, 364 U.S. 656, 659-60 (1961).

[111/] *See, e.g., Tampa Electric Co. v. Nashville Coal Co. et al.*, 365 U.S. 320, 326-28 (1961); *Roland Machinery Co. v. Dresser Ind., Inc.*, 749 F.2d 380, 394-95 (7th Cir. 1984) (Posner, J.).

[112/] 47 U.S.C. § 548(c)(5). *See also* 47 U.S.C. § 548(c)(4). Under its current rules, the Commission determines whether to approve or deny a petition for exclusivity by considering the effect of the proposed exclusive contract (i) on local and national multichannel video competition; (ii) on competition from non-cable technologies; (iii) on development of new programming; (iv) on program diversity; and (v) the duration of the exclusivity.

[113/] *See Roland Machinery*, 749 F.2d at 394.

the excluding party could charge supra-competitive prices because its contract reduced rivals' output. If competition is likely to be harmed by the exclusive arrangement, and there are no countervailing benefits that promote consumer welfare, the arrangement is unlikely to survive antitrust review.[114/]

The key difference between antitrust law and the Commission's current exclusivity restriction is that antitrust law examines exclusive contracts from a position of neutrality. The Commission's rules, by contrast, treat such arrangements as having a "presumptively anticompetitive effect."[115/] The approach under antitrust law is more appropriate for a competitive marketplace, since it offers more opportunity for market realization of the pro-competitive benefits of exclusivity.

Regardless of whether new entrant competitors required special assistance in 1992 in order to gain a foothold in the MVPD business,[116/] the Commission's statutory charge now is to take its cues from competitive conditions in the marketplace.[117/] Now that competition has taken hold, there is no basis for the Commission to predicate a continuation of the exclusivity restrictions on the need to protect new entrants. To the contrary, the statute expressly requires that the Commission allow Section 628(c)(2)(D) to sunset unless it is "necessary to preserve and protect *competition* and diversity in the distribution of video programming."[118/] The adequacy of

---

[114/] *Jefferson Parish Hosp. Dist. No. 2 et al. v. Hyde*, 466 U.S. 2, 39-42 (1984) (O'Connor, J., concurring).

[115/] *See, e.g., Outdoor Life Network*, 13 FCC Rcd 12226 at ¶ 11.

[116/] *Cf. Program Access Order* ¶ 63 ("Congress has clearly placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that impede this entry").

[117/] 47 U.S.C. § 548(c)(5).

[118/] *Id.*

the antitrust laws in protecting competitive markets against harmful exclusivity arrangements obviates the need for the continued imposition of the Commission's exclusivity restrictions.

III. THE BAN ON EXCLUSIVE CONTRACTS VIOLATES THE FIRST AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

It is well established that cable programmers and cable operators "engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment."[119/] Burdens on cable operators' and cable programmers' protected speech are permissible only if they "further[] an important or substantial governmental interest" and are "no greater than is essential to the furtherance of that interest."[120/] Given the vibrant competition in the MVPD marketplace discussed above, a continued ban on exclusive contracts would fail to meet this standard.

When the D.C. Circuit rejected a facial challenge to the program access rules, it noted that "the ability to enter into exclusive contracts could create economic incentives to invest in the development of new programming" and "prohibiting such contracts might result in reduced programming -- that is, less speech."[121/] The court concluded, however, that the impact of the rules on speech was "too conjectural," and thus outweighed by Congress' interest in increasing fair competition.[122/] These rationales no longer support upholding continued program access rules. As the D.C. Circuit recently held, restrictions on cable operators that are not grounded in

---

[119/] *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994) ("*Turner I*"), *citing Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("the activities in which [a cable operator] … engage[s] plainly implicate First Amendment interests."). While the Supreme Court in the *Turner* proceedings mandated that cable operators make their conduit available to broadcasters, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), the Court did not address the extent to which the government could require programmers to provide content to third parties.

[120/] *Turner I*, 114 S. Ct. at 2469, quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[121/] *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979 (D.C. Cir. 1996).

market realities raise grave constitutional concerns.[123/] As discussed above, the program access rules are unnecessary to ensure a competitive marketplace. There is also now substantial evidence that the program access rules have worked to stifle programming investment that otherwise would have occurred -- thus placing a heavy burden on vertically integrated cable operators' speech.[124/]

Given the vibrant state of competition in the MVPD marketplace, regulations forcing vertically integrated cable operators to speak in a specific manner against their wishes also are not "narrowly tailored" enough to achieve Congress' goal of increasing diversity in the marketplace because there are numerous less restrictive alternatives that burden and curtail expression less severely. As discussed above, these alternatives include reliance on the antitrust laws. Given the availability of less restrictive alternatives that are more narrowly tailored to achieve the government's interest, the Commission cannot extend the ban on exclusivity consistently with the First Amendment.[125/]

Finally, extending the exclusivity ban also raises Fifth Amendment concerns because it forces cable operators to give up exclusive rights to their property and turn it over to unaffiliated MVPDs, directly interfering with cable operators' exclusive use of their property.[126/] Moreover, a regulatory regime that treats other similarly-situated programmers, content

---

[122/] *Id.*

[123/] *See Time Warner Entertainment v. Federal Communications Commission et al.*, 240 F.3d 1126,1133-34 (D.C. Cir. 2001) (invalidating the Commission's horizontal ownership rules, in part because the Commission could not have properly evaluated the harm to competition posed by market concentration if it failed to taken into account the "substantial changes in the cable industry" and the "impact of DBS on [cable's] market power").

[124/] *See* EI at 2, 24-25.

[125/] *Turner I*, 114 S. Ct. at 2469; *Time Warner Entertainment*, 93 F.3d at 978; *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (FCC rules regulating which programming could be aired on free television rather than pay television raised serious First Amendment concerns).

providers and copyright holders as presumptively entitled to employ exclusive distribution contracts unconstitutionally discriminates against vertically-integrated cable operators in violation of the Fifth Amendment. Such a rule would single out one medium of communication for differential treatment without serving a permissible governmental interest that could not be furthered through non-discriminatory means -- such as reliance on the antitrust laws or uniform treatment across all programming media. These serious constitutional infirmities argue strongly against Commission re-enactment of the exclusivity ban after its Congressionally-mandated sunset.

[126/] *See Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 712 (3d Cir.), *aff'd*, 480 U.S. 470, 488 (1987).

CONCLUSION

The ban on exclusivity is outdated in today's vigorously competitive marketplace, burdens the ability of Rainbow and other cable programmers to compete, and stifles the valuable innovation and investment in programming services by all MVPDs. These restrictions on competition are completely unnecessary when the antitrust laws are sufficient to police any anticompetitive behavior that may arise. For these reasons, the exclusivity restriction of Section 628(c)(2)(D) should not be reenacted.

Respectfully submitted,

/s/

Howard J. Symons
Thomas G. Krattenmaker
Christopher J. Harvie
Tara M. Corvo
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

Of Counsel:

Robert Lemle
Vice Chairman and General Counsel
Lisa Rosenblum
Senior Vice President - Government Relations and Education
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-1005

David Deitch
General Counsel
Rainbow Media Holdings, Inc.
200 Jericho Quadrangle
Jericho, NY 11753
(516) 803-2569

December 3, 2001

WDC 227523v9

CERTIFICATE OF SERVICE

I, Tara M. Corvo, hereby certify that on this 3rd day of December 2001, I caused a copy of the foregoing "Comments of Cablevision Systems Corp." to be sent to the following by hand delivery, or via the Internet by electronic mail (*):

Qualex International
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Karen Kosar (*)
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
kkosar@fcc.gov

Tara M. Corvo/s/
Tara M. Corvo

WDC 232185v1