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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 Delivery in Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	RECEIVED JAN - 7 2002 FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY
	)	
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS
OF
RCN TELECOM SERVICES, INC.

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SUMMARY

Together with numerous other new MVPD competitors, RCN urged the Commission in its initial comments in this proceeding to extend the 10 year general ban imposed by Congress in 1992 on the use of exclusive program access arrangements between cable companies and their vertically integrated programmers. As all the new competitors noted, the incumbent cable industry is becoming ever more highly concentrated, vertical integration of programmers and MSOs continues to expand, and full access to vertically integrated programming sources remains vital for the development of MVPD competition. Emerging competitors simply must have access to local and regional sports programming. Without such programming, competitive entry is uneconomic and cannot be expected to succeed either in the marketplace or in capital markets.

The entrenched cable MSOs, on the other hand, assert that the MVPD market is far more competitive than it was in 1992 when the ten year ban on exclusivity was enacted and that, accordingly, there is no justification for the Commission to further extend that ban. Indeed, argue the incumbents, exclusivity restraints on competitors' access to vertically integrated cable programming is very much in the public interest, consistent with antitrust doctrine, and mandated by constitutional considerations.

RCN does not dispute that overall, cable's historic dominance of the MVPD market has been lessened, with DBS now accounting for some 15% of the market and other competitors, such as C band operators, MMDS, SMATV, OVS and terrestrial overbuilders accounting for another 5%. But an 80% share of the national market constitutes dominance by any commonsense understanding of market dominance. Certainly in the individual markets where the competition actually occurs the incumbent cable companies remain vastly stronger than any

of the competitors, or all of the competitors combined. In the urban markets in which RCN competes with incumbent cable operators, those operators enjoy upwards of 90% of the local market. In this light it is little less than absurd to contend that struggling MVPD competitors like RCN do not fall within the ambit of the Congressional concern which prompted the passage of an exclusivity ban in 1992.

The recently announced proposal for AT&T Broadband and Comcast to merge, thus becoming the largest cable provider in the country, with some 22 million subscribers and operations in 17 of the largest 20 markets, simply underscores the growing concentration in the cable industry and the need for the Commission to take reasonable steps, such as extending the program exclusivity ban, to encourage competitive entry.

Similarly, the MSOs misunderstand antitrust and constitutional doctrine and case law and are accordingly very much in error in contending that the still-dominant cable industry should be left free to continue – indeed to exacerbate – its prior anticompetitive practices concerning vertically integrated programming. The Commission must consider whether to extend the program exclusivity ban in the context of the entirety of Title VI of the Communications Act. Given the detailed regulation of franchised cable operators which is prescribed by Title VI and which establishes important legal parameters to which local franchising authorities must adhere, it is not sufficient simply to rely on general antitrust law to protect the public against the historic market power abuses of the entrenched cable industry. Little meaningful relief — and therefore little meaningful vindication of the public's right to a competitive MVPD market — can be expected from the cumbersome, slow, very expensive and very uncertain processes of civil antitrust litigation.

The cable industry commenters advance a number of internally inconsistent arguments. They contend that limits on exclusivity for vertically integrated entities eliminate economic incentives for the production of cable programming, yet they also tout the great increase in cable programming during the almost 10 years in which the ban on exclusivity has been in effect. They contend also that the dramatic growth of MVPD competition in the period since the ban was enacted demonstrates that the ban is no longer needed. But since that increase occurred precisely while the ban was in effect, the Commission might reasonably conclude there is a cause and effect relationship and that the loss of the ban would negatively impact on the growth of a competitive market.

Nor do the vertically integrated cable companies have a meaningful first or fifth amendment challenge to the extension of the 10 year congressional ban. The ban on exclusivity is content neutral and is the least intrusive step that Congress or the FCC could take to assure that the public has the benefits of competitive video distribution services. Prior judicial precedent concerning the cable industry's constitutional claims, including the recent 4th circuit decision supporting the constitutionality of the Satellite Home Viewer Improvement Act, fully support a continuation of the ban.

The Commission has ample authority under section 628 of the Act, Title VI of the Act as a whole, and sections 4(i) and 303(r) of the Act, to extend the ban on exclusivity. Similarly the Commission should take this opportunity to extend its reading of section 628 to apply to all vertically integrated programming, whether delivered by satellite or by some other means.

In sum, the circumstances which prompted the Congress in 1992 to impose a ban on vertically integrated program exclusivity remain as relevant today as they have been throughout the last 10 years. If the Commission wishes to see continued entrance and perseverance among MVPD competitors, it must extend the program exclusivity ban. Even if the DBS sector of the market has grown strong enough or large enough to survive without such a ban, the remaining competitive elements in the MVPD market certainly have not done so, and may never do so unless the ban is extended.

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REPLY COMMENTS
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RCN Telecom Services, Inc. ("RCN"), by the undersigned counsel, herewith submits its reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter[1] and to the initial comments of other parties. In briefest outline RCN and numerous other competitive entrants contended in their initial comments that competitive access to the programming vertically integrated into the dominant cable MSOs is vital for any commercially realistic competitive entry. RCN in particular emphasized that access to local and regional sports programming is a *sine qua non* for successful market penetration. RCN and others emphasized that far from becoming more diverse and decentralized, cable ownership is growing increasingly concentrated and vital programming is becoming ever more tightly bound to the

[1] Notice of Proposed Rulemaking, FCC 01-301, *rel.* October 18, 2001.

small number of dominant cable MSOs. The cable industry disputes this proposition, and in these reply comments RCN addresses and refutes their arguments. RCN also contended that the Commission should reassess and alter its prior determinations that section 628 applies only to integrated programming delivered by satellite. Here too the cable industry takes a contrary view which RCN believes is unjustified by the language of section 628 and its legislative history.

To counter the new entrants' claims that the public interest justifies continued access to vertically integrated programming, the cable industry alleges that vertical integration, coupled with exclusive distribution arrangements, actually advances public welfare, that the antitrust laws do not establish a presumption against vertical integration, and that such laws can be relied upon to adequately protect the interests of the viewing public. RCN believes that each of these positions is factually erroneous, wrong as a matter of law, and, even if correct, inadequate to justify the sunset of the exclusivity ban. Finally, bringing one of its favorite old war horses to the battle, numerous cable interests contend that the preservation of the exclusivity ban would violate cable's first and fifth amendment rights. These arguments fly in the face of judicial decisions to the contrary, and should not long delay Commission action to extend the exclusivity ban another 10 years.

I. THE MVPD INDUSTRY CONTINUES TO BE DOMINATED BY MSOs AND CABLE PROGRAMMING CONTINUES TO BE HEAVILY VERTICALLY INTEGRATED WITH THE LARGEST MSOs

While it should surprise no one that the cable and non-cable camps disagree about the proper interpretation of section 628 of the Act[2/] and various related legal provisions or concepts, it is somewhat surprising that there is so much disagreement about the basic facts: is the cable

[2/] 47 U.S.C. § 548.

industry more concentrated than it was 10 years ago, or less so? Is the programming industry more concentrated than it was 10 years ago, or less so? Is the integration of distribution and program production more vertically aligned than it was 10 years ago, or less so?

Like others who require access to certain programming to be commercially viable, RCN contended in its initial comments that the cable industry is growing more concentrated and that vertical integration of programming is growing more, rather than less, severe.[3/] RCN noted that the four largest multiple system owners now account for more than 50% of the market and the top 10 served 84% of the MVPD market in 2000. One or more of the top five MSOs holds ownership interests in each of the 99 vertically integrated services and nine of the top 20 video programming networks ranked by subscribership are vertically integrated. This is not merely RCN's or other MVPD competitors' idiosyncratic view, but has been endorsed by the Commission in the NPRM.[4/]

The cable industry, however, disputes this conclusion, arguing that there are many more program producers than existed years ago, and accordingly more programming for a distributor to choose to carry.[5/] The plethora of numbers to which the various parties cite in their respective filings should not obscure the basic truth: while there is indisputably more programming available today than existed 10 years ago, the best, most-watched, and commercially most important programming, is increasingly in a limited number of hands. This distinction between raw

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[3/] RCN Initial Comments at 6, n. 14.

[4/] NPRM, ¶ 9. *See also Seventh Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC01-1, *rel.* Jan. 8, 2001, at ¶ 137.

[5/] *See, e.g.*, Cablevision Initial Comments at 30.

numbers, and the particular program services which are or are not vertically integrated, is crucial. Therefore, even granting that there are many more cable channels available today, the fact remains that to be successful a new entrant must carry the tried-and-true. Stated differently, not all cable programming is created equal, and the more limited access an entity has to the best, or most popular of the programming, the less likely it is to survive. In a word, it is not simply a numbers exercise, but involves qualitative judgments.

As RCN has been telling the Commission for some years now, the most important of these programs is local and regional sports programming.[6] There may be an additional 200 channels featuring animal grooming or petunia planting, but without access to region-specific sports programming, the development of additional channels is of little or no consequence.

Nor is the contention that, without access to such programming competitors would simply have to commit their own resources to develop such popular programming, a persuasive point. What has happened in many metropolitan areas, as the initial comments show, is that the incumbent MSOs have negotiated exclusive agreements with vertically owned or controlled affiliates to carry local professional sports programming. This means that no competitor to the incumbent in a market where the incumbent has exclusive programming rights can carry, or duplicate, the exclusive programming. This was the situation for RCN in New York City and in the Philadelphia area market where Cablevision and Comcast, respectively, had developed a local professional sports program dominance by obtaining exclusive programming rights.

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[6] That this is widely known can be seen from a recent press article which notes that cable operators may be relieved that EchoStar, rather than Rupert Murdoch, may be acquiring DirecTV. The article notes that for months cable owners "were bracing for Murdoch to use his regional sports networks and national sports rights against them, making some of that product exclusive to DBS." Broadcasting & Cable, Nov. 5, 2001, at 19.

In its comments Cablevision notes that competitors in New York City are nevertheless able to carry a great deal of local sports programming, notwithstanding Cablevision's ownership of programming rights to the great majority of New York area sports programming.[7] RCN has always acknowledged that this is true, but has noted that it was not able to get certain of the high-profile play-off games and that its subscribers and potential subscribers did not want to be left in doubt about whether or not RCN would be carrying all the local sports programs of interest, as Cablevision would certainly be doing.[8] Again, it is not a numbers game. To sell a competitive service against an entrenched competitor, the newcomer needs to be able to offer – and assure potential subscribers that it will be offering – a local sports line-up as good as that carried by the existing cable company. "Almost" as much, or "most," or "maybe, we can't be sure," does not work. If, as everyone agrees, program access decisions should be market-driven so far as possible then this simple bit of ground truth should be crucial. Where the incumbent can tie up for its own use the bulk of local sports programming market entry will be slowed, curtailed, or precluded. A recent study has concluded that DBS penetration was lowest in areas served by Cablevision and Comcast, two MSOs who have used their dominance of local sports programming against MVPD competitors.[9]

In its Initial Comments AT&T contends that competition will be enhanced by removing the ban on exclusivity, citing to judicial decisions sustaining exclusivity in program distribution.[10]

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[7] Cablevision, Initial Comments at 30.

[8] RCN Comments at 14.

[9] Communications Daily, Friday, January 4, 2002, at 2.

[10] AT&T Initial Comments at 12-13.

In some circumstances this is clearly true, and RCN was careful to note in its Initial Comments that it did not seek to compel an incumbent cable operator to make available to its competitors a program which could essentially be duplicated by such competitors.[11] Rather, RCN is concerned about having access to programming which cannot be duplicated or replicated no matter how much time and money a competitor may commit, because such programming is *sui generis*, such as the broadcast of a local professional team's games. It is really just this simple.

II. THE INCUMBENT CABLE INDUSTRY CONTINUES TO HAVE AMPLE MOTIVE AND INCENTIVE TO EXCLUDE COMPETITIVE ENTRANTS FROM THE MVPD MARKET

A number of the entrenched MSOs argue at some length that, even in the absence of the exclusivity ban, competitors would have access to a wide variety of programming because the vertically integrated cable companies have commercial incentives to make such programming widely available.[12] To substantiate this point, they cite to various authorities of a theoretical kind. The problem with these hypothetical arguments, however, is that they simply have not applied to the MVPD market in the past, and there is little reason to think they will apply in the future. In New York City, for example, where Cablevision controls the great bulk of the local professional sports programming, RCN has not been able to persuade Cablevision to make all of its sports programming available to RCN. The issue has not been one of cost, nor of RCN's credit reliability, nor any other issue of a normal commercial nature in respect to maximizing its programming revenues or profits. The issue has simply been that in the face of RCN's

[11] RCN Initial Comments at 22. AT&T's citation, Initial Comments at 13, to *Paddock Publications, Inc. v. Chicago Tribune Co.*, 103 F.3d 42 (7th Cir. 1996) is therefore not in point. RCN agrees that exclusivity for news-type programming is entirely appropriate.

[12] *See, e.g.*, AOL/Time Warner Comments at 10; Cablevision Comments at 29.

competitive offering in those boroughs of New York City where Cablevision is the franchise holder, it did not want RCN to be able to carry all the local sports which Cablevision was carrying. RCN was prepared to pay commercially reasonable fees for this privilege, but Cablevision didn't want even to discuss the terms: the unavailability of the programming was motivated solely by the desire to make a potentially significant competitor uncompetitive.

The same circumstances existed in the Philadelphia area market, where Comcast, with control over the bulk of the local professional sports programming through its ownership of SportsNet, sent its employees to prospective RCN subscribers to allege that RCN might not have continuing rights to carry SportsNet programming. It is really no more complicated than this, and the elaborate theoretical submissions of the cable companies which address the issue in abstract and academic terms are simply irrelevant smokescreens.[13] The Commission should not allow itself to be diverted by such abstractions, but should instead stay focused on the real-world problems RCN and other competitive commenters have set forth in this proceeding and elsewhere.

III. THE CABLE INDUSTRY CONTINUES TO HAVE THE ABILITY TO EXCLUDE NUMEROUS MVPD COMPETITORS FROM THE MARKET

Cable commenters, pointing to the rapid decline in cable's share of the market, contend that the incumbent cable operators no longer possess the market share, or market power, to

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[13] By way of illustration, the cable commenters speak from time to time of the problem of "free riders." *See, e.g.* Cablevision Comments at 3; AT&T Comments at 12. At no time has RCN ever asked any incumbent, vertically integrated cable company to make its programming available to RCN at no cost. On the contrary, RCN has always been willing to pay reasonable commercial programming fees.

exclude other MVPD providers from the market.[14] Market power may be defined as the ability to raise price above competitive levels and to restrict output.[15] Given on-going concerns about the increases being experienced in cable prices, the industry's assertions in their comments that they are effectively price-constrained by competition is simply not believable. These arguments are also unconvincing in light of the tremendous advantages an incumbent cable operator possesses in competition with a new entrant. RCN has alluded to these advantages in its initial comments and will not repeat them here.[16]

RCN has also contended that the ability to dominate markets must be examined in the context of individual local markets, and not on a national basis, since the latter is largely meaningless where the real competition occurs.[17] At least one former academic commentator agrees with this proposition.[18] If one looks at individual markets, the incumbent cable operators will in the vast majority of cases be serving more than 90% of the market within their franchised areas. Such percentage shares are important. "Not all firms are created equal and the impact on

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[14] *See, e.g.*, Comcast Initial Comments at 4-10; NCTA Initial Comments at 7-11.

[15] *See* Krattenmaker and Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986) at 212-213 and, *e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S.Ct. 2847 (1985).

[16] *See* RCN Initial Comments, at 6-7.

[17] *See, e.g.*, RCN's Initial Comments in the Commission's review of its cable ownership limits, *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, et al*, Further Notice of Proposed Rulemaking, FCC 01-263, *rel.* September 21, 2001, filed January 4, 2002, at 6-7.

[18] *See* Krattenmaker, *The Telecommunications Act of 1996*, 49 Fed. Comm. L.J. 1, 44 (1996) (For telecommunications, it is "particularly important to distinguish between local and national markets. Conventional telecommunications delivery services to the home operate mostly in local markets.")

market behavior of commercial practices or mergers is partly dependent on whether the firms engaged in the questioned behavior are among those who were created more equal than others."[19] One can argue – as the cable interests do at great length – about the theoretical incentives which vertically integrated cable enterprises have to maximize their revenue by selling their vertically integrated programming to as many of their competitors as possible, but the plain facts, as the last 10 years have shown, is that in many instances these entities have sought to minimize the competitive viability of new comers by denying them access to what they know is vital programming. There is no reason to believe these incentives are any different today than they have been in the past.

A number of cable commenters make the argument that while vertical program exclusivity may injure one or another individual competitor, the relevant public policy question is whether the practice negatively affects the competitive process.[20] This distinction is, of course, vital to competition theory and to antitrust law, and in general is beyond debate. But in the particular context in which the exclusivity ban is being examined the broad scale analysis suggested by the concept is unhelpfully vague. This proceeding is not addressing competitive analysis in a normal free market context. It is concerned with the perceived need to introduce competition into what has heretofore been a tight monopoly situation, enjoying until very recently governmentally granted and sustained exclusive rights to a market. The history of the MVPD industry over the last 10 years demonstrates conclusively that competition will not flourish if the dominant

[19] *Id.*, at 45, citing to Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (1994), at 455-66.

[20] *See, e.g.*, AT&T Initial Comments at 14; AOL Time Warner Initial Comments at 3.

monopolists or incumbent franchisees are not constrained against the normal exercise of their market power. Of course program exclusivity has damaged competition, and not just individual competitors. Had it not, Congress would not have passed the exclusivity ban in the first instance. What is relevant now is only whether circumstances have changed sufficiently to allow the rule to sunset; it is decades too late to argue that broad antitrust principles are sufficient to protect the public from monopolistic abuses.

IV. THE ANTITRUST LAWS ARE NOT ADEQUATE TO PROTECT THE PUBLIC FROM THE ADVERSE EFFECTS OF PROGRAM EXCLUSIVITY

To support their contention that the Commission can allow the program exclusivity ban to lapse, cable commenters claim that the public interest will be adequately protected by application of the antitrust laws.[21] In the absence of a continuation of the circumstances existing in 1992, claim these commenters, the broad-based antitrust laws can be relied upon to assure that anticompetitive acts do not occur. RCN and other MVPD entrants, as noted above, do not agree that the present circumstances are less prone to competitive abuse than was the case in 1992, so this branch of the cable commenters' argument would be wholly unpersuasive if RCN is right about the continuing anticompetitive climate.

But even if one accepts the cable industry's contention that the MVPD industry is more competitive than it was in 1992, complete reliance on the antitrust laws to protect the public from the power of cable incumbency is not justified on the present record. Antitrust law is complex and uncertain of outcome in any given circumstance. One of the most controversial areas in

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[21] *See, e.g.*, AT&T Initial Comments at 14, 24; Cablevision Initial Comments at 37-40.

antitrust is the issue of vertical restraints. "In the last 20 years, economists have come up with any number of pro- and anticompetitive rationales for such restraints."[22] Given the unambiguous history of cable's repeated and indeed increasing efforts to minimize competition by denying emerging competitors access to vital programming, it would be unwise for the Commission to rely on some theoretical construct of game-theoretic efficiency gains to allow vertically integrated cable companies to withhold their affiliates' programming from competitors like RCN.

Stated differently, reference to antitrust principles is certainly appropriate in assessing the public interest, *Paragon Cable Television v. FCC*,[23] but the public interest test established in section 628 goes beyond traditional antitrust considerations and requires a separate analysis. *Time Warner Cable*.[24] Among other cable commenters, AT&T notes that exclusivity arrangements are common throughout the economy.[25] Citing to Hovenkamp, AT&T contends that the benefits of

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[22] Butz and Kleit, *Are Vertical Restraints Pro-Or Anticompetitive? Lessons From Interstate Circuit*, 44 J.L.& Econ. 131 (2001). One branch of the academic debate is the theory that distributors seek to raise rivals' costs by colluding to force competitive distributors to raise their prices above competitive levels. *See* Krattenmaker and Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986). *See also Storer Cable Communications, Inc. v. City of Montgomery, Alabama,* 826 F. Supp. 1338 (M.D. Ala. 1993) at 1354-64 (consumer welfare at risk where dominant cable operator enters exclusive contract with programmer.)

[23] 822 F.2d 152, 154 (D.C. Cir. 1987).

[24] 9 FCC Rcd 3221 (1994), at ¶ 35. ("In our view, it would be flatly inconsistent with the Cable Act to find an exclusivity provision presumptively lawful simply because it might not rise to the level of a Sherman Act violation. Thus, contrary to Time Warner's assertions, the 1992 Cable Act requires a separate analysis of the competitive effects of the proposed exclusivity under the specific factors identified in the Act that is distinct from a traditional antitrust analysis.")(footnote omitted).

[25] AT&T Initial Comments at 9.

exclusive dealing greatly exceed their potential for harm.[26] However this may be true, this proceeding is concerned with a specific and rather narrowly defined set of circumstances. Generalized observations are therefore of limited utility. As Hovenkamp observes, "Private firms benefit both from arrangements that reduce their costs or risk and from arrangements that facilitate the creation or exercise of market power. Antitrust, of course, approves only the former."[27] Similarly, Cablevision emphasizes that the antitrust laws generally grant product makers and service providers wide latitude in choosing their distributors and eschew blanket restrictions on exclusive arrangements.[28] Here too, the MSO's argument is too broad.[29]

Yet another reason why antitrust is not an adequate remedy is that section 628 of the Act is embedded in Title VI, and as such is merely a part of a regulatory scheme which is premised upon a special status for cable entities. Apart from the hortatory language in section 628(a) itself, which speaks of the section's purpose to promote the public interest by increasing

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[26] Herbert Hovenkamp, *XI Antitrust Law: An analysis of Antitrust Principles and Their Application* ¶ 1810 (1998).

[27] *Id.* Moreover, competitive harm can consist in raising entry barriers – a serious issue in the present context. *Id.* at ¶ 1802.

[28] Cablevision Initial Comments at 6.

[29] While the general observation is true, it is so broad as to be of little analytic value. Cablevision cites *Westman Comm'n Co. v. Hobart Int'l, Inc*, 796 1216 (10th Cir. 1986), a case involving the sale of premium quality kitchen equipment. But in rejecting a *per se* analysis on the facts of that case, the *Westman* Court relied on *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (overruled on other grounds), and cited language from the Supreme Court's *Schwinn* decision to the effect that where "other and equivalent brands [of a product]...are readily available in the market" a manufacturer may select his customers to whom alone he sells his product. 388 U.S. at 376. But this is exactly what is not true in respect to markets where the incumbent MSO has exclusive distribution rights for a *sui generis* product – local sports contests.

competition and diversity in the MVPD market, section 601(4) of the Act[30] provides that one of the purposes of Title VI is to assure that cable communications "provide and are encouraged to provide the widest possible diversity of information sources and services to the public." Section 601(6)[31] specifies that the promotion of competition in cable communications is another of its purposes. Section 612(a) states: "The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."[32]

In short, cable franchisees are not aluminum companies, or shoe manufacturers, or ski-lift operators: they have a special status which Congress deems to be vital to the advancement of important social purposes. More specifically, under Title VI, cable operators have certain obligations to the public which are not shared by the generality of commercial firms. These include affirmative obligations to provide capacity for public use,[33] to avoid redlining in developing service areas,[34] to make channels available to unaffiliated programmers, [35] to avoid conduct which, *inter alia*, imposes financial penalties on programmers or relies on coercive or

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[30] 47 U.S.C. § 521(4).

[31] 47 U.S.C. § 521(6).

[32] 47 U.S.C. § 532(a).

[33] 47 U.S.C. § 531.

[34] *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Transferor, to AT&T, Transferee*, 15 FCC Rcd 9816, (2000), ¶¶ 144-153.

[35] 47 U.S.C. § 532.

retaliatory tactics to obtain exclusive programming rights,[36] and the like. Public franchise holders are, by their nature, a kind of public trustee, and while they are fully subject to the antitrust laws, and have occasionally been sued under such laws, they cannot simply be considered a commercial entity like any other.

Moreover, remitting new entrants to an antitrust remedy for instances in which an incumbent MSO limits the distribution of vital programming is to impose an overwhelming financial and logistical burden on new competitors which in many cases would simply mean no relief at all will be available. Such litigation, as is commonly known, is very expensive, long delayed, uncertain of outcome, and demanding in terms of diversion of executive time and energy. While large entities like the DBS operators may have the capability to exercise their legal rights to bring antitrust suits, other, vastly smaller competitors, do not. The result would be that for such entities entering the market as MMDS, SMATVs, OVS, or cable overbuilders in one or a few markets, there simply would be no remedy for all practical purposes. Not only would this, by damaging existing competitive entrants limit the welfare gains of competition, it would also send a signal to the capital markets that further investment in such enterprises is at grave risk of having no practical remedy for marketplace abuses, thereby even further damaging competition.

V. CONTINUATION OF THE PROGRAM EXCLUSIVITY BAN VIOLATES NEITHER THE FIRST NOR THE FIFTH AMENDMENT

Cable industry commenters assert that continuation of the program exclusivity ban would violate their First and Fifth amendment rights.[37] There is no question that cable operators have

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[36] 47 U.S.C. § 536.

[37] *See, e.g.*, AOL/Time Warner Initial Comments at 4-7; Cablevision Initial Comments at 40-42.

First Amendment rights because, by selecting programming on their systems, they exercise "a significant amount of editorial discretion... ." *FCC v. Midwest Video Corp.*[38] Nevertheless, the First Amendment arguments presented in the cable industry's initial comments are wholly unpersuasive. The courts have often noted that government can impose reasonable, targeted limits on cable operators. First Amendment claims typically arise when government action restricts a cable operator's ability to broadcast its message, such as by limiting service to customers.[39] Here, however, a requirement that a vertically integrated cable operator make its programming available to MVPD competitors within the local market would neither restrict nor compel speech, but on the contrary would simply expand its availability.

In short, such a regulation does not threaten a vertically integrated cable operator's ability to broadcast its message.[40] It simply expands the distribution channels for such programming. "An essential goal of the First Amendment is to achieve the widest possible dissemination of information from diverse and antagonistic sources." *Time Warner Entertainment Co., L.P. v. FCC*,[41] quoting *FCC v. National Citizenship Commission for Broadcasting*.[42] Because the

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[38] 440 U.S. 689, 707 (1979).

[39] *See City of Los Angeles v. Preferred Communication, Inc.*, 476 U.S. 488, 490 (1986) (involving local government regulations that denied a cable operator the opportunity to compete); *Leathers v. Medlock*, 499 U.S. 439, 442 (1991) (involving a sales tax imposed on cable operators); *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2453 (1994) ("*Turner I*") (involving must carry rules that required cable operators to carry local stations).

[40] *Cf. Police Department of the City of Chicago v. Mosley*, 402 U.S. 92, 95 (1972) ("First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.")

[41] 93 F.3d 957, 975 (D.C. Circuit 1996), *reh'g den.* 105 F.3d 723 (1997). In the *Time Warner Entertainment* decision the D.C. Circuit not only rejected a facial constitutional challenge to the exclusivity provision but also relied on Congress's finding that "the increased

program access rules are not content-based regulations, the cable operator would have to demonstrate that the provisions "burden substantially more speech than is necessary."[43] No cable commenter has done so.

Recognizing that in *Time Warner v. FCC* the D.C. Circuit has rejected facial challenges to the constitutionality of the program access law, the cable commenters nevertheless resurrect their First Amendment arguments to justify allowing the ban on exclusivity to lapse. While the argument is somewhat tortured, it appears basically to be as follows. It is true that in *Time Warner v. FCC* the court found that program access requirements do not constitute an unconstitutional intrusion into the First Amendment rights of cable operators, but that finding is based on a Congressional expression of concern for the development of competition and diversity in the MVPD industry, a concern which is constitutionally legitimate and which requires only the application of intermediate scrutiny to assure that the speech-affecting regulation is not overly broad. But, claim the cable competitors, that Congressional concern is no longer relevant, since the 10 year term set forth in section 628(c)(2)(D) is about to end, and thereafter there will remain only Congressional authorization for the Commission to preserve the ban if it can make its own finding based on current circumstances. Since the Congressional finding behind the 10 year ban

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speech that would result from fairer competition in the video programming marketplace-- outweighed the disadvantages-- the possibility of reduced economic incentives to develop new programming." *Id.* at 979.

[42] 436 U.S. 775, 799 (1978).

[43] *Turner Broadcasting System, Inc. v. FCC* ("*Turner I*"), 114 S. Ct. at 2469, *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

lapses, claim the cable operators, the constitutional balancing approved by the Court in *Time Warner, supra,* is no longer applicable.

This reasoning is so weak that it falls of its own accord. As noted elsewhere in this Reply, there is nothing in the language, structure, or legislative history of section 628 to support the cable commenters' contention that the circumstances in the period following the end of the 10 year exclusivity ban will be sufficiently distinct to justify diminution of governmental concern about the anticompetitive practices or capabilities of the cable industry. Similarly, there is nothing in the *Time Warner* decision which supports the contention that if the FCC were to make a finding, based on the current record, that the ban should be extended, that finding would be entitled to less weight than that embodied in 628(c)(2)(D) in the balancing of legitimate governmental concerns against the First Amendment rights of the cable industry.[44/] Both are firmly and directly rooted in Congressional concern about the anticompetitive history and proclivities of the cable industry. Of course, if the Commission were to conclude that the ban should not be extended, then there would be no occasion for invocation of the constitutional balancing test. Only in that circumstance would the cable commenters' argument be logically sound, but in that circumstance it would also be irrelevant since no exclusivity ban would be imposed.

[44/] Nor would such an FCC finding be a constitutional problem merely because there may be other ways to promote competitive entry to the MVPD market. In *Turner Broadcasting System, Inc. v. FCC*, 520 U.S.180, 218 (1997) ("*Turner II*"), the Supreme Court stated that "a regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *See also U.S. v. O'Brien*, 391 U.S. 367, 377 (1968) ("A regulation will be upheld if it furthers an important or substantial government interest, if that interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.") Instead, as noted above, the cable operator would have to demonstrate that the regulations are "substantially broader than necessary."

Apart from this initial fallacy in the First Amendment argument, it is unpersuasive in the fundamental sense that there is no First Amendment issue presented by the exclusivity ban – a ban not on what the cable operator can speak, or when or how it can speak it, but only on whether it can withhold the same speech from others. AOL/Time Warner argues that extending the ban would require it to speak in a manner not of its choosing,[45] but the extension of the program access requirement will not change the content of the disputed programming.[46] Rather, the extension simply will ensure that the market retains at least a minimal degree of competition.[47]

These basic principles and judicial precedents, which wholly preclude the arguments advanced by the cable commenters, have been very recently reaffirmed in *Satellite Broadcasting and Communications Association v. FCC*,[48] in which the Fourth Circuit rejected claims that the Commission's newly-adopted satellite "carry-one-carry-all" and "a la cart" rules adopted pursuant to the Satellite Home Viewers Improvement Act[49] violate the first amendment rights of the DBS carriers. In passing SHVIA, as in section 628, Congress sought to promote competition between

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[45] AOL//Time Warner Initial Comments, at 4.

[46] *See Time Warner Entertainment Co, L.P. v. FCC*, 93 F. 3d 957, 979 (D.C. Cir. 1996) (characterizing the relationship between the possible overreach of the program access rules and the First Amendment as "attenuated").

[47] *See Time Warner*, 93 F. 3d at 978 (maintaining that the government has strong reason to use the program access rules to promote competition and allow for as many viewpoints as possible on cable television); *see also Turner I*, 114 S. Ct. at 2471 (holding that the "Government's interest in eliminating restraints on fair competition is substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment").

[48] 2001 WL 1557809 (4th Cir.(Va.)).

[49] Pub. Law No. 106-113, 113 Stat. 1501, Appendix I (1999).

elements of the MVPD industries to "preserve free television... and to promote widespread dissemination of information from a multiplicity of sources."[50]

In affirming the FCC's rules, the Court noted that the *O'Brien* standard "gets its bite" from a two part analysis: does the regulation materially advance an important or substantial interest by redressing past harms or preventing future ones? These harms must be real and the regulation must alleviate them in a direct and material way, says the Court, citing generally to *Turner I*.[51] In making these judgments, the Court notes, "substantial deference" is due to the predictive judgments of Congress, citing *Turner I* at 666. In *Turner II*, notes the *SBCA* decision, the Court observes that its "sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."[52] The *SBCA* decision goes on to note that if the regulation materially advances some important or substantial interest, the court proceeds to the second part of the *O'Brien* analysis to ask whether the regulation promotes a substantial government interest that would be less effectively achieved without the regulation.[53]

All of these criteria are met in the instant proceeding which is clearly an intermediate scrutiny case. If the Commission chooses to extend the exclusivity ban based on its finding that doing so would further encourage the development of competitive entry, it has the last 10 years

[50] *SBCA v. FCC, supra*, at 2, quoting from H.R. Conf. Rept. No. 106-464, at 101 (1999).

[51] *Id.*, at *13.

[52] Quoting from *Turner II,* 520 U.S. at 195.

[53] *Id.*, at *21, relying on *Turner II*, 520 U.S. at 213-214.

of history to buttress the rationality and sufficiency of its finding. The regulation in question, which already exists, is closely tailored to meet the objective of promoting competition and a diversity of information and viewpoints:

> Where multiple competitors jointly pose a common threat with a common structure, the First Amendment permits Congress to protect important government interests from that threat by imposing reasonable content-neutral restrictions on every competitor who significantly contributes to that threat.[54]

Certainly no one will dispute that the government has a legitimate interest in fostering diversity of viewpoint. While an obvious point, it is especially well put by ex-Professor Krattenmaker:

> To help assure that new communications technologies are user friendly rather than centrally controlled-whether by government or by industry-the most important policy government could adopt is a commitment to foster as much competition as possible among would-be speakers for audience attention.[55]

Presciently, in his 1995 article, then Professor Krattenmaker noted that "if the past is prologue, entrenched private interests will use public policy to achieve their goals of limiting competition."[56] The case for the claimed Fifth Amendment violation is equally unpersuasive. Clearly there is no physical taking, as required in *Loretto v. Teleprompter Manhattan CATV*

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[54] *Id.,* at *18.

[55] *Krattenmaker, Converging First Amendment Principles For Converging Communications Media*, 104 Yale L. J. 1719 (1995) at 1734. As noted by Professor Krattenmaker, the government should foster diversity in the media marketplace. *Id.* at 1731. "[D]iversity is achieved when people are allowed to bid for any information or entertainment they desire-no censorship-and to receive what they seek, so long as they are willing to pay the economic costs of receiving it." *Id.* According to Cablevision, however, this principle does not apply to market-dominating cable companies who are unwilling to sell information or entertainment to their competitors, even at a commercially negotiated price, if denying such access would eliminate or hobble the competitor.

[56] *Id.*, at 1735.

Corp.[57] Nor is there any economic taking since competitors wishing to carry vertically integrated programming are willing to pay normal commercial fees for such carriage.[58]

VI. EVEN IF THE DBS COMPETITORS DO NOT ANY LONGER REQUIRE PROTECTION FROM THE ANTICOMPETITIVE TACTICS OF THE CABLE INDUSTRY, THE SMALLER MVPD COMPETITORS DO REQUIRE SUCH PROTECTION

The great bulk of the cable industry's comments focuses on the robustness of the competition offered to incumbent cable operators by EchoStar Communications and DirecTV which, together, account for some 15% of the total MVPD market. But DBS's 15% share of the market is measured on a national basis, and is largely meaningless in individual markets, particularly in the urban areas where terrestrially-based competition is predominantly located. In RCN's experience in the largest cities on the east and west coasts, DBS penetration is in the range of three to six percent.[59] This is also the range of RCN's penetration in such markets. It is simply unrealistic to assert that such modest competitive pressures are enough to assure that anticompetitive practices will not occur, and indeed they have occurred and can be expected to continue to do so, even if non-cable competitors continue to increase their market shares modestly in coming years.

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[57] 458 U.S. 419 (1982).

[58] To the extent the cable companies argue in their comments that such compensation is not adequate because it denies them the theoretical "efficiencies" of vertical distribution limits, they have failed entirely to demonstrate any such efficiencies exist other than as an abstraction. *See, e.g.*, Cablevision Comments at 38; Comcast Comments at 13.

[59] According to Joint Comments filed by a number of wireline broadband, wireless cable and private cable operators, the DBS penetration in the city of Philadelphia is only 3.7%. *See* Joint Comments at 14, citing Nielsen data. This low penetration in Philadelphia is undoubtedly reflective in large part of the inability of the DBS operators to carry Comcast's SportsNet in that market.

But even if the DBS operators are large enough, and well enough endowed strategically or financially to successfully battle with the entrenched cable MSOs without the benefit of the exclusivity ban in section 628, other competitors, who collectively account only for some five percent of the market, are not yet large enough to do so. If the MMDS, SMATV, OVS and cable overbuilders continue to grow and increase their market share, it is reasonable to assume that at some point they too will be able to battle the anticompetitive tactics of the incumbents without the benefit of the exclusivity ban. But if anything is clear, it is that these competitors are not yet in such a position.

VII. SECTION 628 AND OTHER PROVISIONS OF THE COMMUNICATIONS ACT PERMIT THE COMMISSION TO CONTINUE THE EXCLUSIVITY BAN IF IT FINDS THAT SUCH CONTINUATION IS NECESSARY

Cable industry commenters seek to make much of the fact that the language in section 628(c)(2)(5) specifies that the Commission can continue the program exclusivity ban if it finds that such continuation is "necessary to preserve and protect competition and diversity in the distribution of video programming."[60] According to these commenters, the word "necessary" carries some special weight that shifts the burden of proof to those seeking the extension.[61] In a similar vein these commenters argue that the exclusivity ban is a narrow departure from normal commercial practices and that in other contexts the Congress has simply ordered sunsets of certain provisions, without contemplating their extension on the basis of a Commission finding.

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[60] 47 U.S.C. § 548(c)(2)(5).

[61] *See, e.g.*, Comcast Initial Comments at 3-4; AOL/Time Warner Initial Comments at 3, 18; AT&T Broadband Initial Comments at 1-6.

There is nothing in the legislative history, nor in the structure of section 628, to justify this alleged shift in the burden of proof. Again, the commonsense interpretation of section 628 is that in the face of the anticompetitive record then known to Congress, including the lack of availability to cable's competitors of their captive programmers' product, Congress simply imposed a presumptive ban on such exclusivity for a period of years, and left to the Commission to determine, at the end of that period, whether to continue the ban, and if so, under what new terms and conditions to do so, taking account of the facts at the time. Far from supporting the cable commenters' assertions, the existence of the provision specifically contemplating an extension reveals, not confidence that a 10 year ban would be sufficient, but just the opposite, *i.e.*, a concern that a 10 year ban might not be sufficient. There is in the language of the statute no presumption one way or the other, and no subsequent interpretation of the statutory language has taken the position advocated by the cable commenters. There are, of course, other sunset provisions in the Communications Act,[62/] but their presence and their variation simply serve to emphasize that in each case Congress crafted legislative language to suit the perceived need in a specific context.

The language of section 628(c)(2)(5) thus expresses Congressional concern that the initial 10 year general ban might not be sufficient. This does not mean that Congress thought the

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[62/] Section 623(c)(4) (47 U.S.C. § 543(c)(4)) provides that rate regulation for upper tiers was to sunset on March 31, 2000; Title II of the Act contains sunsets concerning restrictions on BOC participation in electronic publishing (four years) (47 U.S.C. § 274(g). *See also* § 271(e)(1) concerning joint marketing of local and interLATA services (three years), and a default sunset of BOC offers of certain services through a separate affiliate (three years from date FCC authorizes a BOC to provide interLATA services under § 271(d) (§ 272(f)(1)) and § 325(b)(3)(C)(ii) (FCC restriction on exclusive retransmission consent arrangements to sunset on Jan. 1, 2006.)

problem addressed by the language of section 628(c)(2)(D) would disappear magically on October 5, 2002, but rather that it might not. Nor should the Commission, in considering the meaning of section 628(c)(2)(5), overlook the context in which the provision was adopted by Congress, *i.e.*, an overwhelming concern about the cable industry's record of competitive abuse, ever-rising prices, poor customer service, and lack of innovation. As noted above in the discussion of the relevance of traditional antitrust law to the present issue, Title VI of the Communications Act reveals a broad concern about the need for government at both the federal and local (or state) levels to closely monitor the activities of the cable industry. Set in the context of that broad and pervasive statutory scheme, it would be quite surprising indeed if Congress intended to put the burden of proof on those seeking access to vertically integrated programming. Even less persuasive is Comcast's

contention that the exclusivity ban should be considered a "temporary" one, citing the FCC's 1990 *First Program Access Order*.[63/]

VIII. CONCLUSION

The need for a continuation of the general ban on exclusivity for vertically integrated cable programming is amply proven by the anticompetitive record of the incumbent cable industry. Given the flexibility of application which is inherent in the statute and the Commission's implementing rules, no great burden on a cable entity wishing to enter into

[63/] Comcast Initial Comments at 4, citing *First Program Access Order*, 8 FCC Rcd at 3384, ¶ 63 (1990). The fact is that two years later the Congress disregarded the Commission's objections to a provision like § 628(c)(2)(D) and enacted a 10 year ban. Ten years may be "temporary" in some contexts, but in the fast-paced world of telecommunications regulation it is a significant period of time, thus reflecting Congress's deep concern about the cable industry's anticompetitive proclivities.

exclusive arrangements exists: it merely needs to persuade the Commission that in the circumstances its desire for exclusivity serves the broad public interest standards of the Communications Act and particularly section 628(c)(4)(A-D) thereof. On the other hand, as indicated in RCN's initial comments, if the Commission is inclined to reduce the scope of the present general ban it should do so only in instances in which the incumbent does not serve 50 percent or more of a local market.

Respectfully submitted,

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APPENDIX A

This appendix contains specific responses to a paper entitled "Competition For Video Programming: Economic Effects Of Exclusive Distribution Contracts," dated December 3, 2001 and prepared by Economists Incorporated, which has been submitted by Cablevision as an attachment to its initial comments. The paper is referred to herein as "Cablevision's Report," or simply as the "Report."

At the outset it should be noted that, while the style, language and title of Cablevision's Report suggests that it was prepared by consulting economists, nowhere is the Commission or the public informed about the identity of the authors, their professional credentials and experience, their prior or current clientele, or their prior work in the MVPD distribution industry. The submission of what purports to be an outside study without providing such information is unusual and makes it impossible to evaluate the knowledge, competence, bias, or other relevant characteristics of the author(s). Accordingly the Commission should give the Report no more weight than if it had simply been incorporated in Cablevision's initial comments.

Apart from the absence of any information about the authors of the Report, it is substantively unpersuasive because it rests on platitudes and is riddled with logical flaws, a misunderstanding of the statutory provision at issue, and an incomplete understanding of the actual circumstances faced by new MVPD competitors. The fundamental thesis of the Report is that as a general economic proposition exclusivity in the arrangements for the distribution of programming contributes to consumer welfare and accordingly should not be limited by an extension of the 10 year ban on exclusivity for vertically integrated programming. This is an enormous leap which the Report does not seriously attempt to justify. In fact, as demonstrated briefly below, the Report is entitled to no weight at all because it never successfully takes the reader from the general to the specific.

The Report begins with an extended discussion of two propositions: that as a general principle free markets, investment, and consumer welfare are well served by exclusivity in distribution chains, and that in the specific market for intellectual property, including programming, such arrangements are quite common. Both propositions are correct, and RCN does not dispute either. However, they are hardly sufficient to demonstrate that in the particular circumstances addressed by Congress in 1992, or indeed in today's circumstances, restrictions on exclusive arrangements between MSOs and their vertically integrated program affiliates are unjustified. The Report asserts (p.6) that it is "anomalous" that exclusive contracts involving vertically integrated cable operators are "held to be unlawful *per se* ." This assertion is, of course, factually erroneous since section 628(c)(2)(D) does not at all bar such exclusive contracts *per se.* On the contrary, the statute provides specifically for consideration of a variety of factors which can conceivably justify such contracts.[64]

The Report then argues that cable operators collectively account only for about 22% of all video programming and hence lack the ability to foreclose access to the market (p. 12). This circumstance, however, even if true, is irrelevant. As noted elsewhere in the literature, not all

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[64] *See* 47 U.S.C. § 628 (c)(4). The Report may, of course, be speaking of § 628(c)(2)(C) which does flatly bar such exclusive arrangements in instances where no cable service existed in 1992. However, nowhere do the Report's anonymous authors indicate that they are aware of this distinction. Indeed, the Report speaks of a *per se* ban at various points, including pp.9-10 and p. 23. This apparent misunderstanding of the relevant statutory provisions should lead any reader of the Report to be highly skeptical both of the quality of the analysis and of its conclusions.

programming is created equal, and if incumbents are allowed to corner the market on programming such as local professional sports programming, which is vital for any competitor, that competitor will not be competitively or economically viable in the long run. That the newcomer may be able to carry a plethora of dog grooming or petunia planting programs does not mean that the marketplace is working as it should.

To buttress its argument that competitors could invest in and develop their own programming, the Report (p. 9) introduces what appears to be an equity argument, *i.e.*, that cable companies developed programming to compete with over-the-air television in the early days of the cable industry, so requiring new MVPD competitors to develop their own programming is both equitable and feasible. The analogy is not a good one. In its earliest days the cable industry developed in areas where there was little or no over-the-air reception, and it had no competition, almost by definition, for video subscriber revenue. A competitor entering the MVPD market today, on the other hand, is trying to overcome an incumbent with a market share of some 90% or more in most urban areas, a reliable revenue stream of significant portions, and a lock on some of the most vital programming which any MVPD must carry to be successful. Simply put, if RCN cannot carry local sports programming in an urban area with professional teams, it is pointless to spend tens or hundreds of millions of dollars to develop its own programming. The subscribers simply won't take the service in sufficient numbers to make it viable.[65]

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[65] The Report makes a related point at pp. 24-25, alleging that if entities such as Fox were able to enter the network distribution market without benefit of restrictions on preexisting network program distribution practices, MVPD entrants should be able to do so as well. Fox, however, was not saddled with the enormous cost of building out its own broadband distribution network from scratch, as is RCN. Nor did any of the preexisting broadcast networks, with which FOX had to compete, have an 80% or 90% share of the local markets in which FOX wished to compete.

The Report contends that a ban on exclusivity will reduce the output and diversity of programming (pp.14-15). But this theoretical supposition is plainly belied by the facts. As noted in many of the cable industry's initial comments, and in the Report itself, the last 10 years, during which the ban on exclusivity was in place, has seen a tremendous jump in investment in programming and an explosion of new programming. The industry and its apologists can't have it both ways: either the industry is entitled to reap the benefit of its vast programming expenditures over the last ten years, or a continuation of the exclusivity ban will choke off development of programming.

The focus on vertical integration in the statute and any extension of the ban on exclusivity for vertical programming is attacked in the Report (p. 16). There is no theoretical or empirical support for the argument, the Report says, that vertical integration is particularly associated with abuse of the exclusivity privilege. RCN disagrees, and simply points to its own prior difficulties, and those of other new entrants, in securing programming rights. These difficulties have arisen in virtually every case from incumbent cable companies which chose to withhold their own vertically integrated programming from new competitors in order to competitively disadvantage their incipient rivals. History, therefore, provides all the justification that is needed to support the imposition of an exclusivity ban in the case of vertical programming.

Nor is this history restricted to the last few years. As the legislative history of the Cable Act of 1992 amply demonstrates, the ban was enacted – over strong opposition from the cable industry and indeed over a Presidential veto, because Congress had been presented with overwhelming evidence that the program access problems arose from situations involving vertical integration. Again, the Report is premised on little or no knowledge of the industry and its history.[66]

The Report also suggests that vertical integration increases consumer welfare, by overcoming the inefficiencies which allegedly arise when a monopsonist, facing an upward-sloping supply curve, buys too little at too low a price, thereby restricting output. Vertical integration, the Report says, may avoid certain transaction costs (p. 18). The NPRM's assumption, set forth in ¶ 6, that the reverse is true, is therefore incorrect, concludes the Report. These theoretical speculations, however, do not stand up to close scrutiny, particularly of the history of anticompetitive behavior by cable MSOs, who have used their vertically integrated programming to inhibit competitive entry. Production efficiencies may or may not exist in vertically integrated production and distribution in the cable industry, but even if they do, they are entirely beside the point. Neither RCN nor the Commission can have any objection to efficiencies achieved through vertical integration. What RCN objects to is not such efficiencies, but the net loss of consumer welfare which occurs when RCN's ability to discipline an

[66] The Report also argues that there is little practical difference between vertical integration and arms length contracts which could achieve exclusivity without affiliation between the programmers and the distributors. No doubt in principle this is true, although the distributor in such cases might have to pay more, or sacrifice somewhere else in the negotiations to achieve the exclusivity, or might be more exposed to public criticism in seeking such arrangements. It may also be that, notwithstanding the purity of analytic reasoning in the Report, program producers willing to sign exclusives with cable operators were scarce in the early years of the industry so that they had to be bought to compel them to enter into such arrangements. But in any case, seeking exclusives from independent producers was not the path the industry has predominantly chosen. Both Cablevision and Comcast bought sports programming producers before limiting competitive access to that programming in their respective markets. Moreover, the existence of the statutory ban in § 628, while limited to vertical integration, might well have suggested to thoughtful cable operators that the obvious ruse of spinning off affiliates for the purpose of thereafter entering into exclusivity contracts would only prompt remedial legislation to correct the patent end-run.

incumbent by viable competition is curtailed through abuse of that vertical integration to keep vital programming away from RCN. The Commission's concern about this, set forth in ¶ 6 of the NPRM, is entirely justified by more than a decade of competitive abuse.

Next the Report makes the irrelevant observation that even if MSOs had an incentive to foreclose competitors, and foreclosure did occur, it would not go beyond the geographic areas in which the vertically integrated cable operator is franchised (pp. 18-19). Here again, the Report fails to come to grips with the problem: the attempted foreclosure occurs precisely within the franchised area of the incumbent, and it is within that area that competitors must have access to certain programming. When Cablevision denied RCN access to its New York City area MetroChannel sports programming, it did so within the city itself, where Cablevision competed (at least in portions of the city) and freely offered such programming to RCN in New Jersey, where Cablevision was not a competitor. Apparently when Cablevision saw no need to foreclose RCN as a competitor, the theoretical incentives to maximize its profits by selling the programming to RCN were suddenly irresistable.

The Report makes the related argument that because vertically integrated cable companies own, in a majority of cases, only partial interests, foreclosure through unprofitable denial of programming to competing distributors would be difficult to hide from other equity interest holders who would require some sort of compensation for such submaximizing behavior. No doubt this sort of theoretical question could keep a flock of academic economists busy for some time. From a practical perspective, however, there are innumerable ways in which such dissonances among stockholders or controlling parties can be handled, many of which would never see the light of day and which are difficult or impossible to quantify. What RCN knows for a fact, however, is that in a number of instances it has been denied, or faced threatened denial, of vital programming which was vertically integrated with its incumbent competitor. The Report claims that the growth of MVPD competition over the 10 year life of the current exclusivity ban despite the application of the ban to only about half of the programming sold to MVPDs demonstrates the lack of need for such a ban (p.17). But, as RCN has noted above, this is illogical. In the 10 years since the ban was imposed by the Cable Act Of 1992, the rate of growth of competitive MVPDs has been uneven, and for the first seven of those 10 years, very slow.[67]

For foreclosure to occur on a scale sufficient to exclude competitors or significantly raise their costs, claims the Report, a cable operator would have to control through exclusive contracts or vertical integration a large portion, or at least the most valuable of all available programming (p. 20). But this would not occur, opines the Report, because a competitor could identify the most valuable programming and create its own competing programs. *Id.* Again, the Report reveals a lack of knowledge of the facts. If local sports programming is, by contract, rendered unavailable to a competitor — as has happened in numerous markets — then the competitor has no way to duplicate or reproduce that programming. The loss of such marquee programming is a very serious competitive disadvantage to a struggling competitor, which undoubtedly explains why it is such a common subject of anticompetitive programming restrictions.[68]

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[67] In 1992 incumbent cable operators held about 99% of the MVPD industry, and this number began dropping to its present 80% only in the last three years or so. Even today, without DBS, the rate of competitive entry is approximately 5%. For smaller competitors, therefore, the impact has been devastating.

[68] The Report's contention that the cable industry has not invested enough to lock up all programming (p. 21) is, for the same reason, irrelevant. It is not necessary to lock up all, or even most programming; it is only necessary to lock up the programming which is essential to an incoming competitor.

According to the Report, maintenance of the exclusivity ban would unnecessarily impose external costs on vertically integrated cable operators, such as abandoning satellite distribution (pp. 22-23). That a report paid for by the cable industry would make such an argument is rather ironic, since the industry has been insisting for some time that in instances where it has migrated programming from satellite to terrestrial distribution, it has done so not to evade the program exclusivity ban, but on the contrary, to capture the economies of local fiber optic distribution.[69] Again, the proponents of terminating the ban can't have it both ways, and again it would appear that the author(s) of the Report are not very familiar with the cable industry's prior claims.

Finally, the Report claims that MVPD competitors must begin to offer differentiated products to compete successfully for the remaining tv households (p. 25). RCN does offer a differentiated product: it generally offers more channels, of higher technical quality, than its local cable competitors. Its prices are generally lower, and it offers integrated video distribution, broadband access, and local exchange and long distance telephone service. As RCN noted in its initial comments, it does not seek access to any cable vertically integrated programming which it can itself duplicate or replicate; rather it seeks continuing access to marquee programming, such as local sports, which are essential to any competitor and which simply cannot be duplicated because the distribution rights have been used to exclude competitors.[70]

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[69] *See, e.g., RCN Telecom Services of New York, Inc. v. Cablevision System Corporation, et al.*, 16 FCC Rcd 12048 (2001) at ¶ 11.

[70] RCN, Initial Comments at 37-38.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2002, a copy of the foregoing Reply Comments of RCN Telecom Services, Inc. was served by hand, on each of the persons listed below.

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