

**CONDITIONS THAT LED THE FCC TO RECOMMEND “TEMPORARY, LIMITED”
RESTRICTIONS ON EXCLUSIVITY IN 1990 HAVE BEEN SATISFIED**

In 1990, the Commission’s finding that there was insufficient competition to cable prompted it to recommend that Congress enact a program access requirement, including a restriction on the use of exclusive contracts. *Competition, Rate Deregulation and the Commission’s Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, ¶¶ 129-130 (1990). Recognizing, however, that “it is in many ways inappropriate and inadvisable for the government to intrude in programming negotiations or to substitute its judgment to resolve legitimate business concerns” (*id.* ¶ 130), the Commission suggested only a “temporary, limited and targeted intervention to ensure that alternative multichannel program providers have fair and equitable access to programming” in order “to promote the emergence of alternative, effectively competitive multichannel distributors” (*id.* ¶ 129) and “encourage development of new programming and thus enhance the diversity of available program services for consumers.” (*id.* ¶ 112)

These goals have now been met, and the market conditions that prompted the Commission to call for program access requirements in 1990 are far different from those that exist today. For example:

- In 1990, there was very little competition to the cable operator -- wireless cable, HSD, and SMATV had small penetration and DBS was not yet available (*id.* ¶¶ 98-111). The total number of non-cable MPVD subscribers grew over 15% from June 2000 to June 2001. In particular, DirecTV and EchoStar have a total of 17 million DBS customers, combined revenues of almost \$25 billion, and are respectively the third and fifth largest MVPDs in the country.
- In 1990, cable systems had equity interests in 13 of the top 20 national basic cable networks (*id.* ¶ 78). Today, only 9 of the top 20 are vertically integrated.
- In 1990, vertical integration in the industry had been accelerating for five years (*id.* ¶ 79). On contrast, over the last few years, the percentage of vertically integrated networks in the cable industry has declined sharply, from 53 percent in 1994 to 35 percent in 2001.
- In 1990, no new independent channels had been successful (in terms of high subscribership and ratings) for five years (*id.* ¶ 81). In 1994, 12 of the top 15 most watched cable programming networks (measured by prime time rating) were still vertically integrated. By 2000, however, that number had been cut in half, and remains unchanged in 2001.

The Commission’s 1990 recommendations were based in part on anecdotal evidence that unaffiliated distributors were being refused access to the programming, and their ability to compete was reduced as a result. By contrast, DirecTV and EchoStar have ready access to capital, substantial market capitalization, attractive subscriber bases, phenomenal growth rates, and can command access to programming, including DBS-only exclusive programming such as NFL Sunday Ticket[®]. Even if some programming provided by vertically-integrated programmers is offered on an exclusive basis, DirecTV and EchoStar would still have access to an ample supply of unaffiliated and affiliated programming that would allow them to remain competitive in the market. Lifting the exclusivity restriction will intensify competition and foster innovation by both spurring DirecTV and EchoStar to make programming investments of their own and removing deterrents to programming investments by other programmers.