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

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	))	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	))))	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	))))))	MB Docket No. 05-192

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Rick Chessen
Michael S. Schooler
Diane B. Burstein
Stephanie L. Podey
Counsel for the National Cable & Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

June 22, 2012

TABLE OF CONTENTS

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

In the Matter of Revision of the Commission's Program Access Rules News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	))))))))))))))))	 MB Docket No. 12-68 MB Docket No. 07-18 MB Docket No. 05-192

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA")[1] hereby submits its comments on the Notice of Proposed Rulemaking ("*Notice*") in the above-captioned proceeding.[2] In the *Notice*, the Commission seeks comment on whether to retain, sunset, or relax the prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming.[3]

1 NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $185 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

2 *See In re Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413 (2012) ("*Notice*").

3 *See Notice* ¶ 1.

Consistent with Congressional intent, the Commission should allow the prohibition to fully sunset.

INTRODUCTION AND SUMMARY

Just this month, the Commission noted that there have been dramatic changes in the video marketplace in the past five years.[4] These changes bear directly on the key issue in the instant proceeding – namely, whether the Commission's rule prohibiting exclusive contracts between cable-owned satellite-delivered program networks and cable operators should finally sunset as required by Section 628(c)(5) of the Communications Act.[5]

Competition has undeniably taken hold in the multichannel video marketplace, with most consumers having a choice of at least three – and many having the choice of four, or even five – MVPDs. Consumers can also access thousands of hours of additional video from sources on the Internet. Cable operators respond to the robust competition in the marketplace by offering consumers the innovative services that they demand. Meanwhile, vertical integration between cable operators and programming networks – a key concern identified by Congress in 1992 – has dropped markedly in the past twenty years and no longer threatens competition in the video marketplace.

Indeed, it is hard to imagine that, when Congress provided that the exclusive contract prohibition would expire ten years after enactment unless it remained "necessary to preserve and protect competition and diversity"[6] in the video marketplace, it would have concluded that the competitive conditions that exist today were not yet sufficient to trigger the sunset. Congress did not intend the prohibition to last forever or for as long as there was some hypothetical risk of

---

[4] *In re Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Report & Order, FCC 12-59, CS Docket No. 98-120 ¶ 13 (rel. June 12, 2012).

[5] 47 U.S.C. § 548 (c)(5).

[6] *Id.*

anticompetitive conduct. The standard for sunsetting the exclusivity prohibition has clearly been met, and the Commission should allow it to expire.

Furthermore, to implement the Congressional directive in Section 628(c)(5), the Commission must allow the exclusivity prohibition to *fully* sunset. There is no basis for requiring cable operators to demonstrate, on a case-by-case basis, that their service areas are competitive before they are permitted to enter into exclusive contracts. Nor is there any basis for retaining the prohibition with respect to so-called "must have" programming. Moreover, while the discrimination prohibition of Section 628(c) will remain in effect after the exclusivity ban sunsets, that provision cannot reasonably be construed to apply to exclusive contracts. Nor may the general provisions of Section 628(b) be construed in a manner that effectively imports and resuscitates the expired ban on exclusive contracts in Section 628(c). Finally, in deciding whether the statutory standard to sunset the exclusivity prohibition has been met, the Commission must be mindful of the serious First Amendment issues that would be raised by a decision to further extend the prohibition.

I. THE FCC SHOULD ALLOW THE EXCLUSIVE CONTRACT PROHIBITION TO SUNSET.

Twenty years ago, when Congress enacted Section 628 of the Communications Act as part of the 1992 Cable Act, the competitive landscape for the provision of video programming looked very different than it does today. In 1992, the economics of the developing video marketplace rarely justified the deployment of more than one cable system in any particular franchise area. As a result, most consumers who wanted to enjoy the growing array of cable programming services in addition to over-the-air broadcast programming had only a single option. The program access provisions of Section 628 – and, especially, the prohibition in Section 628(c) on exclusive contracts between cable-owned satellite programming networks and cable operators – were aimed at nurturing the development of competition in the multichannel video marketplace.

In 1992, a new technology – direct broadcast satellite ("DBS") – offered the prospect of head-to-head competition for cable systems. Congress feared, however, that cable operators vertically integrated with cable programming networks might nip such competition in the bud by denying their nascent DBS competitors access to the critical mass of programming they would need to begin attracting customers.[7] The number of channels provided by cable systems was far fewer than are available today, and a large portion of the program services carried on those channels were satellite-delivered networks owned by cable operators. Consequently, Congress in Section 628(c) specifically directed the Commission to adopt rules prohibiting such vertically owned satellite-delivered networks from entering into exclusive contracts with cable operators except where such contracts were first shown to be in the public interest.[8]

Congress, however, expressly stated that the prohibition on exclusive contracts was to be of limited duration. Congress provided that the prohibition "shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[9]

---

7 *See* S. Rep. No. 102-92, at 26 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1159.

8 *See* 47 U.S.C. § 548(c)(2)(D). Section 628(c) also required the Commission to adopt rules prohibiting such networks from discriminating in the prices, terms, and conditions offered to competing multichannel distributors, except in certain enumerated circumstances. *See id.* § 548(c)(2)(B).

9 *Id.* § 548(c)(5).

By 2002, the circumstances that had concerned Congress had already dramatically "changed for the better."[10] Two national DBS providers had established themselves as sturdy competitors to cable throughout the nation, and cable's share of multichannel customers had been reduced from approximately 95 percent in 1992 to only 78 percent.[11] The number of channels offered by cable and DBS systems had substantially increased, and the percentage of vertically integrated networks on such channels had significantly decreased.[12] Nevertheless, while then-Commissioner Martin found it to be a "very close call" and Commissioner Abernathy dissented,[13] the Commission found that cable operators still had the incentive and ability to withhold programming from their competitors and that the exclusivity prohibition remained "necessary to preserve and protect competition." It extended the prohibition for five years.[14]

In the intervening five years, from 2002 to 2007, all of the competitive trends of the previous ten years intensified and accelerated. Not only had the two DBS companies continued to gain significant market share, they established themselves as the second and third largest MVPDs.[15] Meanwhile, the large regional telephone companies, which had been freed by the Telecommunications Act of 1996 to become cable operators in their telephone service areas, had finally begun offering cable service – along with telephone and high-speed Internet service – in

---

[10] *See In re 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*, Report & Order, 17 FCC Rcd 12124 ¶ 65 (2002) ("*2002 Extension Order*").

[11] *Notice* App. A.

[12] *See 2002 Extension Order* ¶ 18.

[13] Separate Statement of Commissioner Martin, approving in part, concurring in part, *id.* at 12181; Dissenting Statement of Commissioner Abernathy, *id.* at 12175.

[14] *Id.* ¶¶ 63, 80.

[15] *See* Comcast Ex Parte, filed in Dkt. No. 07-29, at attachment (June 13, 2007).

vigorous competition with incumbent cable operators.[16] Cable's market share declined to 67 percent.[17]

During the same period, vertical integration between cable operators and programming networks continued to diminish – to only 22 percent.[18] Plus, the proliferation of video programming on the Internet had already begun.[19] By 2007, all evidence indicated that competition in the video marketplace was here to stay.

Despite these trends, the Commission again refused to allow the exclusivity prohibition to expire as intended. The Commission asserted that a significant portion – though far from a majority – of the most popular program networks were still owned by cable operators.[20] Since, in the Commission's view, there were no good substitutes for some of these networks, the Commission postulated that cable operators, by denying what it characterized as "must have" programming to their competitors, could prevent them from competing effectively.[21] It therefore extended the prohibition for five more years.[22]

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision.[23] The Court confirmed that the prohibition could be retained only if the Commission found that it was necessary to preserve competition – not if it

---

16 *See In re 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; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report & Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 ¶ 24 (2007).

17 *Id.* ¶ 23.

18 *Id.* ¶ 18.

19 *See id.* ¶ 25.

20 *See id.* ¶ 37.

21 *See id.* ¶ 42.

22 *See id.* ¶ 79.

23 *See Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1316 (D.C. Cir. 2010) .

simply found that some competitors could be harmed if the prohibition were eliminated.[24] But it deferred to the Commission's finding that due to cable's share of multichannel customers and the extent to which cable operators still owned popular program networks, the withholding of cable-owned programming from a cable operator's competitor could harm competition as well as harming the competitor.[25]

The Court made clear, however, that the prohibition was not intended to stay in place forever just because some cable-owned programming might be viewed as unique and popular. To the contrary, the Court explicitly

> anticipate[d] that cable's dominance in the MVPD market will have diminished still more by the time the Commission next reviews the prohibition, and expect that at that time the Commission will weigh heavily Congress's intention that the exclusive contract prohibition will eventually sunset. . . . We expect that if the market continues to evolve at such a rapid pace, the Commission will soon be able to conclude that the exclusivity prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming.[26]

Now, five years later, it is time for the Commission to fulfill the Court's expectations and Congress's intention by allowing the prohibition on exclusive contracts to sunset. As we show below, cable's share of MVPD customers *has* diminished still more. Vertical integration remains far below the levels that concerned Congress. And the companies that have made the marketplace vigorously competitive – including DIRECTV, Dish Network, Verizon, and AT&T – are robust national companies that now rank, respectively, as the second, third, seventh, and eighth largest MVPDs nationwide.[27] Their viability can withstand the rigors of competition, and consumers are the beneficiaries of the continuing efforts of cable operators, DBS companies,

---

[24] *See id.* at 1313.

[25] *See id.*

[26] *See id.* at 1314.

[27] NCTA, *Top 25 Multichannel Video Programming Distributors as of Dec. 2011, at* http://www.ncta.com/Stats/TopMSOs.aspx (last visited June 12, 2012).

phone companies, and new video competitors to differentiate themselves and attract customers with superior products and services – including unique programming.

A. Competition in the Video Marketplace is Irreversible, Robust, and Vigorous.

The Commission's most recent comprehensive analysis of the video distribution marketplace (based on the marketplace as of 2006) found that, "competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation" and reported that almost all consumers had the choice of obtaining programming from broadcast television stations, a cable operator, and at least two DBS providers.[28] In addition, it found that,

> [i]n some areas, consumers also may have access to video programming delivered by emerging technologies, such as digital broadcast spectrum, fiber-to-the-home facilities, or web-based Internet video. In addition, through the use of advanced set-top boxes and digital video recorders, and the introduction of new mobile video services, consumers are now able to exercise more control over what, when, and how they receive information.[29]

This trend has continued unabated -- competition in the marketplace is undeniably established, dynamic, and fierce. As Michael Powell, President and CEO of NCTA, recently explained,

> We face competition and that is healthy. Wireless broadband is enjoying astronomical growth. Telcos remain in the thick of the fight. And, satellite companies continue to battle, convinced that you will end up in a ditch, sell your hair to a wig shop, or have a grandkid with a nose ring if you don't "get rid of cable." There is also a place for Internet video providers to compete and complement the cable model and some consumers may even cut the cord. At the end of the day, cable benefits from the competition and will work even harder to compete fairly and effectively on value and consumer experience.[30]

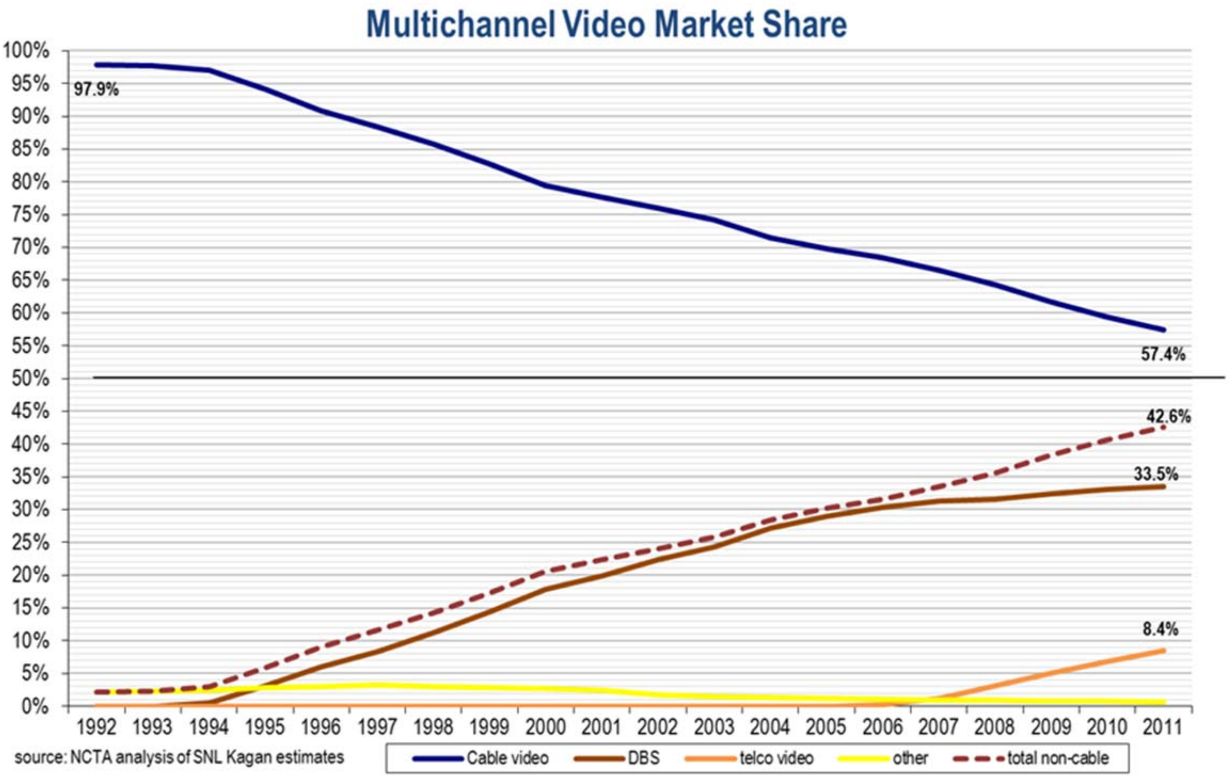
---

[28] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503 ¶ 5 (2006).

[29] *Id.*

[30] Michael K. Powell, President & CEO, NCTA, Keynote Address at the Cable Show (May 21, 2012), *available at* http://www.ncta.com/DocumentBinary.aspx?id=1029.

As the chart below demonstrates, the over 95 percent share of MVPD customers attributable to cable that concerned Congress in 1992 had dropped to less than 67 percent in 2006, and has further dropped to under 58 percent today.



DBS providers DIRECTV and Dish Network, and telco cable providers Verizon FiOS and AT&T U-Verse have not only established a foothold in the marketplace; they are entrenched competitors, with more subscribers than most cable multiple system operators.[31] The MVPD landscape has undoubtedly evolved to become the competitive marketplace that Congress hoped for in 1992.

In fact, developments in today's video landscape *exceed* what Congress had hoped for. Americans love video content – the average American spends 147 hours watching television in

[31] *See infra* note 27.

their homes every month.[32] To address this demand, video content providers – both traditional MVPDs and new competitors – are rapidly innovating to provide consumers an abundance of quality programming, delivered in a variety of ways to meet consumer demand.

Press reports speculate on who will win the "TV platform battle," citing to potential competition from a bevy of potential competitors, including game console providers like Microsoft, manufacturers of Internet-enabled televisions, "over-the-top-video" devices like Roku or Apple TV, and online video providers such as Google and Amazon.[33] It is rumored that Google will soon offer a television package as part of its high-speed Internet network in Kansas.[34] And, according to a recent article, Intel, the world's largest chipmaker, "thinks it can build a better set-top box and over-the-top subscription service to deliver TV content to consumers."[35] Meanwhile, online video distributors including Netflix, YouTube, and Hulu, have announced substantial investments in original and exclusive content to attract viewers to their programming online.[36] At the same time, DBS providers and telco video providers like AT&T and Verizon continue to innovate to offer their customers new ways to access subscription video content.[37]

---

32 The Nielsen Co., *State of the Media: The Cross-Platform Report* 6 (2011), *available at* http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2012-Reports/Nielsen-Cross-Platform-Report-Q3-2011.pdf.

33 *See, e.g.*, Colin Mann, *Microsoft to Win TV Platform Battle?*, Advanced Television.com, May 18, 2002, *at* http://advanced-television.com/index.php/2012/05/18/microsoft-to-win-tv-platform-battle/.

34 *See* Scott Canon, *TV Service Looks Likely*, Kansas City Star, June 6, 2012, at A13.

35 Yinka Adegoke & Noel Radewich, *Insight: Intel's Plans for Virtual TV Come Into Focus*, Reuters, June 8, 2012, *available at* http://www.reuters.com/article/2012/06/08/us-intel-tv-idUSBRE85706Q20120608.

36 *See, e.g.*, Janko Roettgers, *Netflix, Hulu and the Golden Age of Content*, GigaOM News, Jan. 16, 2012 (describing investments in original content by Netflix, Hulu, YouTube, and others), *at* http://gigaom.com/video/netflix-hulu-exclusive-content/.

37 Press Release, DISH Network, *DISH Now Streaming Thousands of On-Demand Movies and TV Shows to iPad* (Jan. 8, 2012), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=637694; Press Release, DIRECTV, *New! Watch Live TV on Your iPad®* (Nov. 15, 2011), *available at* http://news.directv.com/2011/11/15/watch-live-tv-on-your-ipad/; Press Release, AT&T, *AT&T U-verse TV Wins*

Traditional cable operators are responding to these announcements by developing their own exciting innovations. Cable operators appreciate that their customers demand the best video content and services wherever, whenever, and however they want. To that end, they are working to revolutionize the set-top box[38] and are offering apps to consumers that allow them to browse, search, and control electronic program guides and DVRs from tablets and smart phones.[39] Going a step further, cable operators are also increasingly making it possible for consumers to stream popular subscription video content on a variety of devices.[40] Plus, with a recent announcement, the top five cable operators are joining together to provide their customers free access to over

---

IP&TV Industry Award for "Best TV App" and "Best Consumer Device" (Mar. 22, 2012), *available at* http://www.att.com/gen/press-room?pid=22623&cdvn=news&newsarticleid=34104&mapcode=att-awards|U-verse; Release, Verizon Communications, *Verizon Simplifies Remote Access to Broad Range of Entertainment Services and Customer Tools With New 'MY FiOS' Application* (Oct. 18, 2011), *available at* http://newscenter.verizon.com/press-releases/verizon/2011/verizon-simplifies-remote.html.

38 *See, e.g.*, Press Release, Comcast Corp., *Comcast Begins National Launch of X1: Next-Generation Cloud Enabled Television Platform and Introduces The X1 Remote Control App* (May 21, 2012), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1186&SCRedirect=true; Mae Kowalke, *Set-Top Cable Boxes Get Flexible*, TMCNet.com, June 8, 2012, *at* http://cable.tmcnet.com/topics/cable/articles/2012/06/08/293870-set-top-cable-boxes-get-flexible.htm (last visited June 14, 2012).

39 *See* Press Release, Time Warner Cable, *Time Warner Cable Launches TWC TV™ for iPhone* (Jan. 20, 2012), *available at* http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-newsArticle_print&ID=1650997&highlight=; Press Release, Comcast Corp., *Comcast Announces Launch for Xfinity TV App for iPad with the Ability to Watch TV Shows and Movies Anytime, Anywhere* (Nov. 15, 2011), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1020&SCRedirect=true; Press Release, Cox Communications, *Cox Communications Introduces Cox TV Connect(SM)* (Dec. 5, 2011), *available at* http://cox.mediaroom.com/index.php?s=43&item=572; Press Release, Charter Communications, *Charter Launches Mobile Apps* (Mar. 25, 2010), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=1406123&highlight=via%20apps; Press Release, Cablevision Systems, *Cablevision Expands "TV To Go" Options for iO TV Digital Cable Customers with Launch of HBO GO® and MAX GO®* (Mar. 14, 2012), *available at* http://www.cablevision.com/pdf/news/031412.pdf.

40 *See, e.g.*, Press Release, Charter Communications, *Charter Adds Turner Networks to Online Search and Discovery Feature for Customer Enjoyment of More Content Anytime, Anywhere* (Jan. 5, 2012) (announcing a deal that provides Charter subscribers access to over 500 hours of Turner content on PCs and other mobile devices, including live streaming of CNN and HLN), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=1645139&highlight=; *Comcast Offers ESPN on iPhone*, Phil. Inquirer, May 9, 2012, at A19 (indicating that the new free app will allow Comcast subscribers to stream ESPN, ESPN2, ESPN3, and ESPNU to mobile devices).

50,000 Wi-Fi hotspots across the country – which can be utilized to access an almost endless variety of video content.[41]

B. Vertical Integration No Longer Threatens Competition in the Video Marketplace.

At the same time, the amount and significance of cable-owned, vertically integrated programming on MVPD programming lineups has continued to diminish. In its 2007 Report & Order extending the exclusivity prohibition, the Commission noted that the percentage of satellite-delivered national programming services owned by cable operators had declined from 35 percent in 2002 to only 22 percent by 2007.[42] According to the *Notice*, and as shown below, the current rate of vertical integration has fallen to only 14.4 percent.[43] Moreover, as the *Notice* notes, excluding Comcast-controlled networks, the rate of vertical integration is a mere 11 percent.[44]

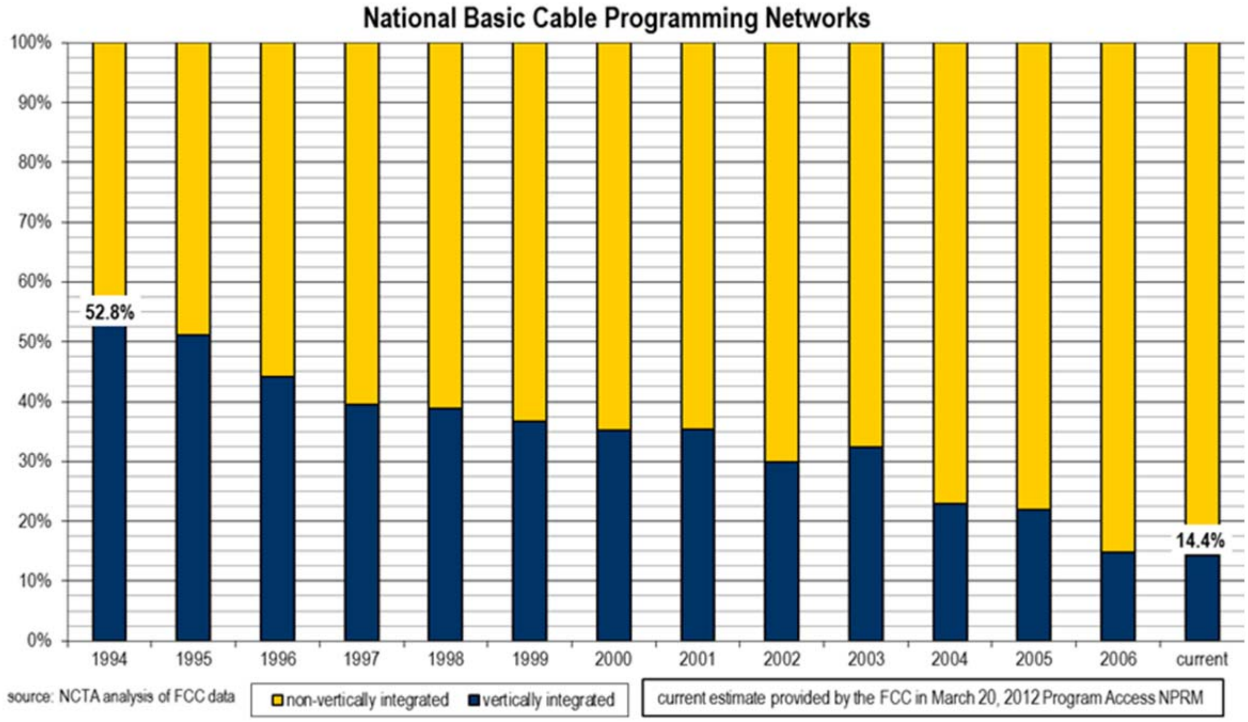
---

41 *See* Mike Reynolds, *MSOs Get Hot with WiFi Sharing Initiative*, Multichannel News, May 21, 2012, *available at* http://www.multichannel.com/article/484841-MSOs_Get_Hot_with_WiFi_Sharing_Initiative.php.

42 *In re Implementation of the Cable Television Consumer Protection & Competition Act of 1992*, Report & Order, 22 FCC Rcd 17791 ¶ 18 (2007).

43 *Notice*, App. B, Table 1.

44 *Id.*



Most significantly, there is no evidence to suggest that, as vertical integration has sharply declined and competition from DBS and other MVPDs has sharply increased, there is any significant likelihood that cable-affiliated program networks would or could seek to use exclusivity as a means of foreclosing competition. Among other things, the very success of DBS and telco video providers means that any decision for a program network to deal exclusively with cable operators would require it to forgo viewership and revenues from more than 40 percent of MVPD households.

In any event, program networks that are vertically integrated with cable operators no longer constitute the critical mass of MVPD programming lineups, as Congress thought they did in 1992. And even if it were appropriate for the Commission to focus now on "popular" or "must-have" programming, which it is not, in the *Notice,* the Commission reports that, excluding

Comcast-affiliated networks, only five out of the top 20 satellite-delivered video programming networks (ranked by prime time ratings) are vertically integrated with cable operators.[45]

Many of the remaining top-rated networks are vertically integrated with *non-cable* media entities. Those entities, as well as other independent programmers, have already created viable alternatives in virtually all the genres and niches of programming provided by cable-owned networks. As a result, it is unlikely that: (1) highly rated cable operator-owned networks would refuse to deal with alternative MVPDs and thereby cede viewership and revenues to a competitive network and (2) were it to occur, any such exclusive dealing would have the effect of squelching competition from new or existing competitors.

*****

In sum, it's hard to imagine that, when Congress provided that the exclusive contract prohibition would expire ten years after enactment unless it remained "necessary to preserve and protect competition and diversity" in the video marketplace, it would have concluded that the competitive conditions that exist today were not yet sufficient to trigger the sunset. As the Court of Appeals made clear, Congress did not intend the prohibition to last forever or for as long as there was some hypothetical risk of anticompetitive conduct. The standard for sunsetting the rule has clearly been met, and the Commission should allow the rule to expire.

II. THE PROHIBITION SHOULD "CEASE TO BE EFFECTIVE" IN ITS ENTIRETY.

The Commission asks whether, in lieu of allowing the exclusive contract prohibition in Section 628(c) to expire, it might "relax" the prohibition, either by sunsetting the rule only on a market-by-market basis, or by retaining the prohibition for satellite-delivered regional sports

[45] *Notice*, App. B, Table 1.

networks and other supposedly “must have” programming.[46] Neither step is warranted under the sunset provisions of Section 628(c).

There is no basis to sunset the prohibition in Section 628(c) on a market-by-market basis. Congress’s objective in enacting the time-limited prohibition has been achieved: Consumers nationwide have a choice among several established, vibrant, and competitive MVPDs. Cable operators should not be required to demonstrate, on a case-by-case basis, that their service areas are competitive before they are permitted, like their competitors, to create and enter into exclusive contracts to provide their own programming services.

Nor is there any basis for retaining the prohibition with respect to so-called “must have” programming. In a competitive MVPD marketplace, competitors will always seek to obtain an advantage by making their product uniquely attractive to consumers, whether with new technology or with unique programming they hope consumers will find irresistible. When companies are successful, their market shares will rise – until their competitors respond with their own unique attractions. Congress could not have intended to prevent this pro-competitive back and forth by endlessly prohibiting cable operators from acquiring exclusive rights to any programming in which they have invested if such programming is uniquely appealing to some audience segment. To the contrary, as the Court of Appeals made clear, Congress intended that once sufficiently sturdy competition took hold in the marketplace (which it correctly expected to occur ten years ago), the prohibition was to “cease to be effective.”

Also, precisely because Congress intended the prohibition to “cease to be effective,” the Commission may not continue to enforce it through the prohibition on discrimination in Section 628(c). Section 628(c)(2)(B) requires the Commission to prohibit discrimination by cable-

[46] *See Notice* ¶ 21.

owned program networks "in the prices, terms, and conditions of sale of delivery" of satellite programming among or between cable systems, cable operators, or other MVPDs. But Congress made clear that an exclusive contract would *not* be deemed a form of unlawful discrimination under this provision if such a contract was "permissible under subparagraph (D)" of that section – *i.e.*, if the Commission found that the contract was in the public interest.[47] Meanwhile, virtually all other exclusive contracts involving a vertically-integrated satellite-delivered network would be unlawful under the exclusivity ban in Section 628(c)(2)(D), wholly apart from the discrimination ban. So, in effect, Congress determined that if an exclusive contract were permissible under the exclusivity ban, it would be permissible under the discrimination ban.

If, when the ban on exclusive contracts sunsets, such contracts would still be prohibited under the discrimination ban unless they met the public interest standard of Section 628(c)(2)(D), the sunset provision would be meaningless. The only exclusive contracts that would be permissible under the discrimination ban would be the same ones that would have been permissible under the exclusivity prohibition – the prohibition that was to "cease to be effective." The proper interpretation of the statute is that, once the exclusivity ban sunsets, *all* exclusive contracts are permissible under Section 628(c)(2)(D) – and *none* are prohibited by the discrimination ban in Section 628(c)(2)(B).

Section 628(*b*) will, of course, remain in effect as a safeguard against any anticompetitive effects of particular conduct that may occur in a particular market or in particular circumstances – although its general prohibition of "unfair" conduct that hinders significantly or prevents an MVPD from competing in the provision of video programming should not be deemed or expected to apply generally to exclusive contracts that Congress intended to permit after a

[47] *See* 47 U.S.C. § 548(c)(2)(B)(iv); *see also id.* § 548(c)(4).

sunset. In a marketplace characterized by competition among strong national DBS and telephone company services, exclusive contracts are likely to promote competitive objectives and outcomes,[48] and, insofar as they do so, should not be deemed unfair. After the prophylactic prohibition of exclusive contracts expires, complainants who attempt to utilize Section 628(b) as a means to challenge an exclusive contract should bear a heavy burden in seeking to demonstrate that conduct is "unfair," and the Commission cannot simply import the *per se* approach of Section 628(c)(2)(D) by ruling in advance that certain exclusive contracts are presumptively unfair and significantly hinder competition.

III. THE FIRST AMENDMENT BARS ANY FURTHER EXTENSION OF THE EXCLUSIVITY BAN.

In deciding whether the statutory standard to sunset the exclusivity prohibition has been met, the Commission must be mindful of the serious First Amendment issues that would be raised by a decision to retain the rule. Those issues were fully and persuasively discussed by Judge Kavanaugh in his dissenting opinion in the appeal of the Commission's last extension of the sunset. The majority did not reach those issues, holding that they had not been squarely raised by the petitioner.[49] Judge Kavanaugh concluded not only that the issues *had* been raised but also that continuing to enforce the prohibition on exclusive contracts when the marketplace conditions that had justified the ban no longer existed would be unconstitutional.[50]

Those marketplace conditions have drifted even further from those that existed when the prohibition was enacted, and, for the reasons set forth in Judge Kavanaugh's dissent, extending the prohibition again would be even more problematic under the First Amendment than it was

[48] *See Cablevision*, 597 F.3d at 1326 (Kavanaugh, J., dissenting) (noting "exclusivity can be a legitimate business strategy" (citing S. Rep. No. 102-92, at 28 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161)).

[49] *See id.* at 1312.

[50] *See id.* at 1316 (Kavanaugh, J., dissenting).

last time. The statute does not compel continued application of the ban; to the contrary, it contemplates an end to it in competitive circumstances such as exist today. To the extent that there is any question whether those circumstances meet the statutory standards to sunset the prohibition, the Commission should construe those standards to avoid the serious constitutional issues that would be raised by extending the ban and allow the prohibition to expire.

CONCLUSION

The marketplace for video distribution has vastly changed not only from the landscape that concerned lawmakers two decades ago, but even from the already competitive marketplace that existed during the past decade, when the Commission was reluctant to let the prohibition on exclusive contracts sunset. As Chairman Genachowski testified two years ago,

> The communications and media landscape is rapidly evolving. New media and new communications technologies are an increasingly important part of the landscape, even as millions of Americans continue to rely on traditional forms of media and communications. The landscape today is very different from five and ten years ago, and will be very different five and ten years from now.[51]

Congress's goals have been met. It is time for the Commission at last to effectuate the Congressional directive by allowing the prohibition on exclusive contracts in Section 628(c)(2)(D) to sunset.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen
Michael S. Schooler
Diane B. Burstein
Stephanie L. Podey
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

June 22, 2012

[51] Julius Genachowski, Chairman, FCC, Before the U.S. Senate Committee on Commerce, Science and Transportation, *Consolidation in the Video and Broadband Market*, Mar. 11, 2010, at 3, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296803A1.pdf.