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 for 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 THE MADISON SQUARE GARDEN COMPANY

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The Madison Square Garden Company ("MSG") submits the following comments in response to the Notice of Proposed Rulemaking issued by the Commission ("FCC" or "Commission") in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

The two-decade-old ban on exclusivity for cable-affiliated programming is an outmoded remnant of the "pre-competitive" multichannel video programming distribution ("MVPD") business. Whatever useful purpose the ban may once have served has long since dissipated. Competition has taken firm and permanent root in the MVPD marketplace and the prohibition now serves only to deny program creators and program distributors a common business tool

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1/ *Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, FCC 12-30, ¶ 1 (Mar. 20, 2012) ("*NPRM*").

routinely utilized in content markets and universally recognized as enhancing competition and consumer welfare.

Congress always intended for the exclusivity ban to be temporary, recognizing both that exclusive contracts can be beneficial in competitive markets and that the MVPD marketplace would become competitive over time.[2/] Consequently, Congress directed the Commission to evaluate after a period of ten years whether competition in video services had progressed sufficiently to allow the ban on exclusive contracting to be lifted.[3/] In 2002, when the Commission conducted its first review of the continued need for the prohibition, then-Commissioner Kevin Martin stated that "whether the exclusivity ban continues to be necessary was a very close call."[4/] Commissioner Abernathy went further, concluding that because of "the significant competitive changes in the marketplace" the ban was no longer necessary.[5/] In reviewing the Commission's 2007 Order extending the ban for another five years, the D.C. Circuit Court of Appeals noted the vibrant competitiveness of the video marketplace and signaled that another extension likely would be unwarranted: "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."[6/]

2/ *NPRM* ¶ 9.

3/ *NPRM* ¶ 9.

4/ *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 and Order, 17 FCC Rcd 12124, 12180 (2002) ("*2002 Extension Order*"), (Separate Statement of Commissioner Kevin J. Martin); Press Statement of Commissioner Kevin J. Martin Approving in Part, Concurring in Part, at 1.

5/ *2002 Extension Order* (Separate Statement of Commission Kathleen Abernathy).

6/ *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010).

In this third proceeding on whether to allow the sunset that Congress intended to occur, the time has come for the Commission to acknowledge that in today's robustly competitive video marketplace, the exclusivity ban is no longer necessary to preserve – and, in fact, hinders – competition and innovation in the video programming marketplace. The inability of programmers such as MSG to utilize a common business tool like exclusivity inhibits investment and innovation. Exclusivity can help programmers attract capital for new programming and provide incentives for expanding their presence and visibility in certain markets.

Artificial restrictions on the use of exclusivity by programmers subject to the program access rules are wholly unnecessary in today's video services marketplace, which no longer even remotely resembles the cable-dominated marketplace Congress considered when it adopted the exclusive contracting ban. Cable's share of the MVPD marketplace continues to decline from 97% in 1992 to 58% today.[7/] DIRECTV and DISH Network are the second and third largest MVPDs in the country. AT&T and Verizon, the two largest communications companies in the country, did not even begin providing video programming until about five years ago but now offer video service to tens of millions of households. Each of these companies has invested billions of dollars in sunk costs in video-capable networks. Each has the ability to select from among hundreds of video programming networks to distribute to their subscribers, the overwhelming majority of which are not affiliated with cable. Robust competition from those companies will continue regardless of whether a handful of exclusive arrangements emerge in the wake of a sunset. And video programming from online video distributors, an embryonic development during the Commission's last review, has now become a major competitive force in

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7/ *NPRM*, Appendix A.

the marketplace. Indeed, Netflix now has more subscribers than any single MVPD,[8/] and like other online video distributors, it has emerged as a major force in the marketplace without any guaranteed access to programming. Hence, removal of the ban will have no effect on the continued growth of that source of competition.

The constraints of the ban are particularly unjustified for a programmer such as MSG, which has been spun off from Cablevision (the cable operator that MSG continues to be deemed affiliated with) as a separate public company; where neither MSG nor Cablevision has any equity stake in the other; and each company is answerable to its own stockholders. MSG is nonetheless treated under the current framework as though its program licensing decisions are effectively dictated by the interests of Cablevision's video distribution business – a proposition squarely at odds with MSG's business and economic circumstances and fiduciary obligations.

Meanwhile, the trend in the marketplace is away from vertical integration, as programming companies are being separated and operated independently from cable companies and other MVPDs – as shown by the spin-offs involving Time Warner Inc. and Time Warner Cable, AMC Networks and Cablevision, Liberty Media and DirecTV, and MSG and Cablevision. The trend away from vertical integration of MVPDs and content providers suggests that the marketplace values and rewards programmers that operate independently of cable and other MVPDs, thereby further eroding the rationale and necessity of rules that presume cable operators will wield excessive control over licensing decisions of affiliated programmers.

[8/] *Compare Netflix Q1 results: 3 million new streaming subscriber worldwide, record viewing hours*, ENGADGET, Apr. 23, 2012, *available at* http://www.engadget.com/2012/04/23/netflix-q1-results/ (noting Netflix's 23.4 million U.S. subscribers) *with* National Cable & Telecommunications Association, Top 25 Multichannel Video Programming Distributors as of Dec. 2011, *at* http://www.ncta.com/Stats/TopMSOs.aspx (listing Comcast as #1 MVPD with 22.3 million subscribers).

The relevant regulatory landscape has changed significantly in the last five years as well. The Commission's explication of its authority under Section 628(b) – upheld twice by the D.C. Circuit since 2007[9/] – underscores the possibility of addressing any specific exclusive arrangement that significantly hinders MVPD competition on a case-by-case basis via the "unfair practices" provision of the program access rules. Even erstwhile proponents of the exclusivity restriction, have questioned the wisdom of continuing the blanket ban, given Section 628(b).[10/]

The possibility of relief under Section 628(b) also obviates the need for special restrictions on exclusive contracts for cable-affiliated regional sports network ("RSN") programming. Notwithstanding claims to the contrary, guaranteed access to RSN programming is not an essential requirement of success as an MVPD. In fact, there are numerous instances in which MVPDs have opted to forego carriage of RSNs without adversely affecting their competitive viability. Further, the wide variance in characteristics of RSN markets (such as number of RSNs, type of sports programming carried, and the strength and durability of MVPD competition in the market) strongly suggest that a blanket rule against RSN exclusivity would be inappropriate. A case-by-case review under Section 628(b) makes far better sense for addressing any unique RSN exclusivity situations that may arise, particularly in light of the fact that a blanket exclusivity ban that singles out only RSN programming would be unlikely to survive First Amendment free speech review in the courts.

Lastly, the Commission should reject proposals to adopt new rules regarding volume price discounts or so-called uniform price increases by cable-affiliated programmers. There is no evidence that volume price discounts are adversely affecting competition in the MVPD

[9/] *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010); *Cablevision Systems Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011).

[10/] *See infra* at n. 51.

marketplace, and new constraints on such discounts could upset existing contractual arrangements and lead to *higher* prices for programming.

Likewise, there is no empirical history of competitive harm from alleged uniform price increases that would justify imposing new rules restricting the ability of programmers deemed to be affiliated with cable operators to seek rate increases. Not only does the Commission lack the authority to regulate so-called uniform price increases, but such rules are unnecessary given the incentive and ability of MVPDs to bargain hard to keep programming costs down. Such rules would also impermissibly discriminate against cable-affiliated programmers by exempting unaffiliated programmers from the burdens of such restrictions.

I. A BLANKET BAN ON EXCLUSIVITY FOR CABLE-AFFILIATED PROGRAMMING IS NO LONGER NECESSARY TO ENCOURAGE AND PRESERVE MVPD COMPETITION.

A. Competition in the MVPD marketplace has taken firm root.

Congress adopted program access provisions, including the blanket prohibition on exclusive contracts for cable-affiliated programming, as part of the 1992 Cable Act,[11/] out of concern that cable operators would seek to prevent MVPDs newly entering the market from being able to compete by withholding access to satellite-delivered, cable-affiliated programming.[12/]

At the time the 1992 Cable Act was adopted, cable operators served more than 95 percent of all multichannel video subscribers.[13/] Direct Broadcast Satellite ("DBS") was in its infancy, serving less than one-tenth of one percent of multichannel video subscribers, telephone companies had not yet been authorized to provide video services, and online video providers did

11/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

12/ *NPRM* ¶ 6.

13/ *NPRM*, Appendix A, note 2.

not exist.[14/] Courts held that Congress was justified in adopting the restrictive provisions in the 1992 Cable Act as a means to promote competition in light of the "bottleneck monopoly power exercised by cable operators" at that time.[15/]

But video services markets have changed dramatically in the 20 years since the 1992 Cable Act was adopted, and any "bottleneck monopoly power" cable operators may once have held has long since disappeared,[16/] replaced by vigorous and well-established competitive markets.[17/] The blanket ban on cable exclusivity is an anachronism, erected to address market conditions that have vanished and obviated by three key trends.

First, MVPD competition has taken firm and permanent hold in the marketplace. DBS operators now serve 33.9 percent – more than one-third – of all MVPD subscribers, with telephone companies making up 7.6 percent of the market.[18/] In contrast, the share of the MVPD market held by cable companies has declined consistently and significantly since 1992, and now stands at only 58.5 percent.[19/]

Relatively recent entrants to the MVPD marketplace, telephone companies – particularly Verizon's FiOS and AT&T's U-verse video services – have moved aggressively and successfully

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14/ *NPRM*, Appendix A; *id*. at Appendix A, n. 10.

15/ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994).

16/ *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992.").

17/ *See, e.g.*, Trefls Team, *Can Comcast Increase Pay TV Market Share?*, FORBES, Feb. 9, 2011, *available at* http://www.forbes.com/sites/greatspeculations/2011/02/09/can-comcast-increase-pay-tv-market-share/ ("Comcast faces intense competition from fellow cable companies (such as TWC and Cox), telecoms (such as AT&T and Verizon) and direct broadband satellite companies (such as Dish and DirecTV). Both TWC and Comcast continue to lose subscribers to AT&T's U-Verse and Verizon's FiOS, which utilizes a fiber optic service. The U.S. cable market is also becoming saturated, with limited scope for expanding subscriber base. As a result, competition is intensifying, as operators look to both retain their own subscriber base and poach from rivals.").

18/ *NPRM*, Appendix A.

19/ *Id*.

to compete with cable operators in markets they have entered.[20/] As one observer described the current state of the market, "Video offerings from telcos Verizon and AT&T have made significant inroads into the video market, and despite signs of slowing growth . . . , the concomitant decline in subscribers on the historical 'cable guys' financial reports paints a picture of a changing video landscape in the U.S. The most recent data on subscriber change from the major players . . . indicates the customer exodus from cable in favor of other video offerings is continuing unabated."[21/]

Cable's MVPD competitors are not small, besieged newcomers, needing government assistance to gain a competitive toehold. DIRECTV is the nation's second largest MVPD; DISH Network is the third largest.[22/] AT&T, now operating the eighth largest MVPD in the country,[23/] is America's largest telecommunications company and the country's eleventh largest

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20/ *See, e.g.*, Jermaine S, *Top Spot in Communications: FIOS vs. Cable, FIOS vs. Dish*, Bright Hub (May 20, 2011), *available a*t http://www.brighthub.com/computing/hardware/articles/41649.aspx ("Verizon FIOS is the new player on the block, and it's making great inroads into a market dominated by Cable and Dish. These days it's all about competition when it comes to video and Internet services. And lately, there's been a heated battle going on in contested marketplaces around the country."); Rob Owen, *FiOS TV vs. Comcast: The Battle Heats Up*, Pittsburgh Post-Gazette.com (March 17, 2012), *available at* http://www.post-gazette.com/stories/ae/tv/fios-tv-vs-comcast-the-battle-heats-up-515070/ ("The battle for your money is heating up on the cable front now that Verizon's FiOS TV has come to town to battle Comcast. The region's dominant cable company faced incursions from satellite competitors DirecTV and DISH Network in the past, but FiOS TV is more similar to Comcast (no dish to buy) and therefore more of a threat.").

21/ Jesse Cryderman, *The Battle for Video*, 8 PIPELINE, Issue 6 (2011), *available at* http://pipelinepub.com/1111/OSS_BSS/Competition-for-Video-Services-1.php.

22/ National Cable & Telecommunications Association, Top 25 Multichannel Video Programming Distributors as of Dec. 2011, *at* http://www.ncta.com/Stats/TopMSOs.aspx. *See also* Steven Waldman, FCC, *The Information Needs of Communities—The Changing Media Landscape in a Broadband Age*, at 113 (2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307406A1.pdf ("DBS has grown to become a significant provider of video services and a vibrant competitor to cable.").

23/ National Cable & Telecommunications Association, Top 25 Multichannel Video Programming Distributors as of Dec. 2011, *at* http://www.ncta.com/Stats/TopMSOs.aspx.

corporation.[24/] Verizon, now the nation's seventh largest MVPD,[25/] is also the second largest telecommunications company and the fifteenth largest corporation.[26/]

Each of these companies has demonstrated the financial capability to invest billions of dollars in building satellite or fiber optic networks to be able to compete effectively in the multichannel video services marketplace. Each also clearly has the ability and the resources to select from among hundreds of video programming networks to distribute to their subscribers. Plainly any of these companies has sufficient resources to invest in its own programming, should it desire to do so, or to invest in obtaining exclusive access to desirable programming, as DIRECTV has done with its NFL Sunday Ticket.[27/] None of these companies will be driven from the video marketplace by exclusive contract arrangements between the handful of cable-affiliated programmers and cable operators that may (or may not) emerge should the exclusivity ban sunset in October 2012.[28/] To the contrary, the most likely effect of any cable exclusivities that may arise after the *per se* ban sunsets will be to encourage competing MVPDs to invest more resources into developing their own competing programming, some of which they in turn may choose to contract exclusively. For example, in 2008 DIRECTV initiated an exclusive

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[24/] 2012 Fortune 500 Rankings *at* http://money.cnn.com/magazines/fortune/fortune500/2012/industries/157/.

[25/] National Cable & Telecommunications Association, Top 25 Multichannel Video Programming Distributors as of Dec. 2011, *at* http://www.ncta.com/Stats/TopMSOs.aspx.

[26/] 2012 Fortune 500 Rankings *at* http://money.cnn.com/magazines/fortune/fortune500/2012/industries/157/.

[27/] *See, e.g.*, Ryan, Lawler, *DirecTV Subscriptions Boosted by NFL Sunday Ticket Deal*, GIGAOM.COM (Nov. 3, 2011), *at* http://gigaom.com/video/directv-3q-2011/ (reporting that "[t]hanks to incredible demand for its exclusive NFL Sunday Ticket package, the satellite provider added 327,000 subscribers in the quarter, even as cable and IPTV competitors struggled to retain existing customers and attract new ones.").

[28/] As the Commission notes, even after sunset, an MVPD may be able to bring a complaint about an exclusive contract under Section 628(b), but would bear the burden of demonstrating that the exclusive contract constituted an unfair act that had the purpose or effect of significantly hindering or preventing the MVPD from providing satellite cable programming or satellite broadcast programming. *NPRM* ¶ 50.

arrangement for initial showings of the critically acclaimed series *Friday Night Lights*.[29/] DIRECTV subsequently launched an entire network of exclusive programming, its "AUDIENCE Network," that it advertises as "the *exclusive* home for the smartest, most daring entertainment on television," allowing audiences "to catch shows [they] can't see anywhere else, uncut, commercial-free and in HD—*only on DIRECTV*."[30/] The rule's sunset will spur more competition like this, not less.[31/]

Second, an especially new and powerful competitive development affecting all MVPDs in every market is the rapid and increasingly substantial challenge posed by streaming video over the Internet. Netflix, one of the most popular streaming video sources, had 23.4 million subscribers as of April 2012,[32/] with viewership that constituted 30 percent of all Internet traffic during peak hours.[33/] According to a recent study, "[a]t least 21% of U.S. households (approximately 27 million) have either an Internet-ready TV, game console, standalone Blu-ray player or smart set-top box connected to their home network."[34/] And the streaming video that comes over those devices represents very real competition for cable and other MVPDs. Roku, the maker of one of the most popular set-top boxes for streaming video, reports that 20 percent of those that purchase one of its boxes cut back their cable service, while another 20 percent cancel

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29/ *See* Joann Ostrow, *"Friday Night Lights" lives*, DENVER POST, Apr. 2, 2008, *available at* http://www.denverpost.com/entertainment/ci_8784137.

30/ *See* AUDIENCE Network, Available only on DIRECTV, *at* http://www.directv.com/DTVAPP/content/premiums/audience (last visited May 29, 2012) (emphasis added) (listing 12 drama and comedy series and numerous musical concerts available exclusively on the DIRECTV AUDIENCE Network).

31/ *See* Part II, *infra*.

32/ *See* note 8, *supra*.

33/ Erick Schonfeld, *Netflix Now the Largest Single Source of Internet Traffic in North America*, TECHCRUNCH, May 17, 2011, *at* http://techcrunch.com/2011/05/17/netflix-largest-internet-traffic/.

34/ *Study: 21% Have a TV Connected to Web*, NETNEWSCHECK.COM, Apr. 30, 2012, *at* http://www.netnewscheck.com/article/2012/04/30/18442/study-21-have-a-tv-connected-to-web (discussing a study by ABI Research).

their cable service altogether.[35/] According to one report, in the three years between 2008 and 2011, "more than 2.65 million subscribers – mostly cable subscribers – dropped their pay-TV service entirely in favor of streaming video options."[36/] Netflix has begun developing its own exclusive series offerings to compete with cable and other MVPDs.[37/]

Notably, this vigorous new form of video competition has emerged and gained traction with consumers without any government-guaranteed access to programming or restrictions on licensing imposed upon content providers. The rise of online video as a viable alternative to MVPD offerings highlights the vibrancy and maturity of video programming competition and underscores the lack of need for continued government intervention in the marketplace.

Third, another significant trend in the video marketplace is the continued decline of vertical integration, further demonstrating the lack of need for a continued ban on exclusive contracts for cable-affiliated programmers. The percent of satellite-delivered national programming networks that are cable-affiliated has declined from 53 percent in the early 1990s, when the exclusivity ban was first adopted, to less than 15 percent today (or only 11 percent

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35/ Jolie O'Dell, *How Roku is kicking the cable industry's butt & where it's going next*, VENTUREBEAT, Mar. 3, 2012, *at* http://venturebeat.com/2012/03/03/roku-intervie/.

36/ Mike Snider and Roger Yu, *Flood of Video Streaming Options Could Confound TV Watchers*, USA Today (April 10, 2012), *available at* http://www.usatoday.com/tech/news/story/2012-04-09/streaming-video-options/54136024/1. *See also*, Daniel Frankel, *Nielsen: 1.5M U.S. households cut the cord in 2011*, PAID CONTENT, May 4, 2012, *at* http://paidcontent.org/2012/05/04/nielsen-1-5-m-u-s-households-cut-the-cord-in-2011/.

37/ *See* Erik Cain, *Could the New Netflix Exclusive Series 'Lilyhammer' Give New Life to Online Television?*, FORBES, Jan. 3, 2012, *available at* http://www.forbes.com/sites/erikkain/2012/01/03/could-the-new-netflix-exclusive-series-lilyhammer-breath-new-life-into-online-television/; Anna Heim, *Netflix beefs up its exclusive content slate with horror series helmed by Eli Roth*, THE NEXT WEB: MEDIA, Mar. 21, 2012, *at* http://thenextweb.com/media/2012/03/21/netflix-beefs-up-its-exclusive-content-slate-with-horror-series-helmed-by-eli-roth/; Richard Lawler, *Netflix, Fox ready to resurrect Arrested Development as a streaming exclusive in 2013*, ENGADGETHD, Nov. 18, 2011, *at* http://www.engadget.com/2011/11/18/netflix-fox-ready-to-resurrect-arrested-development-as-a-stream; Kim Masters, *David Fincher Battles Over Budget on Netflix's 'House of Cards' (Exclusive)*, HOLLYWOOD REPORTER, Mar. 7, 2012, *at* http://www.hollywoodreporter.com/news/netflix-house-cards-david-fincher-media-rights-capitol-297444.

without the networks associated with Comcast, which will continue to have exclusivity restrictions for at least 6 years regardless of the action the Commission takes in this proceeding).[38/] Thus, while more than half the cable programming available in the marketplace was controlled by cable operators when the exclusivity ban was adopted, now only a small slice of the numerous networks available for distribution are nominally at risk of being leveraged anti-competitively. To the extent there was concern when the exclusivity ban was adopted that without such restrictions competitive MVPDs would lack access to sufficient programming to be able to compete, that concern is no longer realistic.

Moreover, as the *Notice* points out, a sunset will have no impact on the availability of Comcast-affiliated program networks, since those will continue to be subject to access provisions in the *Comcast/NBCU Order*. And most, if not all, of the handful of programming networks deemed affiliated with a cable operator that would be afforded relief from elimination of the exclusivity ban likely have contractual commitments with MVPDs for some period of time going forward, thereby further minimizing the prospect that a sunset could have any near-term effect should any such programming network elect to pursue an exclusive arrangement for an existing service. Further, many of the cable networks subject to program access are deemed affiliated notwithstanding the fact that their affiliate cable operator exercises no control over program licensing decisions,[39/] further reducing the likelihood that a sunset would have disruptive effects in the marketplace.

Not only has the number of networks unaffiliated with cable grown substantially, but the trend in the marketplace has been in the direction of dissolving vertical relationships and separating content from distribution. In recent years, Time Warner Cable separated from Time

38/ *NPRM*, Appendix B.

39/ *See* Part I.B., *infra*.

Warner, Inc., [40/] AMC Networks separated from Cablevision,[41/] MSG was spun off from Cablevision, [42/] and Liberty Media separated from DIRECTV.[43/] Vertical integration between content and distribution has recently been viewed as "a strategic combination of assets that has fallen out of favor on Wall Street as big media corporations compete with faster-moving Internet companies."[44/]

In each case of separation noted above, stockholders and directors of the integrated companies determined that the programmer would be more valuable if it could be operated as an independent company, prompting the spin-off. The marketplace trend away from vertical integration of content and distribution further militates against continuation of a programming exclusivity ban that is predicated primarily upon concerns that cable operators will wield too much control over licensing decisions of programmers.

B. Continuation of a Blanket Ban on Exclusivity for Cable-Affiliated Programming Erroneously Assumes All Programmers Deemed Affiliated with a Cable Operator Have the Incentive and Ability to Harm or Diminish MVPD Competition.

The exclusivity ban is predicated upon the assumption that "cable-affiliated programmers ha[ve] the incentive and ability to favor their affiliated cable operators over other, unaffiliated,

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40/ *See* Time Warner Inc., Press Release, Time Warner Inc. Declares Spin-Off Dividend of Time Warner Cable Inc. Shares and Announces March 27 Effective Date for One-for-Three Reverse Stock Split (Feb. 26, 2009).

41/ *See Cablevision Board Approves AMC Networks Spin-off Cablevision Declares Spin-off Distribution of AMC Networks Shares; Announces Record and Distribution Dates and Final Distribution Ratio*, BUSINESSWIRE.COM (June 6, 2011), *at* http://www.businesswire.com/news/home/20110606006776/en/Cablevision-Board-Approves-AMC-Networks-Spin-off.

42/ *See* Madison Square Garden, Press Release, Cablevision Board Approves Madison Square Garden Spin-off Cablevision Declares Spin-off Distribution of MSG Shares Announces Record and Distribution Dates and Final Distribution Ratio (Jan. 12, 2010).

43/ *See Liberty Media sets Shareholder Vote for DirecTV Spinoff*, DENVER BUSINESS JOURNAL (Oct. 22, 2009), *at* http://www.bizjournals.com/denver/stories/2009/10/19/daily70.html.

44/ *Time Warner to spin off cable arm*, REUTERS, Feb. 19, 2009, *at* http://www.reuters.com/article/2009/02/20/us-timewarner-idUSTRE51J0DG20090220.

MVPDs . . . ."[45/] The Commission has justified its prior decisions to re-impose the ban based upon concerns that "if a vertically integrated cable operator withholds programming from competitors it can recoup profits lost at the upstream level (*i.e.*, lost licensing fees and advertising revenues) by increasing the number of subscribers of its downstream MVPD division."[46/] But the definition of "cable-affiliated" includes programmers like MSG, whose affiliation with a cable operator is only nominal.[47/] As an entity that has been spun off from its former cable operator parent as a separate public company, MSG would have no interest in an exclusive arrangement whereby it would sacrifice programming revenue for the benefit of Cablevision's (or any other distributor's) video programming distribution business. MSG benefits from competition among MVPDs and would not enter into any arrangement that was contrary to MSG's business and economic best interests or its fiduciary obligations.

MSG was spun off from its former parent corporation, Cablevisions Systems Corporation on February 9, 2010 and became a separate publicly traded company, with neither entity having any equity stake in the other.[48/] Nevertheless, MSG continues to be treated as cable-affiliated

45/ *NPRM* ¶ 6.

46/ *See id.* ¶ 38. *See also 2007 Extension Order* ¶ 52; *2002 Extension Order* ¶ 36. Further, even if applicable, the importance of this concern diminishes as competing MVPDs continue to gain a higher share of the MVPD marketplace. *See 2007 Extension Order* ¶ 60. The size and market share of competing MVPDs in today's marketplace means that the costs of pursuing a foreclosure strategy through exclusivity also have risen substantially, making it even less likely that lifting the ban would result in anti-competitive uses of exclusivity.

47/ *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶ 31 (1993) ("*1993 Program Access Order*") (adopting "a relatively inclusive attribution rule").

48/ *Cablevision Value Watch: Madison Square Garden Spin-Off*, MARKETWATCH.COM (Jan. 12, 2010) (reporting that Cablevision Systems Corporation (NYSE: CVC) approved the spin off of Madison Square Garden to Cablevision and that the share distribution would take place on February 9, 2010), *at* http://www.marketwatch.com/story/cablevision-value-watch-madison-square-garden-spin-off-cvc-msgnv-msg-gbl-2010-01-12; Peter Edmonston, *Cablevision Approves Madison Square Garden Spinoff*, N.Y. TIMES (July 30, 2009) (reporting that Cablevision's board "approved a plan to spin off a basket of assets including Madison Square Garden and Radio City Music Hall in New York as a separate company.").

under the Commission's rules. As distinct public companies, MSG and Cablevision are each bound to act in the best interest of its own shareholders. MSG and Cablevision have separate pools of shareholders and lenders, requiring completely separate financial statements, and separate audits. MSG has an independent obligation to operate its business so as to maximize profits that will in turn maximize value for its shareholders. MSG's fiduciary and other responsibilities require that it not sacrifice its own profits for the benefit of another corporation like Cablevision or any other cable operator.[49/]

Furthermore, in conjunction with Cablevision's spin-off of MSG, corporate controls were put into place requiring Cablevision and MSG to follow special, independent director approval policies for transactions with each other. But notwithstanding the separation between the two companies, application of the Commission's outdated ownership attribution rules in the exclusive contract prohibition context continue to treat MSG as if its licensing and business decisions are controlled by Cablevision, despite the reality that that is not the case as either a legal or factual matter.

The crude instrument of a blanket ban on exclusivity arrangements sweeps in even programmers that are deemed "cable-affiliated" notwithstanding the cable operator's inability to exert control over the programmer's licensing decisions. This circumstance needlessly and counterproductively deprives the public of the benefits of exclusive arrangements driven by market forces. The overbreadth of the *per se* ban is highlighted by the fact that it automatically precludes MSG from entering into an exclusive arrangement with Verizon or Charter, even

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49/ *See*, *e.g.*, *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) ("[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders"); *Unocal Corp. v. Mesa Petroleum Co*., 493 A.2d 946, 955 (Del. 1985) ("[O]ur analysis begins with the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders.").

though such a transaction would confer no benefit on Cablevision. There is clearly no sound economic or policy rationale for restricting a programmer deemed affiliated with a cable operator from entering into an exclusive arrangement with a cable operator that does not control the programmer, let alone a cable operator that it is not even deemed affililiated. To the contrary, the *per se* ban significantly disadvantages such programmers relative to their rivals that are not considered "cable-affiliated," and are thereby free to exercise their own business judgment as to whether exclusivity in a particular market or for a particular network constitutes the best means of maximizing viewership of their content and value for their shareholders. There is no reason for this disparate treatment to continue.

Allowing the exclusivity ban to sunset will enable programmers to enter into exclusivity arrangements if and when such an arrangement makes good business sense for the programmer – precisely the sort of consumer welfare-enhancing dynamic that prevails in virtually all other content markets.[50/] An MVPD may be willing to pay an attractive exclusivity premium, or a programmer like MSG may view an exclusive contract as an effective means to help launch a new programming network or expand its presence or visibility in a particular market. Those are business factors that the 85 percent of all programmers in the marketplace that are not deemed to be affiliated with a cable operator are permitted to weigh in connection with their licensing decisions. There is no reason why MSG should be deprived from doing the same, since its incentives to maximize its content licensing and advertising revenues are indistinguishable from the same incentives held by programmers not subject to the rule. The blanket exclusivity ban, however, erroneously assumes that a programmer deemed affiliated with a cable operator will sacrifice its own revenue to benefit an MVPD even where, as is the case with MSG and

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[50/] *See infra* at n. 56.

Cablevision, neither entity has any equity stake in the other and MSG has been spun off as a separate, public company.

Sunset of the blanket exclusivity ban would not leave the Commission without tools to protect competition, when and where needed. Should there be an instance where one of the very few programmers that are actually controlled by a cable operator enters into an exclusivity arrangement that may harm MVPD competition, aggrieved MVPDs and the Commission can seek to bring the Section 628(b) general prohibition on unfair acts to bear. Even stalwart supporters of the Commission's program access rules have questioned the continuing need for the prophylactic ban on exclusive contracting given the possibility of case-by-case review under Section 628(b).[51/] The overbroad Section 628(c)(2)(D) prohibition on exclusive contracting is no longer necessary for that purpose, however, and, given the sweeping market changes since its adoption, now serves more to restrain competition than to promote it.

II. ALLOWING THE EXCLUSIVITY BAN TO SUNSET WILL BENEFIT CONSUMERS BY ENCOURAGING INVESTMENT AND INNOVATION IN PROGRAMMING.

The inability of "cable-affiliated" programmers like MSG to utilize a common business tool like distribution exclusivity harms the public interest by artificially constraining investment and innovation in programming, resulting in reduced quality and diversity of programming

[51/] *See e.g.*, Letter of February 8, 2012 from John Bergmayer, Senior Staff Attorney, Public Knowledge, to Marlene Dortch, Secretary, Federal Communications Commission, at 2 ("The program access rules have been successful in promoting competition between MVPDs and prevent discriminatory practices that harm consumers. But, at the same time, the D.C. Circuit has made its skepticism fairly plain. While it upheld the FCC's last order extending the rules, it may not do so again. With this as a backdrop, the Commission may wish to consider adopting, as part of its overall reform, an adjudicatory process to resolve complaints of violations of Section 628 of the Communications Act. Such a procedure would protect against unfair acts while allowing a more nuanced exploration of the issues on a case-by-case basis, and would allow the Commission's standards to evolve to meet the needs of a changing marketplace").

available to consumers.[52/] The opportunity for programmers to engage in exclusive contracts with cable operators and other MVPDs can benefit the public in three ways: by enhancing investment, encouraging competition, and promoting program diversity.

First, the ability to engage in exclusive contracts encourages programmer investment and innovation in new programming.[53/] Development of new programming requires significant investment and entails substantial risks – both with respect to development of new programming networks and with development of new content and programs for existing networks. A programmer attempting to launch a new network has typically invested many millions of dollars in developing new content, obtaining distribution rights for content developed by others, lining up advertisers, and undertaking all of the myriad (and expensive) tasks that creating a new network entails. The same risk is inherent in development of new programming for an existing network. The programmer risks the loss of all of its substantial investment if it cannot ensure that it can achieve distribution with MVPDs that provides sufficient viewership to allow the programmer to recoup its substantial costs through a combination of per-subscriber carriage fees and advertising revenue.

An exclusive distribution arrangement can substantially reduce the uncertainty inherent in creating a new programming network or new programming by allowing the programmer to share the considerable financial risks with an MVPD that may be willing to give the network

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52/ *See, e.g., Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers,* RM 11497, Comments of AT&T, at 7-8 (filed Feb. 2, 2009) ("Exclusive arrangements are commonplace in competitive markets, and it is widely accepted in both economics and the law that they generally provide important benefits to consumers."); *1993 Program Access Order* ¶ 63 ("As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized.").

53/ The Commission has recognized that programmer exclusivity can promote investment in programming. *See New England Cable News*, Memorandum Opinion and Order, 9 FCC Rcd 3231, ¶ 34 (1994) (exclusivity may "attract investment, carriage and support of [a programming] service").

assistance in the form of, for example, favorable tiering placement or higher per-subscriber carriage fees in exchange for exclusivity. An exclusivity arrangement can create a guaranteed revenue stream for the programmer and further reduce the risk of failure of the new or improved programming network by enhancing the incentive of the contracting MVPD to market and publicize the network.[54/]

Thus, exclusivity can be particularly helpful in facilitating the launch of new services and in expanding the distribution footprint of an existing service. By blocking this avenue of support for programmers, the statutory prohibition on exclusive contracts by cable-affiliated, satellite-delivered programmers acts as a real deterrent to investment and innovation that would benefit consumers.[55/]

Second, exclusivity enhances competition in video service markets through increased investment in programming by MVPDs that, facing competition from a rival that has exclusive programming, seek to differentiate their own services to consumers with new or improved program offerings – perhaps through their own exclusive arrangements with programmers. As the Commission itself has acknowledged, exclusivity in content-related markets typically spurs investment, as rival distributors are incented to invest capital into content that can help differentiate their offerings.[56/] The end result of this increased investment is intensified

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54/ An MVPD investment in exclusive programming for use as a product differentiator against competing MVPDs only makes sense if the MVPD touts the attractiveness of the exclusive programming to its current and potential customers.

55/ Of course, the blanket ban on exclusivity contained in 47 U.S.C. § 548(c)(2)(D) does not prohibit exclusive contracts between cable-affiliated, satellite-delivered programmers and non-cable MVPDs, such as DBS operators. But because the statutory ban prevents exclusive contracts with all cable operators, not solely those with which the programmer is at least nominally affiliated, *NPRM* at n.2, cable-affiliated programmers are denied the opportunity to obtain the benefits of exclusivity with respect to a significant segment of the video market.

56/ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, ¶ 63 (2007) ("*2007 Program* competition in video services markets, encouraging not only development of new programming but also improvements in service quality and competition in pricing – all of which benefits consumers.[57/]

Economists recognize that exclusive contracts are generally procompetitive[58/] and have the potential to reduce consumer welfare only in situations where (1) one of the parties to the exclusive agreement has sufficient market power to dominate access to consumers; and (2) the product that is subject to the exclusive arrangement is needed by the dominant firm's rivals to effectively compete and restrain the dominant firm's prices.[59/] Neither of these conditions is present in today's competitive video services markets. To the extent that cable operators ever held dominant market positions in video services, that is no longer the case.[60/] And the product subject to the exclusive arrangement – a cable-affiliated, satellite delivered programming

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Access Order") ("We recognize the benefits of exclusive contracts . . . , such as encouraging innovation and investment in programming and allowing for 'product differentiation' among distributors.").

57/ *Cf*. Robert Hahn and Hal J. Singer, *Why the iPhone Won't Last Forever and What the Government Should Do to Promote its Successor*, JOURNAL ON TELECOMMUNICATIONS AND HIGH TECHNOLOGY LAW, Vol. 8, No. 2 (2010), pp. 313-350 ("In sum, exclusive contracts between handset makers and wireless carriers benefit consumers by encouraging innovation by both handset makers and wireless service providers that are vying for market share, and by enabling some handset makers to remain viable. These benefits take the form of greater variety of choices in handsets, greatly enhanced capabilities, and a more affordable range of device options. Banning exclusive contracts could have the unintended consequence of reducing innovation, reducing options, raising prices, and potentially establishing market dominance for an incumbent handset maker.").

58/ *See, e.g.*, Scott Wallsten, The Effects of the FCC's Program Access Exclusivity Ban, at 4-5, (attached as Appendix B to *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*, MB Docket No. 07-29, Comments of Cablevision System Corporation (Apr. 2, 2007)) ("Exclusive contracts are a common feature of a well-functioning market economy. Indeed, competition frequently relies on firms' abilities to offer different products to consumers. . . . Exclusive deals can be beneficial and efficient.").

59/ Hahn and Singer, *supra* note 55, at 313.

60/ *See* Part I, *supra*.

network – may in some cases be desired by competitors, but it is not *needed* for them to compete.[61/]

The Commission has explained that when Congress enacted the program access restrictions at issue here, it "recognized that exclusivity can be a legitimate business practice where there is competition."[62/] There can be little question that competition has fully arrived in video services markets, and allowing restrictions on the legitimate business practice of entering into exclusive contracts to sunset will only further that competition.

Third, consumers benefit from increased program diversity that exclusivity encourages.[63/] With the exclusivity restrictions in place, it is more profitable for MVPDs to rely on programming developed by others and proven in the marketplace rather than to make investments of their own. By contrast, exclusivity fuels a virtuous cycle of output production, as both content creators and distributors respond to the exclusivity strategies of their rivals by producing and distributing distinct content offerings that enable them to maintain a unique presence in the marketplace. The product diversity spurred by exclusivity is aptly illustrated by the proliferation of new offerings in the mobile device market. When AT&T had an exclusive arrangement with Apple for the iPhone, its rivals responded by putting significant resources into the development of Android and other cell phones. It is unlikely that the Android platform would have been developed as quickly or become as widely used as it is now if Verizon and

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61/ *See* Part I, *supra*. As explained below, even regional sports network (RSN) programming that the Commission has previously labeled "must have" is not truly necessary for rival MVPDs to compete in today's video market. *See* Part III, *infra*.

62/ *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 and Order, 17 FCC Rcd. 12124, ¶ 8 (2002).

63/ *See New England Cable News*, Memorandum Opinion and Order, 9 FCC Rcd 3231, ¶ 40 (1994) ("[E]xclusivity may promote diversity in the programming market when used to provide incentives for cable operators to promote and carry a new and untested programming service.").

others did not have the market incentive to respond to AT&T's exclusive contract for the iPhone.[64/]

Exclusivity also promotes diversity by enhancing the attractiveness of niche programming for distributors. A content provider with a potential audience base that is limited in size but intensely loyal may be able to use exclusivity as a carrot to encourage a distributor to reach as many members of that limited audience as possible to subscribe. For example, DISH Network advertises that it "offers more international programming than any other satellite or cable TV provider," with "over 200 International channels in 28 languages," much of it exclusive programming.[65/] Thus, exclusivity promotes consumer welfare by encouraging expansion in the supply of programming, helping to bring forth additional programming choices that otherwise would be unavailable to consumers.

III. REGIONAL SPORTS NETWORKS SHOULD NOT BE SUBJECT TO SPECIAL RESTRICTIONS ON EXCLUSIVITY.

A prophylactic ban on RSN exclusivity is not necessary to ensure MVPD competition. Changes in the marketplace have overtaken the Commission's previous view that RSNs are "must have" services that must be shared with rival MVPDs for competition in video markets to survive.[66/] Multiple examples of MVPDs continuing to be competitively viable and even

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64/ *See, e.g.*, Michael Sinkinson, Pricing and Entry Incentives with Exclusive Contracts: Evidence from Smartphones, at 29 (Nov. 2011), *available at* http://faculty.chicagobooth.edu/workshops/marketing/archive/pdf/exclusive_handsets_010211.pdf (concluding that the exclusive contract between Apple and AT&T for the iPhone "significantly increased the entry incentives of rival smartphones, such as those running Google's Android operating system").

65/ DISH Network, International Programming, *at* http://www.dish.com/entertainment/packages/international/. *See also* DISH International Programming *at* http://blog.dish-usa.com/_blog/DISH_Blog/post/DISH_International_Programming/ ("DISH also offers exclusive content for Taiwanese, Vietnamese, Filipino, and Japanese customers.").

66/ *See, e.g.*, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, ¶ 52 (2010) (discussing "evidence [that] supports the conclusion that RSNs typically offer non-replicable content and are considered 'must have' programming by MVPDs").

thriving while operating without regional sports networks and other professional sports content belie any claim that shared access to RSN programming is a basic requirement of competition in video services markets.

In New York, DISH Network carries none of the four RSNs in that marketplace. It has never carried YES network (the network featuring games of the Yankees and Nets),[67/] and it ceased carriage MSG Network and MSG Plus (the networks featuring games of the Knicks, Rangers, Sabres, Islanders, Devils, and RedBulls) in 2010 and SportsNet New York (the network featuring games of the Mets) in 2011.[68/] DISH has also dropped many other RSNs, including all of the Fox RSNs and CSN California in 2010.[69/] In New Orleans, DIRECTV has never carried Cox Sports Television, which has featured games of the New Orleans Hornets and the LSU Tigers, despite the fact that the RSN has been offered to the MVPDs.[70/] Charter Communications also voluntarily went two years without Cox Sports television in New Orleans.[71/] DIRECTV also has opted not to carry the regional sports network serving the

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67/ *Dish Network Drops Fox Cable Networks*, BUSINESS WIRE, Oct. 1, 2010, *at* http://www.businesswire.com/news/home/20101001006388/en/DISH-Network-Drops-Fox-Cable-Networks ("And DISH has refused to carry the YES Network, the television home of the New York Yankees.").

68/ *See, e.g.*, Marcus Vanderberg, *SNY Goes Off The Air On Dish Network*, TVNEWSER, Apr. 1, 2011, *at* http://www.mediabistro.com/tvnewser/sny-goes-off-the-air-on-dish-network_b87370; Ryan Nakashima, Fox Sports Channels, MSG Drop off Dish in Dispute, ABC News, Oct. 1, 2010, *at* http://abenews.go.com/Entertainment/wireStory?id--11775299.

69/ Mike Reynolds, *Dish Disconnects CSN California After Losing Arbitration Decision*, MULTICHANNEL NEWS, Nov. 24, 2010, *at* http://www.multichannel.com/article/460326-Dish_Disconnects_CSN_California_After_Losing_Arbitration_Decision.php.

70/ *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, n.502 (2006) ("*Adelphia Order*"); Mike Farrell, *DirecTV Could Pare Some Networks*, MULTICHANNEL NEWS, Dec. 2, 2010, *at* http://www.multichannel.com/article/460578-DirecTV_Could_Pare_Some_Networks.php.

71/ Jimmy Smith, *Charter to offer Cox Sports Television to north-shore subscribers*, THE TIMES-PICAYUNE, Dec. 17, 2010, *at* http://www.nola.com/hornets/index.ssf/2010/12/charter_to_offer_cox_sports_te.html.

Portland, Oregon market, for several years.[72/] Cablevision went an entire year without carrying YES network, losing only 2.1% of its subscribers that year. [73/] Even if that drop was entirely attributable to the decision to forego carriage of YES network (which is highly unlikely), the impact demonstrates that MVPDs can remain fully competitive without carrying high-profile RSNs.

In fact, some MVPDs are recognizing that there may be significant demand for video programming offerings that do not include RSNs. For example, Dish Network CEO Charles Ergen recently told investors that DISH Network "almost went there last year with Fox Sports. We ultimately were able to reach an agreement. But had we not, we were certainly prepared to not have regional sports. *We don't do it in New York today as an example and we certainly have plenty of customers in New York*."[74/]

In today's marketplace, a wealth of sports programming is available from a wide variety of sources, the vast majority of which are not subject to exclusivity restrictions – with no detrimental effect on competition. Indeed, the most popular televised sport in the country, NFL

[72/] Mike Farrell, *DirecTV Could Pare Some Networks*, MULTICHANNEL NEWS, Dec. 2, 2010, *at* http://www.multichannel.com/article/460578-DirecTV_Could_Pare_Some_Networks.php.

[73/] *See General Motors Corporations and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, Appendix D, ¶ 47 (2004) ("*News Corp/DirecTV Order*"); *Adelphia Transfer Order*, Appendix D, ¶ 20.

[74/] *See Dish Network's CEO Discusses Q3 2011 Results - Earnings Call Transcript* (Nov. 7, 2011) (emphasis added), *at* http://seekingalpha.com/article/305999-dish-network-s-ceo-discusses-q3-2011-results-earnings-call-transcript?part=qanda. *See also* Yinka Adegoke, *What's Charlie Ergen's Strategy This Week?*, Reuters, Nov. 7, 2011, at http://blogs.reuters.com/mediafile/2011/11/07/whats-charlie-ergens-strategy-this-week/ (quoting DISH Network CEO Ergen: "[Y]ou really got four providers in every market now, the phone company, cable company and two satellite companies and everybody sells the same thing . . . I would say there could be a day when one of the big providers just doesn't have a sports offering so that they can differentiate their programming in a major way . . . ."); *Dish Network's CEO Discusses Q1 2011 Results - Earnings Call Transcript*, Seeking Alpha, May 2, 2011, *at* http://seekingalpha.com/article/267123-dish-network-s-ceo-discusses-q1-2011-results-earnings-call-transcript?part=qanda.("[T]here is a strategy potentially out there for one video provider not to carry regional sports. And I think there might be some short short-term pain, but they [would] probably do pretty well long term, if that was the case.").

football, is not shown on any RSN, and hundreds of out-of-market NFL games are available only on an exclusive basis from one of cable's most fierce competitors, DIRECTV. [75/] Team-affiliated RSNs unaffiliated with any cable MSO are present in many major markets, including Boston (NESN), New York (YES), Washington, D.C./Baltimore (MASN), and Denver (Altitude). League-owned networks such as the NFL Network, NBA TV, the NHL Network and the MLB Network – as well as college conference channels such as the Big Ten Network and the Pac-12 Network – all feature live games and signal heightened interest by the professional and college sports leagues in exercising greater control over the distribution of their content.[76/]

National networks such as Fox, NBC, ESPN, ESPN2, TNT, TBS, NBC Sports Network and others collectively show thousands of live professional and college sports events on television each year. Moreover, in the past several years, the amount of professional sports on line has grown exponentially, with Major League Baseball, the National Basketball Association, the National Hockey League, and Major League Soccer each making games available over the Internet.[77/]

75/ *See* Meg Marco, *NFL Sunday Ticket Will Remain DirecTV Exclusive Until 2014* (Mar. 26, 2009), http://consumerist.com/2009/03/nfl-sunday-ticket-will-remain-directv-exclusive-until-2014.html. *See also* DIRECTV's CEO Discusses Q1 2012 Results - Earnings Call Transcript, SEEKING ALPHA, *at* http://seekingalpha.com/article/571551-directv-s-ceo-discusses-q1-2012-results-earnings-call-transcript?part=qanda (interview with DIRECTV CEO Michael D. White discussing DIRECTV's strategy in using the exclusive NFL Sunday Ticket programming to drive increases in subscribership).

76/ *See* John Ourland, *What's ahead for league-owned networks?*, SPORTS BUSINESS JOURNAL, Nov. 9, 2009, *at* http://www.sportsbusinessdaily.com/Journal/Issues/2009/11/20091109/SBJ-In-Depth/Whats-Ahead-For-League-Owned-Networks.aspx (describing league-owned sports networks); Michael Hiestand, *Texas' Longhorn Network sparks debate in college athletics*, USA TODAY, Aug. 12, 2011, *available at* http://www.usatoday.com/sports/college/football/big12/2011-08-11-texas-longhorn-network-debate_n.htm (discussing the proliferation of college-oriented sports networks).

77/ *See* MLB.TV *at* http://mlb.mlb.com/index.jsp (providing information on subscription to view Major League Baseball games over the Internet); NBA League Pass *at* http://www.nba.com/home/leaguepass/index.html (providing information on subscription to view National Basketball Association games over the Internet); NHL Game Center Live, *at* https://gamecenter.nhl.com/nhlgc/secure/gclsignup?intcmpid=nhl.com:gcl:vdsbnv&nav-video-gcl (providing information on subscription to view National Hockey League games over the Internet); Match

The proliferation of new sources of, and platforms for, live professional sports content, coupled with the diversity of the sports programming market across different geographic communities, highlights the wisdom of making fact-dependent, case-by-case assessments regarding the competitive impact of any potential RSN exclusivity. Whether an exclusive contract for an RSN has the potential to harm competition in a given video market is dependent upon a wide variety of factors, including the size of the market, the number of professional sports teams, the number of RSNs in the market, the volume and type of sports programming carried by the RSN in question, the performance of the teams carried by the RSN, the ratings of the individual team games on the RSN, and the strength and durability of MVPD competition in the market at issue. A one-size-fits-all blanket ban on RSN exclusivity, however, effectively preempts any assessment of these factors in determining the competitive impact of any particular exclusive agreement. As a result, any ban on RSN exclusivity hinders licensing arrangements that may have no adverse competitive effects and could enhance consumer welfare.

A blanket prohibition on RSN exclusivity also fails to take account of the impact of exclusivity in markets where there are multiple RSNs. It is not reasonable to presume that the impact of RSN exclusivity in a market with one RSN showing all professional sports teams in that market would be similar to the impact of exclusivity in a market with multiple networks, each featuring only certain local teams. Yet the Commission's current rules do just that. In the New York market, for example, RSNs available to MVPDs include the YES network (New York Yankees Baseball and New Jersey Nets basketball), SportsNet New York (New York Mets baseball), MSG and MSG+ (New York Knicks basketball and New York Rangers, Buffalo Sabres, New Jersey Devils, and New York Islanders hockey). In addition, NFL football

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Day Live, *at* https://mdl.mlssoccer.com/mlsmdl/secure/registerform (providing information on subscription to view Major League Soccer games over the Internet).

programming featuring the New York Giants and New York Jets is available to viewers on non-RSN outlets. Even without access to one or two of the RSNs in the New York market, an MVPD there can still compete, even for viewership of avid sports fans. Indeed, as noted above, DISH Network competes for subscribers in the New York market – and has, by its own account, "plenty of customers" there -- and does not carry any of the four RSNs in the market.[78/]

An across-the-board ban on RSN exclusivity also precludes programmers from responding to increased competition or changes in the marketplace. For example, an unaffiliated RSN that loses carriage of a particular team or experiences a reduction in the number of professional or Division 1 college football or basketball games could respond to this circumstance by offering exclusivity to preserve its attractiveness to distributors. Conversely, the flexibility to engage in exclusive arrangements may enhance that unaffiliated RSN's ability to bid for and obtain the rights to certain events. RSNs deemed to be affiliated with cable operators, however, are denied recourse to these tools and strategies. A more rational regulatory framework would take better account of sports programming market variations, by allowing fact-intensive, case-by-case review of whether any particular RSN exclusivity is an unfair practice under Section 628(b) rather than preemptively condemning all such arrangements under Section 628(c)(2)(B).

Finally, any rule that would maintain a blanket prohibition on exclusivity for RSNs while allowing exclusives for other cable-affiliated programming to be examined on a case-by-case basis would implicate significant First Amendment issues[79/] and would be unlikely to survive

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78/ *See supra* text accompanying note 76.

79/ *Cf. Notice* at ¶ 72. The content of a programmer's speech is the programming it offers. *Cf., e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994) (explaining that the burden of the must-carry provisions under review is "unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers").

judicial review. When reviewing a content-based government restriction on protected speech, such as programming transmitted by a cable-affiliated, satellite-delivered programmer,[80/] courts apply strict scrutiny.[81/] A *per se* prohibition on exclusive contracts for RSNs would be a restriction based on the content of the speech, as RSNs are a category of programming specifically defined on the basis of the content they deliver.[82/] To pass a strict scrutiny review, the government must be able to demonstrate that the speech restriction is narrowly tailored to serve a compelling government interest, a difficult hurdle to surmount in today's vigorously competitive video marketplace.[83/]

A blanket ban on RSN exclusivity that applies to all RSNs and all markets cannot be considered a narrowly tailored restriction. The Commission's own research has demonstrated that the idea that exclusive RSN arrangements undermine MVPD competition does not hold true for all RSNs in all markets. In the Commission's *Adelphia Order*, a statistical review of RSN exclusivity found that in one of the three markets studied RSN exclusivity had no significant effect on MVPD competition.[84/] That the Commission articulated in that case what it considered unique characteristics of the particular RSN and the particular market to explain the lack of

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80/ It is well established that "[c]able programmers . . . engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System, Inc.*, 512 U.S. at 636.

81/ *Turner Broadcasting System, Inc.*, 512 U.S. at 624 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

82/ *See NPRM* at n.99 (defining an RSN solely on the basis of the type and amount of sports programming it distributes). The fact that an RSN exclusivity prohibition would force programmers to contract – *i.e*. speak with their programming – rather than restrict their ability to contract is not relevant to the analysis. As part of its protection of the freedom of speech, the First Amendment also protects the right *not* to speak. See *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 524, 559 (1985).

83/ *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002).

84/ *Adelphia Order* ¶ 149.

effect on competition[85/] does not negate the implicit concession that a blanket ban on RSN exclusivity is not warranted because there is concrete evidence that exclusivity will not harm competition in all cases.[86/]

IV. THE COMMISSION SHOULD NOT IMPOSE NEW RULES GOVERNING VOLUME PRICE DISCOUNTS.

In its initial Order adopting the program access rules, the Commission provided guidance on the circumstances under which differences between MVPD program license agreement price, terms and conditions would not run afoul of the anti-discrimination rules.[87/] In that Order, and on subsequent occasions as well, the Commission recognized that volume price discounts are a standard feature of cable network licensing agreements, just as they are a common characteristic of most content licenses and other business agreements.[88/] The Commission has consistently affirmed that its rules should not be construed to bar or unduly limit such discounts,[89/] and cable-affiliated programmers have relied upon that guidance in negotiating their license agreements

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85/ *Adelphia Order* ¶ 151 & n.503.

86/ 47 U.S.C. § 628(b). While, as explained, a blanket ban on RSN exclusivity would be subject to strict scrutiny constitutional analysis, the prohibition would also fail intermediate scrutiny analysis, which requires any restriction to be "no greater than is essential to the furtherance" of a "substantial governmental interest." *Time Warner Entertainment Co. v. FCC*, 93 F. 3d 957, 978 (D.C. Cir. 1996). Because an interest in MVPD competition can be readily and adequately furthered by restricting RSN exclusivity only through case-by-case analysis under Section 628(b), a blanket restriction cannot be considered to be "no greater than is essential."

87/ *1993 Program Access Order* ¶¶ 105-15.

88/ *1993 Program Access Order* ¶ 108. *See also, e.g., Comcast Corp., GE Co. & NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶ 56 (2011); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, ¶ 248 (2009); *Adelphia Order* at n.838; *General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 343 (2004).

89/ 47 U.S.C. § 628(c)(2)(B)(iii); 47 C.F.R. § 76.1002(b)(3). *See also 1993 Program Access Order* ¶ 108 (recognizing statutory support for allowing volume discounts and declaring that volume discounts "allow[ ] for reasonable and legitimate price variances within the cable industry as well as between technologies.").

with MVPDs. The Commission itself has stated that "public policy requires that we avoid unnecessary regulatory interference regarding contracts entered into by consenting parties."[90/] There is no need for, or benefit to, upsetting the manner in which volume price discounts are treated under the Commission's rules.

First, there is no evidence that volume discounts represent a detriment to MVPD competition. As the Commission acknowledges, in the twenty years that the rule has been in effect there has never been even a single complaint filed with the Commission alleging unfair application of volume discounts by a cable-affiliated programmer.[91/] The mere existence of rate differentials between larger and smaller MVPDs is, as the Commission itself has recognized, a reflection of a normal market dynamic and not a competitive concern.[92/] In addition, there are no empirical studies demonstrating or suggesting that there are unreasonable volume price discounts or that volume price discounts harm MVPD competition. Nor is there any suggestion that any volume price discounts that may be offered by cable-affiliated programmers vary in any manner or impact MVPD competition differently than any such discounts offered by the 85% of unaffiliated programmers that are not subject to the program access rules and are entirely free to charge what the market will bear. While there is no evidence that volume price discounts adversely affect MVPD competition, disparate imposition of such restrictions on cable-affiliated

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90/ *EchoStar v. Fox/Liberty*, ¶ 20.

91/ *NPRM* ¶ 100.

92/ *See e.g. DirecTV Sports Net Pittsburgh, LLC v. Armstrong Utilities, Inc.*, Order on Review, 26 FCC Rcd 12574, ¶ 37 (2011) ("[T]here is no dispute that Comcast will receive a discount relative to Armstrong based on the rates in the Armstrong final offer. Thus, the Armstrong final offer is consistent with the fundamental principle of marketplace negotiations for RSN programming that larger MVPDs will receive better rates"); *id.* at ¶ 40 (noting "the fundamental principle of marketplace negotiations for RSN programming that an MVPD that has a larger number of subscribers and generates more revenue for an RSN will obtain better rates, terms, and conditions for carriage of the RSN than an MVPD that has fewer subscribers and generates less revenue").

programmers would clearly distort and harm competition in the programming marketplace by granting unaffiliated programmers artificial advantages in license negotiations.[93/]

Second, programmers have every incentive to maximize the revenue they receive from any distributor, large or small, regardless of whether they are deemed affiliated with a cable operator. If a programmer is offering an MVPD a volume discount, the most likely reason is that the programmer has determined that doing so is warranted by virtue of the benefit it obtains from the volume of subscribers delivered by the MVPD. The Commission has long recognized that size-based differentials reflect the efficiency and added benefits that accrue to a programmer from an ability to reach a large portion of its potential audience through a single distribution agreement.[94/] In the unlikely event there is an affiliated programmer that is engaged in volume discounting that is inconsistent with industry practice and with the intent to harm MVPD competition, the Commission already has tools available to it to address such a circumstance on a case-by-case basis. No new rules on volume discounts are required.

Third, changing the Commission's longstanding guidance on volume discounts would unnecessarily disrupt the market for satellite cable programming. Volume discounts in contracts between satellite cable programming vendors and MVPDs are as old as the market and certainly predate the 1992 Cable Act. The recognition in the Cable Act and the Commission's implementing rules that volume discounts based on cost savings and other "direct and legitimate economic benefits" are permissible is deeply ingrained in current markets. It is likely that nearly every satellite cable programming vendor currently has at least one contract with at least one MVPD that includes a volume discount.

93/ *See* text accompanying note 104, *infra*.

94/ *See 1993 Program Access Order* ¶ 108.

A change in the Commission's rules that would make volume discounts more difficult or more burdensome to justify in a complaint proceeding, even possibly establishing a rebuttable presumption against them,[95/] would establish a new climate that implicitly disfavors volume discounts – despite the fact that the record demonstrates no history of discriminatory use of such discounts. New restrictions on volume discounts for cable-affiliated programmers likely would lead to rate increases for MVPDs and consumers as cable-affiliated programmers move away from granting such discounts in new agreements and renewal agreements due to concerns that by offering a volume discount to one MVPD the programmer will be effectively forced by the more restrictive regulatory environment to offer essentially equivalent discounts to all other MVPDs, even where they are not warranted on a cost or benefit basis. Such a circumstance also could fuel more programming disruptions due to rate disputes with MVPDs concerned over the elimination or reduction of volume price discounts they previously enjoyed.

Fourth, because any new restrictions on volume discounts will apply to only cable-affiliated programmers, such restrictions will necessarily distort the market for satellite-delivered cable programming by artificially favoring programmers that are not cable-affiliated and are therefore free from application of any new volume discount restrictions. This market distortion will be harmful both to fair competition and consumer welfare, as programming distribution arrangements and revenue levels reflect artificial regulatory advantages, rather than market forces and consumer preferences. There is no need or justification for introducing such distortions into the marketplace, since there is no real evidence that volume price discounts engender competitive problems.

95/ *Cf. NPRM* ¶ 100.

Lastly, even if the Commission were inclined to modify its volume discount rules, it has not provided sufficient notice of the proposed modification under the requirements of the Administrative Procedure Act.[96/] The NPRM does not propose any new rules regarding volume price discounts on which parties may comment, but simply asks whether current rules "adequately address potentially discriminatory volume discounts and, if not, how these rules should be revised to address these concerns."[97/] If the Commission wishes to change the rules, it is required to give "fair notice" of any rule it may ultimately adopt and "also must describe the range of alternatives being considered with reasonable specificity."[98/] Here, the Commission has done no more than interested parties themselves to identify issues and propose rule changes.[99/] To the extent the Commission wishes to adopt any new rules regarding volume price discounts, it must do so in a separate proceeding.

V. THE COMMISSION SHOULD NOT IMPOSE NEW RULES RESTRICTING SO-CALLED UNIFORM PRICE INCREASES.

The Commission lacks authority to impose new rules restricting so-called uniform price increases, and even if it had such authority there is no evidence of competitive harm arising from such increases to warrant such rules. The Commission would face considerable challenges in identifying and distinguishing unfair uniform price increases from across-the-board, market-based rate adjustments reflecting the cost and appeal of a program network. Like the rest of the program access regime, moreover, such a rule would disadvantage cable-affiliated programmers

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96/ *See* 5 U.S.C. § 553; *National Black Media Coalition v. FCC*, 791 F. 2d 1016, 1022 (2d Cir. 1986).

97/ *NPRM* ¶ 98.

98/ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 452 (3d Cir. 2011) (internal quotation marks omitted).

99/ *See National Black Media Coalition*, 791 F. 2d at 1023 ("[T]he comments of other interested parties do not satisfy an agency's obligation to provide notice.").

by imposing asymmetrical restrictions on their ability to seek higher fees from MVPDs, notwithstanding the fact that they have no more incentive or ability to impose uniform price increases than any other programmer.

The Commission has no statutory authority to regulate uniform price increases. Any general rules aimed at restricting the ability of programmers to implement price increases – even uniform price increases – would effectively constitute regulation by the Commission of wholesale programming rates. Congress did not intend to authorize the Commission to regulate wholesale cable rates when it adopted the 1992 Cable Act.[100/]

Even if the Commission possessed authority to adopt rules regulating uniform price increases, however, there would be no need to do so. There is no evidence that cable-affiliated programmers as a group have the ability to impose uniform price increases on the MVPDs they negotiate distribution contracts with. The Commission suggests that it might in theory be profitable for a cable operator to raise rivals' costs by increasing the price for an affiliated network for all MVPDs, thereby raising rivals' costs while treating the increase as an internal accounting transfer.[101/] This assumption is wholly inapposite to MSG, which has been spun off as a separate, public company from Cablevision, with neither entity retaining any equity stake in the other and each entity bound to act in the best interest of its own shareholders. This theory of harm also unjustifiably assumes that cable-affiliated programmers have sufficient market power to impose price increases that might not otherwise be warranted. It likewise erroneously presupposes that the affiliated cable operator is sufficiently insulated from competition such that

[100/] S. Rep. No. 102-92 (1991) at 73 ("In the analysis of this section [i.e., Section 5 – Regulation of Rates], when the Committee discusses the regulation of rates, it is referring to the retail rates charged subscribers. It does not refer to the wholesale rates paid to programmers by cable operators.").

[101/] *NPRM* ¶ 101.

it can seamlessly pass through price increases that are otherwise not justified by market conditions.[102/]

To the extent that there have been merger or transfer proceedings involving some of the largest vertically-integrated MVPDs in the country where this concern has arisen,[103/] that hardly constitutes support for adoption of a blanket rule restricting uniform price increases on all cable-affiliated programmers – irrespective of size, revenues, subscriber reach, audience viewership, or competition from other providers. There are probably very few, if any, cable-affiliated programmers that would have the market power to implement a uniform price increase, even if the programmer and an affiliated cable operator considered it profitable to do so.

Indeed, in MSG's experience, MVPDs strongly resist rate increases, even when they are justified by market conditions and changes in programming costs. The fact that a programmer is able to negotiate a rate increase from one distributor in no way ensures obtaining a similar increase from all – or even any – other MVPDs, much less uniformly dictating that increase to every one of them. And even in a case where a uniform price increase may occur, there is likely no measurable or reliable means to distinguish an across-the-board rate increase based on market conditions or costs from an anticompetitive uniform price increase.[104/]

Any rules the Commission might adopt restricting uniform price increases would also necessarily distort the competitive marketplace and be impermissibly discriminatory. Because of the limits of the Commission's statutory authority, any such rules would necessarily apply only to cable-affiliated programmers, thereby putting cable-affiliated programmers at a competitive

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[102/] *NPRM* ¶ 101 and n.348; *Adelphia Order* ¶ 119.

[103/] *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶¶ 81-87 (2004); *Adelphia Order* ¶¶ 130-65.

[104/] *NPRM* ¶ 102 (asking how to "distinguish an anticompetitive uniform price increase intended to raise rivals' costs from a price increase dictated by the market").

disadvantage against unaffiliated programmers not bound by the rules. Unaffiliated programmers would enjoy significant advantages in bidding for new programming, since they would not be subject to regulatory restrictions on their ability to recoup any added costs associated with that new content. There is no justification for such a severe distortion of competition among programmers.[105/]

Lastly, for the reasons discussed in Part IV, no such rules could be adopted in response to the NPRM due to the lack of adequate notice regarding their content and substance.

CONCLUSION

For the reasons described above, the Commission should allow the exclusive contracting prohibition in Section 628(c)(2)(B) to sunset in October 2012, without adopting any new *per se* exclusivity prohibitions related to RSNs or other programming. The Commission should also refrain from adopting any new rules restricting volume discounts or uniform price increases.

Respectfully submitted,

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105/ *See* text accompanying notes 95-98, *supra*.