

**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 CABLEVISION SYSTEMS CORPORATION**

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**COMMENTS OF CABLEVISION SYSTEMS CORPORATION**

Cablevision Systems Corporation (“Cablevision”) hereby submits these comments in response to the Commission’s Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

The time for the ban on exclusivity has come and gone. Permanent and durable competition from powerful companies such as AT&T, Verizon, DirecTV, and Dish Network, coupled with the explosive growth and popularity of online video platforms, has made choice and diversity in the distribution of video programming a reality for all Americans. Congress always intended for the exclusivity ban to be temporary. Cable’s competitors are now

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<sup>1/</sup> *Revision of the Commission’s Program Access Rules*, Notice of Proposed Rulemaking, FCC 12-30 (Mar. 20, 2012) (“*NPRM*”).

sufficiently well-established that further government intervention on their behalf is no longer warranted.

Allowing the ban to sunset will not deprive the Commission of regulatory tools to address any potential anti-competitive uses of exclusive arrangements involving cable-affiliated programming, since Section 628(b) provides it with ample authority to intervene where necessary. A sunset will, however, benefit consumers in several respects, including by eliminating the unjustified overbreadth of the current *per se* ban on cable exclusivity. Elsewhere, the Commission itself has acknowledged that the ability of cable operators to offer local news and other local programming on an exclusive basis *benefits* the public by promoting cable's investment in such programming. Cablevision's award-winning News12 channels and its MSG Varsity high school sports services stand as proof of this point. Sunsetting the ban will give cable operators the same incentive to invest in other forms of programming. At a minimum, there should be no further extension of the ban in markets that the Commission has found to be effectively competitive under the test specified in the Cable Act.

**I. THE EXCLUSIVITY BAN IS NO LONGER NECESSARY TO PRESERVE AND PROTECT COMPETITION IN VIDEO PROGRAMMING**

An outdated relic from a bygone era, the blanket prohibition on exclusive arrangements for cable-affiliated programming has failed to account for, or keep pace with, transformational technological change and the evolution of competition in the video marketplace. Established before direct broadcast satellite ("DBS") and telephone company entry into multichannel video distribution, broadcaster expansion into cable programming, the exponential increase in channel capacity ushered in first by fiber transmission and then again by digitization, the explosive growth of the Internet, on-demand programming, and the proliferation of online video and mobile video offerings, the exclusivity ban long ago ceased to be necessary to preserve

competition in video programming distribution.

Congress recognized that the exclusivity ban departed from the norms of the marketplace, and therefore directed that the prohibition be no more than a temporary tool to jump-start competition that would be eliminated once consumers had the benefits of competition and diversity in the video distribution marketplace.<sup>2/</sup> In the Commission’s two previous proceedings on whether to allow the exclusivity ban to sunset, Cablevision filed extensive comments detailing the reasons why the ban was no longer necessary to preserve and protect competition in video programming distribution.<sup>3/</sup> There is no need to repeat those arguments here, which Cablevision hereby incorporates by reference. The trends identified in those comments – a steady decline in cable’s share of the multichannel video programming marketplace, accelerating growth of competing multichannel video programming distributors (“MVPDs”) such as DBS and the telephone companies, a continued drop in the number and percentage of vertically-integrated cable networks and an ample supply of video content from non-affiliated cable programmers, and a rapid rise in the growth and popularity of online video programming – have only accelerated since 2007.<sup>4/</sup>

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<sup>2/</sup> 47 U.S.C. § 548(c)(5).

<sup>3/</sup> *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 Systems Corporation (Apr. 2, 2007); *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. 01-290, Comments of Cablevision Systems Corporation (Dec. 3, 2001).

<sup>4/</sup> The D.C. Circuit, in connection with its review of the 2007 Commission Order extending the ban, suggested that the ban has reached the end of its useful life. *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010) (stating the court’s expectation “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”). Even in 2002, two Commissioners questioned the need for the artificial crutch of the exclusivity ban to ensure competition in video distribution. *See e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity*

When the program access rules were adopted nearly 20 years ago, cable was the sole source of multichannel programming for virtually all households in the country and served over 95% of the MVPD marketplace. Today, cable's share of the MVPD marketplace has fallen to 58%, while market share for DBS, the telephone companies, and other competing MVPDs continues to grow.<sup>5/</sup> While consumers enjoyed a choice of competing service providers in only small fraction of the marketplace in 1992, today consumers everywhere can choose service from at least two other MVPDs, DirecTV and Dish Network, that are, respectively, the second and third largest MVPDs in the country.<sup>6/</sup> In most metropolitan markets around the country, competing video service also is available from AT&T and Verizon, the first and second largest telecommunications companies in the nation.<sup>7/</sup> Cablevision is smaller than all four of its main rivals, Dish, DirecTV, Verizon, and AT&T, in terms of subscriber reach, and each of those four companies enjoys a market capitalization that is 4 to 64 times larger than Cablevision.<sup>8/</sup> And yet, the persistence of the exclusivity ban impliedly assumes that DirecTV, Dish Network, AT&T, and Verizon require government assistance in order to compete in the video marketplace.

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*in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition, Report and Order, 17 FCC Rcd 12124, Separate Statement of Commissioner Kevin J. Martin (2002) ("2002 Extension Order") ("[W]hether the exclusivity ban continues to be necessary was a very close call"); id., Separate Statement of Commissioner Kathleen Abernathy (concluding that due to "the significant competitive changes in the marketplace," the ban was no longer necessary).*

<sup>5/</sup> See *NPRM*, Appendix A.

<sup>6/</sup> Top 25 Multichannel Video Programming Distributors as of Dec. 2011, at <http://www.ncta.com/Stats/TopMSOs.aspx>.

<sup>7/</sup> Fortune 500 Ranking of Telecommunications Companies 2011, at <http://money.cnn.com/magazines/fortune/fortune500/2011/industries/157/index.html>.

<sup>8/</sup> See Top 25 Multichannel Video Programming Distributors as of Dec. 2011, at <http://www.ncta.com/Stats/TopMSOs.aspx>. See also AT&T Key Statistics, May 30, 2012, at <http://finance.yahoo.com/q/ks?s=T+Key+Statistics>; Verizon Key Statistics, May 30, 2012, at <http://finance.yahoo.com/q/ks?s=vz&ql=1>; DirecTV Key Statistics, May 30, 2012, at <http://finance.yahoo.com/q/ks?s=DTV%2C+&ql=1>; Dish Network Key Statistics, May 30, 2012, at <http://finance.yahoo.com/q/ks?s=DISH%2C+&ql=1>; Cablevision Systems Corporation Key Statistics, May 30, 2012, at <http://finance.yahoo.com/q/ks?s=CVC%2C+&ql=1>.

The anachronistic nature of the exclusivity ban is further demonstrated by the fact that cable-affiliated programming is now a far smaller fraction of total programming than it was in 2007, 2002 – and certainly 1992.<sup>9/</sup> Programming channels affiliated with Cablevision, according to the Commission’s own statistics, account for only 10 of the 800 (1.25%) national programming networks available for distribution by MVPDs, and 4 of the 109 (3.7%) of the regional sports networks (“RSNs”) in the market.<sup>10/</sup>

In a mature competitive marketplace, moreover, no single programming service – including an RSN – can make or break the competitive viability (or lack thereof) of an MVPD in any particular local market. DBS operators and telcos have the resources to counter exclusivity by cable by engaging in their own exclusive arrangements, developing their own programming, or engaging in a wide range of competitive counter-measures – as occurs in response to exclusivity in all other competitive markets. Indeed, cable’s DBS and telco rivals actively promote their exclusive content – such as DirecTV’s Sunday Ticket and “AUDIENCE Network,” Dish Network’s exclusive roster of foreign language channels, and Verizon’s FiOS1 local programming service.<sup>11/</sup>

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<sup>9/</sup> See *NPRM*, Appendix B.

<sup>10/</sup> See *NPRM* ¶ 26 (estimating a total of 800 satellite-delivered national cable programming networks); *id.* Appendix B, Tables 2 and 3 (listing number of satellite-delivered national cable programming networks affiliated with Cablevision, total number of RSNs, and number of RSNs affiliated with Cablevision).

<sup>11/</sup> See, e.g., DIRECTV vs. Cable: When it comes to sports, there’s simply no competition, at <http://www.directv.com/DTVAPP/content/directv/directv-vs-cable-sports> (last visited June 6, 2012) (highlighting exclusive availability of NFL Sunday Ticket); AUDIENCE Network, Available only on DIRECTV, at <http://www.directv.com/DTVAPP/content/premiums/audience> (last visited May 29, 2012) (listing 12 drama and comedy series and numerous musical concerts available exclusively on the DIRECTV AUDIENCE Network); DISH International Programming, at <http://www.dish.com/entertainment/packages/international/> (last visited June 6, 2012) (“Our Filipino, Vietnamese, Taiwanese package features the freshest exclusive content. TV Japan channel offers exclusive content to its viewers.”). See also note 21, *infra* (discussing Verizon’s exclusive FiOS1 channels in New York and New Jersey).

The explosive popularity and growing strength of Internet-based video has resulted in a proliferation of new sources and offerings for video content, thereby enhancing diversity and further reducing the ability of any single video programming outlet to single-handedly sway competition in the marketplace.<sup>12/</sup> Online providers like Netflix are also developing their own exclusive content.<sup>13/</sup> Competition to cable and other MVPDs from online video distributors (“OVDs”) is real and is growing,<sup>14/</sup> and it has emerged without an across-the-board guarantee of access to cable-affiliated content.

## II. ADDITIONAL FACTORS WEIGH IN FAVOR OF A SUNSET

Apart from the well-documented trends described above that highlight the increasingly competitive video marketplace, there are additional factors that militate against retention of a blanket ban on cable exclusivity. First, sunsetting the exclusivity ban will not divest the Commission of power to address anti-competitive exclusive arrangements for the distribution of

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<sup>12/</sup> *US Digital Future in Focus*, COMSCORE, Feb. 2012, (“More than 100 million Americans watched online video content on an average day to close out 2011, representing a 43 percent increase from a year ago.”); Mike Snider and Roger Yu, *Flood of Video Streaming Options Could Confound TV Watchers*, USA TODAY, Apr. 10, 2012, available at <http://www.usatoday.com/tech/news/story/2012-04-09/streaming-video-options/54136024/1>; Todd Spangler, *About 20% of U.S. Pay TV Subs Prone to Canceling: Analysts*, MULTICHANNEL NEWS, Sept. 16, 2011 (noting Credit Suisse survey finding that over 25% of pay TV customers “subscribe to or use an over-the-top service, such as Netflix, Hulu Plus or Amazon Prime Instant Videos” and that “[r]oughly half of those said they use these services as a substitute for pay TV”); *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>.

<sup>13/</sup> *See, e.g.*, 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>.

<sup>14/</sup> *See, e.g.*, 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/>; Henry Blodget, *Cable Cord Cutting: It's Real And Coming To Households Near You*, BUSINESS INSIDER, Oct. 9, 2010, at <http://www.businessinsider.com/cable-cutting-its-real-and-coming-to-households-near-you-2010-10#ixzz1XBbGZaVE>; Suzanne Vranica and Sam Schechner *Online Video Turns Up Heat*, WALL STREET JOURNAL, B6, Apr. 23, 2012, (noting that advertisers increasingly consider online video to be “a legitimate alternative to cable and network TV options for reaching consumers”).

cable-affiliated programming. As the Commission itself has suggested, Section 628(b) provides the Commission with ample authority to address any such exclusive arrangement that significantly hinders competition.<sup>15/</sup> Hence, the chief effect of perpetuating the blanket ban would be to impose an anomalous business restriction on a subset of cable programmers, unnecessarily constraining them from entering into pro-competitive exclusive arrangements – a result permitted neither by the Act nor the First Amendment. Indeed, the Commission itself has recognized that the prophylactic ban required by Section 628(c) poses a far greater risk of overinclusiveness than does the case-by-case assessment of the competitive impact of an exclusive arrangement prescribed by its rules for terrestrial programming under Section 628(b).<sup>16/</sup>

Second, the ban stifles innovation and investment in satellite-delivered local and regional programming, even though the Commission itself has long maintained that exclusivity for local

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<sup>15/</sup> 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, ¶ 3 (2010) (“*2010 Program Access Order*”) (“Congress granted the Commission broad authority in Sections 628(b) and 628(c)(1) of the Act to prohibit unfair acts of cable operators that significantly hinder or prevent their competitors from providing video programming to consumers.”); *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, ¶ 41 (1993) (“Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming.”). See also *Nat'l Cable & Telecomms. Assoc. v. FCC*, 567 F. 3d 659, 664 (D.C. Cir. 2009) (“Mindful that statutes written in broad, sweeping language should be given broad, sweeping application, we note section 628(b)'s broad and sweeping terms, which prohibit practices ‘the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.’”) (internal quotes and citations omitted).

<sup>16/</sup> *2010 Program Access Order*, ¶ 44 (contrasting “broad prophylactic rule” under Section 628(c) with “tailored case-by-case approach that examines actual competitive harms in each instance” under Section 628(b), and noting that latter “prevent[s] overinclusiveness”).

news and other local programming is beneficial and should be encouraged.<sup>17/</sup> Indeed, the Commission has noted that, due in part to the limited geographic market for local and regional news and other local programming, “exclusivity may be important, if not, critical to . . . survival.”<sup>18/</sup> Consistent with these views, the Commission expressly stated in connection with the adoption of new rules governing access to terrestrial programming, that it was “highly unlikely that an unfair act involving local news and local community or educational programming will have” an anti-competitive purpose or effect under Section 628(b).<sup>19/</sup>

The benefits of exclusivity are evident from Cablevision’s investment in *terrestrially-delivered* local programming, which has always been free from the ban. Cablevision started its first local news channel – News 12 – in 1986. Today, News 12’s seven individual local 24-hour news channels are the most watched local news services in the country and are complemented by a robust online offering. Similarly, in 2009, Cablevision launched MSG Varsity – a multi-platform suite of services comprised of a 24/7 Emmy Award winning HD television network, a comprehensive online destination, and a groundbreaking interactive service, all dedicated to high school sports, academics, and activities in the tri-state area. Cablevision invests in these services in part to differentiate its products from rival MVPDs, and that freedom was critical to Cablevision’s willingness to invest. With only a limited base of subscribers for this programming, there would have been no business case to support an investment in those local services had Cablevision been forced to automatically share them upon request of any rival

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<sup>17/</sup> See generally *New England Cable News Petition for Public Interest Determination Under 47 C.F.R. §76.1002(c)(4) Relating to Exclusive Distribution of New England Cable News*, Memorandum Opinion and Order, 9 FCC Rcd 3231 (1994).

<sup>18/</sup> See *id.*, ¶ 57. See also *Time Warner Cable, Petition for Public Interest Determination Relating to Exclusive Distribution of Courtroom Television*, Memorandum Opinion and Order, 9 FCC Rcd 3221, ¶ 57 (1994).

<sup>19/</sup> 2010 Program Access Order n. 200.

MVPD.

In turn, Cablevision's competitors have made their own investments in exclusive local news and sports. News 12 and MSG Varsity, for instance, face competition from Verizon's FiOS1 Long Island and FiOS1 New Jersey, which feature news, sports, weather, and local information and entertainment programming that "won't be found on cable TV."<sup>20/</sup> Notably, Verizon has highlighted its exclusive high school sports offerings on FiOS1 in promotional and marketing materials.<sup>21/</sup> The Commission can and should promote additional investment and innovation in local and regional programming services by eliminating the *per se* ban for satellite-delivered programming.<sup>22/</sup>

Third, the competitive developments emerging in the last five years underscore the lack of any justification for the monolithic application of a blanket ban on cable exclusivity, irrespective of local market conditions. The competitive effect of cable exclusivity can vary

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<sup>20/</sup> Press Release, Verizon, Verizon Launches FiOS1 Channels on Long Island and in Northern New Jersey (June 22, 2009).

<sup>21/</sup> See e.g., Press Release, Verizon, Verizon FiOS1 in New Jersey to Air All New Jersey State Championship Football Games, Starting Dec. 7 (Dec. 5, 2011) ("High school football fans will be able to watch all the New Jersey State Interscholastic Athletic Association state football championship games exclusivity on FiOS1 on Verizon's FiOS TV service."); Press Release, Verizon, Verizon FiOS1, Star-Ledger/NJ.Com Sign Deal for Exclusive Rights to All New Jersey High School Sports Through 2015 (Sept. 23, 2011) ("Verizon FiOS TV customers who are fans of high schools sports will now have access to exclusive high school sports content, thanks to an agreement between Verizon's FiOS1 and Star-Ledger/NJ.com. The agreement makes FiOS1 the exclusive broadcast partner of the New Jersey State Interscholastic Athletic Association. FiOS1, Channel 1 on Verizon's FiOS TV, will broadcast 36 regular-season high school games – including basketball, football, lacrosse and soccer – and feature some of the top matchups between rival schools across the state."); Press Release, Verizon, New Jersey State High School Wrestling Championships to Air on Verizon's FiOS1, Exclusively for New Jersey Customers (Mar. 7, 2012) ("With FiOS1, fans of high school wrestling will have exclusive access to the state wrestling championships and see the state's top student-athletes competing for the top awards,' said Orlando Martinez, FiOS1's director of local sports programming. 'With high school sports programming like this available on FiOS1, FiOS TV customers enjoy a broad range of programming choices and superior picture quality they can only get over Verizon's advanced, all-fiber-optic network straight to consumers' homes.'").

<sup>22/</sup> See 2010 Program Access Order n. 200. Cablevision also joins with Madison Square Garden in arguing that there is no justification to retain the exclusivity ban with respect to Regional Sports Networks.

depending upon the competitive characteristics of the local marketplace, the programming at issue, and the nature of the exclusivity. But the current *per se* ban on exclusivity offers no mechanism for varying – or eliminating – regulatory intervention depending upon the competitive characteristics of the local marketplace. Such a result does not comport with both statutory and constitutional directives to limit regulatory interference with distribution of programming content to only those circumstances where such constraints are necessary to ensure competition.<sup>23/</sup>

The courts and the Commission have emphasized that mandatory asset-sharing arrangements like the program access law are appropriate only where a “granular analysis” of local market conditions demonstrates that competition will be impaired absent the provision of unbundled network elements to competitors.<sup>24/</sup> In considering the merits of market-by-market relief from asset-sharing obligations imposed on the telephone companies, the Commission has held that “it could be appropriate to conclude, based on sufficient facilities-based competition, particularly from cable companies, that the state of local competition might justify forbearance

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<sup>23/</sup> 47 U.S.C. § 548(c)(5) (authorizing retention of the exclusivity ban only if it is “necessary to preserve and protect competition and diversity in the distribution of video programming”); *Cablevision Sys. Corp. v. FCC*, 649 F. 3d 695, 710 (D.C. Cir. 2011) (applying intermediate scrutiny to the FCC’s program access rules, under which the rules are Constitutional only if they “further[ ] an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”). See also, e.g., *2002 Extension Order* ¶ 8 (explaining that in adopting program access restrictions, “Congress recognized that exclusivity can be a legitimate business practice where there is competition”).

<sup>24/</sup> See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 118 (2003) (“*Triennial Review Order*”) (citing *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) (“*USTA I*”)) (subsequent history omitted); *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd. 2533, ¶ 8 (2005) (“*Triennial Review Remand Order*”) (noting *USTA I* rejected national sharing obligations because they were “insufficiently ‘granular’” and “did not account for differences in particular markets and particular customer classes”), *aff’d Covad Commc’ns Co. v. FCC*, 450 F.3d. 528, 544 (D.C. Cir. 2006) (noting that that “*USTA I* and *USTA II* require a nuanced application of a ‘granular’ impairment standard, which incorporates competitive variations within and across markets”).

from unbundling obligations.”<sup>25/</sup> Such a conclusion is equally true with respect to asset-sharing obligations applicable to cable operators.<sup>26/</sup> Indeed, both Verizon and AT&T have argued vigorously that asset-sharing arrangements should not be applied in competitive local markets.<sup>27/</sup>

The most sensible and appropriate means by which the Commission could enable local market conditions to be taken into account would be to allow the exclusivity ban to sunset and rely upon Section 628(b) for case-by-case adjudications of exclusive arrangements that harm competition in local markets. To the extent that the Commission opts to retain the ban in some fashion – notwithstanding the overwhelming case for allowing it to sunset – it should, at a minimum, refrain from applying it in local markets deemed to satisfy the standard for “effective competition” under Section 623 of the Cable Act.<sup>28/</sup> Such a rule would curb the overly broad impact of the *per se* exclusivity ban by eliminating its applicability in local markets that Congress has deemed to be sufficiently competitive to obviate regulation of retail prices charged to consumers. The backstop of case-by-case adjudication under Section 628(b) would continue to be applicable in these markets, thereby ensuring that any exclusive arrangements that harm competition in such a market would remain subject to Commission review.

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<sup>25/</sup> *Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, ¶ 5 (2007).

<sup>26/</sup> *Cf. Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Memorandum Opinion and Order, 20 FCC Rcd 2533, ¶ 2 (2004) (noting benefits of using “unbundling authority in a more targeted manner”).

<sup>27/</sup> *See, e.g., Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket 04-313, Comments of Verizon, at 7-8 (Oct. 4, 2004) (“[T]he Commission must make a finding of impairment with respect to particular geographic markets and market segments before it imposes a UNE obligation in each such market.”); *Cbeyond, Inc., Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act*, WC Docket No. 09-223, Reply Comments of AT&T, Inc., at 18 (Feb. 22, 2010) (quoting *Covad Communications Co. v. FCC*, 450 F.3d 528, 534 (D.C. Cir. 2006) (“The fact that CLECs can viably compete without UNEs . . . precludes a finding that the CLECs are impaired.”)).

<sup>28/</sup> 47 U.S.C. § 543(1)(1).

## CONCLUSION

For the reasons set forth above, the Commission should allow the blanket ban on cable exclusivity to sunset in accordance with Section 628(c)(5) of the Cable Act.

Respectfully submitted,

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