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

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

COMMENTS OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

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COMMENTS OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

Comcast Corporation and NBCUniversal Media, LLC ("NBCUniversal") (collectively, "Comcast") hereby respond to the above-captioned Notice of Proposed Rulemaking ("*Notice*").[1] Today's video marketplace is replete with vigorous competition, rapid innovation, continued growth, and decreasing vertical integration. In such an environment, the prohibition on exclusive contracts between cable-affiliated programmers and cable operators (the "exclusivity prohibition") is not "necessary to preserve and protect competition and diversity" and therefore should sunset as scheduled. More importantly, in such an environment, there absolutely is no need for the Commission to expand its program access rules to address, for the first time ever,

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

alleged “discriminatory” non-cost-based volume discounts or the wholesale prices charged for programming. Doing so would be inconsistent with statutory guidance and exacerbate the First Amendment infirmities of the program access regime.

I. INTRODUCTION AND SUMMARY

In 1992, a radically different era than today, Congress determined that cable operators and their affiliated programmers that entered into exclusive contracts could impede new multichannel video programming distributors’ (“MVPDs”) ability to enter and compete in the video marketplace. Accordingly, Congress adopted the exclusivity prohibition but expressly stated that the prohibition would sunset when it was no longer “necessary to preserve and protect competition and diversity in the distribution of video programming.”[2] In today’s robust, dynamic, and fiercely competitive marketplace, that time has come.

Today’s video marketplace is more diverse and competitive than ever before. Cable’s competitors have grown and prospered, and have become formidable competitors. And MVPDs are not the only avenue for consumers to watch video content; video content continues to expand online, with numerous innovative companies experimenting with a variety of distribution business models. At the same time, the number of programming networks has increased dramatically, while the percentage of programming networks affiliated with cable operators has decreased significantly (Comcast’s acquisition of NBCUniversal notwithstanding). Today, the Commission estimates there are 800 satellite-delivered, national programming networks, and more than 85 percent of those networks are unaffiliated with a cable operator. As for the 14.4 percent of networks that are cable-affiliated, they have powerful economic incentives to

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[2] 47 U.S.C. § 548(c)(5).

license their content broadly. Powerful marketplace incentives also ensure widespread licensing of regional networks.

Quality programming is expensive to produce. Networks need to recoup their costs, and generate a return on invested capital. With the audience so widely dispersed among MVPDs, a programmer that is affiliated with an MVPD would cut itself off from significant revenues if it licensed only to a single MVPD, and the prospects would be poor for recouping those losses by driving other MVPDs' customers to switch to its affiliated MVPD. While there may be unusual circumstances where it makes economic sense for a programmer to enter into an exclusive distribution arrangement, market forces are more than sufficient to maintain a robust, competitive, diverse, and fair marketplace for video programming. So there is no justification for extending into a third decade an exclusivity prohibition that Congress scheduled to sunset in 2002.

There is even less justification in this competitive environment for *expanding* the government's role in the relationships between cable-affiliated networks and MVPDs, either with respect to alleged "discriminatory volume discounts" or alleged "uniform price increases." Congress expressly permitted volume discounts in the Communications Act, and both the legislative history and the plain language of the statute make clear that price differentials that reflect economies of scale, cost savings, and other direct and legitimate economic benefits are allowed. Further, volume discounts are common throughout the video marketplace (indeed, throughout the entire economy) and provide significant economic benefits to consumers, programming networks, and MVPDs.

Similarly, there is no basis for the Commission to address "uniform price increases." Vertically integrated programming networks act no differently from their non-affiliated counterparts when it comes to price increases. The prices they charge to MPVDs reflect fair market value, and no evidence suggests otherwise. To the contrary, intense competition for MPVD carriage – as well as the broad range and liberal availability of other generally substitutable programming – ensures that cable-affiliated programmers' prices are competitive.

For these reasons, the Commission should allow the exclusivity prohibition to sunset, and should refrain from expanding program access regulation in any way.

II. MARKETPLACE DEVELOPMENTS MAKE CLEAR THAT THE EXCLUSIVITY PROHIBITION SHOULD SUNSET AS CONGRESS INTENDED.

In the 1992 Cable Act, Congress expressed a clear preference for competition over regulation even as it imposed significant new obligations on cable operators.[3] And with particular regard to the exclusivity prohibition, Congress built in a sunset to avoid perpetuating regulation beyond the time needed to correct the market failures Congress perceived in 1992. In Section 628(c)(5) of the Act, Congress unambiguously stated its intent for the exclusivity prohibition to initially last only ten years, and be extended *only* if it continued "to be necessary to preserve and protect competition and diversity in the distribution of video programming."[4]

In the nearly twenty years since the 1992 Cable Act was enacted, the video marketplace has evolved significantly and competition has thrived. As the U.S. Court of Appeals for the D.C. Circuit concluded nearly three years ago,

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3 *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b), 106 Stat 1460, 1463 ("1992 Cable Act") ("It is the policy of the Congress in this Act to . . . promote the availability to the public of a diversity of views and information through cable television and other media distribution media [and] rely on the marketplace, to the maximum extent feasible, to achieve that availability . . . ."); *see also* 47 U.S.C. § 521(6) (stating Congress's desire in regulating cable communications to "promote competition" and "minimize unnecessary regulation that would impose an undue economic burden on cable systems").

4 47 U.S.C. § 548(c)(5). In his statement in the 2002 *Extension Order*, then-Commissioner Kevin Martin explained that he believed "necessary" to "mean[] more than just 'helpful' or 'useful'"; rather, it should "mean something closer to 'indispensable' or 'essential.'" *See Implementation of the Cable Television Consumer Prot. & Competition Act of 1992; Dev. of Competition & Diversity in Video Programming Distrib.: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report & Order, 17 FCC Rcd. 12,124 (2002) (Martin, K., concurring) ("2002 *Extension Order*").

> the record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992. . . . [O]ver the same period there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers.[5]

Vibrant competition, both between distributors and between programmers, leaves little doubt that the exclusivity prohibition is no longer necessary to preserve and protect competition and diversity.

A. Cable Operators Face Vigorous Competition Throughout the United States.

If there was a justification for the exclusivity prohibition in 1992, and even assuming there was again in 2002 and 2007, that justification is now long gone in light of today's intensely competitive marketplace. The video marketplace has been transformed since 1992, and competition continues to intensify and diversify.

In the first ten years after the Cable Act's enactment, DBS providers DirecTV and Dish Network (then-EchoStar) grew rapidly from zero subscribers in 1992 to 17 million collective subscribers by the end of 2001.[6] By then, the DBS providers accounted for 20 percent of the MVPD marketplace and were growing at an annual rate of 31 percent.[7] Local MVPDs also became more competitive, with MVPDs like RCN, WideOpenWest Networks, and other overbuilders gaining subscribers.[8] By 2007, DirecTV and Dish Network had increased their subscribership by another 80 percent and had become the second and fourth largest MVPDs in the country, together serving 29 million subscribers or more than 30 percent of all MVPD

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5 *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

6 *See* Comments of Comcast Corporation, MB Docket No. 01-290, at 5 (Dec. 3, 2001).

7 *See id.*

8 *See id.* at 8.

subscribers.[9] In addition, telco providers had entered the marketplace and begun offering cable service in hundreds of markets throughout the United States.[10] By the end of 2006, Verizon offered its FiOS service to more than 2.4 million households, and by April 2007, AT&T offered its U-verse service to 2.2 million households.[11]

Over the past five years since the 2007 extension, cable companies' competitors have added millions more customers.[12] DirecTV and Dish Network are the second and third largest MVPDs in the country, collectively serving 34 million U.S. households.[13] Competition from telcos remains fierce: Verizon and AT&T today are the seventh and eight largest MVPDs in the country, respectively,[14] and both companies continue to add video subscribers at a significant rate.[15]

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[9] *See* Comments of Comcast Corporation, MB Docket No. 07-29, at 7 (Apr. 2, 2007).

[10] *See id.* at 8.

[11] *See id.* at 8-9.

[12] *Compare id.* at 7 n.12 & 8-9 (noting that DirecTV and Dish Network had 15.95 million and 13.1 million subscribers, respectively, at the end of 2006), *with* NCTA, *Top 25 Multichannel Video Programming Distributors as of Dec. 2011*, http://www.ncta.com/Stats/TopMSOs.aspx (last visited June 20, 2012) (showing that DirecTV and Dish Network served 19.88 million and nearly 13.96 million subscribers, respectively, and that Verizon and AT&T served 4.17 million and 3.79 million subscribers, respectively, as of the end of 2011). These numbers are even higher as of Q1 2012, *see infra* notes 13, 15.

[13] NCTA, *Top 25 Multichannel Video Programming Distributors as of Dec.. 2011*, http://www.ncta.com/Stats/TopMSOs.aspx (last visited June 20, 2012). DirecTV added 81,000 U.S. subscribers in Q1 2012, bringing its total to 19.97 million subscribers. Press Release, DirecTV, *DIRECTV Announces First Quarter 2012 Results* (May 8, 2012), *available at* http://investor.directv.com/releasedetail.cfm?ReleaseID=671207. Dish Network "delivered a solid quarter for net subscriber growth," gaining 104,00 net subscribers during Q1 2012 to bring its total to 14.07 million subscribers. Press Release, Dish Network Corp., *DISH Network Reports First Quarter 2012 Financial Results* (May 7, 2012), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=670733.

[14] NCTA, *Top 25 Multichannel Video Programming Distributors as of Dec. 2011*, http://www.ncta.com/Stats/TopMSOs.aspx (last visited June 20, 2012).

[15] Verizon FiOS reported that "demand remains strong for FiOS" and added 180,000 net new video connections in Q1 2012 to reach a total of 4.4 million video subscribers. Press Release, Verizon Communications Inc., *Verizon Reports Double-Digit Earning Growth and Increased Operating Cash Flow in First-Quarter 2012* (Apr. 19, 2012), *available at* http://www22.verizon.com/investor/news_verizon_reports_doubledigit_earnings_growth_and_increased_operating_cash_flow_in_firstquarter_2012_0.htm. AT&T U-verse added 200,000

In fact, today, consumers in every market served by cable have a minimum of three – and often four or five – MVPDs to choose from, and no single cable company accounts for even 25 percent of all MVPD customers.[16] Absent extraordinary circumstances, it would be economically irrational for cable-affiliated programmers to cut themselves off from DBS and telco customers, who together account for more than 40 percent of all multichannel subscribers.[17] The potential revenues are too significant to be lightly disregarded – especially when the presence of so much MVPD competition makes it absurd for any programmer to gamble on the fact that it could capture those same dollars through a migration of a spurned MVPD's subscribers to the programmer's affiliated MVPD. The range of MVPD options for subscribers is too great – and, as discussed below, the range of competing programming choices that the spurned MVPD could offer to keep its subscribers is too robust – for any such "diversion strategy" to succeed.

That would be true even if MVPDs were the only sources of video choices for consumers, but of course they are not. In particular, video continues to expand online, with abundant new sources of content and a wide variety of new distributors employing an array of

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subscribers to reach 4.0 million video subscribers in Q1 2012. Press Release, AT&T Inc., *Solid Growth in Earning, Revenues and Margins, and $4.7 Billion Returned to Shareholders Highlight AT&T's First-Quarter Results* (Apr. 24, 2012), *available at* http://www.att.com/gen/press-room?pid=22629&cdvn=news&newsarticleid=34116.

[16] Assuming there are 99.6 million MVPD subscribers, *see Notice*, app. A, n.5 (relying on Kagan data), Comcast and Time Warner Cable – the two largest cable companies – account for 22.4 percent and 12.1 percent of MPVD subscribers, respectively. *See* NCTA, *Top 25 Multichannel Video Programming Distributors as of Dec. 2011*, http://www.ncta.com/Stats/TopMSOs.aspx (last visited June 30, 2012) (listing Comcast and Time Warner Cable as having 22.3 million and 12.1 million subscribers, respectively). DirecTV and Dish Network, the second and third largest MVPDs, have 20.0 percent and 14.1 percent of MVPD subscribers, respectively. *See id.*

[17] *See Notice*, app. A (Nationwide MVPD Subscribership) (noting that DBS operators account for 33.9 percent of MVPD subscribers and telco providers account for 7.6 percent).

different business models.[18] Popular online video distributors ("OVDs") continue to thrive even without any program access rights. For example,

- Netflix announced a slew of content deals last fall,[19] and its deal with DreamWorks in particular was heralded by the companies as "the first time a major Hollywood supplier has chosen Web streaming over pay television."[20] Netflix fared better than expected in Q1 2012, adding 1.7 million domestic streaming subscribers to bring its total to 23.4 million streaming subscribers – more customers than Comcast Cable.[21]

- Amazon Prime likewise announced several content deals last year and this year,[22] and its Amazon Prime Instant Videos service now offers more than 17,000 titles that can be accessed via more than 300 different devices.[23]

- Hulu Plus reached more than 1.5 million paying subscribers as of January 2012, and reached this milestone faster than any other video subscription service in U.S. history. Its rate of growth continues to soar, attracting on average more than two times the number of subscribers each day when compared to 2010.[24] Hulu's non-subscription

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18 *See, e.g.*, Comments of Sinclair Broadcast Group, Inc., MB Docket No. 09-182, at 11 (Mar. 5, 2012) (noting that "we live in the world of YouTube, Facebook, Twitter, Netflix, blogging, MySpace, Hulu, BitTorrent, TV Everywhere, 24/7 cable news, and the overall explosion of video competition").

19 Netflix announced content deals with DreamWorks Animation, Discovery Communications, AMC Networks, Disney, the CW network, and NBCUniversal.

20 Brooks Barnes & Brian Stelter, *Netflix Secures Streaming Deal with DreamWorks*, NY Times, Sept. 25, 2011, *available at* http://www.nytimes.com/2011/09/26/business/media/netflix-secures-streaming-deal-with-dreamworks.html?pagewanted=all.

21 Netflix, Quarterly Earnings, Q1 2012 Shareholder Letter (Apr. 23, 2012), *at* http://ir.netflix.com/results.cfm. Comcast Cable has 22.3 million subscribers. *See* Comcast Corp., *Comcast Reports 1st Quarter 2012 Results* (May 2, 2012), *available at* http://www.cmcsk.com/releasedetail.cfm?ReleaseID=669493.

22 For example, Amazon Prime reached content deals with CBS, Disney, Viacom, Discovery, and NBCUniversal.

23 Press Release, Amazon.com, Inc., *Amazon Announces Increased Prime Instant Video Selection for Kindle Fire and Prime Customers via Digital Video License Agreement with Viacom* (Feb. 8, 2012), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1658381&highlight=; Todd Spangler, *Discovery Hikes Through Amazon.com*, Multichannel News, Mar. 14, 2012, *available at* http://www.multichannel.com/article/481814-Discovery_Hikes_Through_Amazon_com.php.

24 Jason Kilar, *2011, 2012 and Beyond*, Hulu Blog (Jan. 12, 2012), http://blog.hulu.com/2012/01/12/2011-2012-and-beyond/. Although NBCUniversal has an ownership interest in Hulu, that interest is purely economic. Neither Comcast nor NBCUniversal influences the conduct or operation of Hulu, including board seats, voting for directors or other shareholder matters, management and veto rights, etc.

> site also continues to attract viewers. In January 2012, it had 31 million unique viewers and delivered the highest number of ad impressions (1.4 billion).[25]

And more new entrants have launched or have announced plans to launch services that will allow consumers to view programming online as well.[26]

In short, consumers have more options for where, from whom, and how they obtain their video programming. The video distribution marketplace today is more competitive than ever, and looks drastically different from the marketplace that concerned Congress twenty years ago. This competition creates robust market forces that incentivize programmers to deal – and deal fairly – with all requesting MVPDs (and many entities that are not MVPDs), and to enter into an exclusive arrangement only where the benefits provided to the programmer in exchange for such exclusivity exceed the benefits of broad distribution. In such a marketplace, programmers, whether affiliated with MVPDs or not, should be free to pursue the most rational arrangement they can to promote their business interests and fund future programming development.

This is not just sound policy, but a matter of constitutional imperative. The Supreme Court determined long ago that cable programmers are entitled to First Amendment protections:

> There can be no disagreement on an initial premise: *Cable programmers and cable operators* engage in and transmit speech, and they *are entitled to the protection of the speech and press provisions of the First Amendment*. . . . *[T]he rationale for applying a*

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[25] Press Release, comScore, *comScore Releases January 2012 U.S. Online Video Rankings* (Feb. 20, 2012), *available at* http://www.comscore.com/Press_Events/Press_Releases/2012/2/comScore_Releases_January_2012_U.S._Online_Video_Rankings.

[26] For example, Intel is allegedly planning to become a "virtual cable operator" with a service that would offer consumers a bundle of TV channels over the Internet. Sam Schenchner & Don Clark, *The New Cable-TV Guy: Intel*, Wall St. J., Mar. 13, 2012. According to Todd Spangler of Multichannel News, "[t]he entry of Intel – with its large bankroll – into over-the-top video would add another potentially serious competitor to the traditional pay-TV services, as consumers face a growing number of options for receiving video content over broadband from the likes of Netflix, Apple, Amazon.com and others." Todd Spangler, *Intel Cooking Up Internet TV Service: Report*, Multichannel News, Mar. 12, 2012, *available at* http://www.multichannel.com/article/481728-Intel_Cooking_Up_Internet_TV_Service_Report.php.

> *less rigorous standard of First Amendment scrutiny to broadcast regulation*, whatever its validity in the cases elaborating it, *does not apply in the context of cable regulation*.[27]

The dramatic changes that have occurred in the marketplace make it impossible for the current rules to pass constitutional muster.

Although the D.C. Circuit majority declined to address this issue in *Cablevision Systems Corp. v. FCC*, Judge Kavanaugh (in dissent) did, and persuasively explained that in such a competitive marketplace, the government interest that justified the exclusivity prohibition in 1992 – i.e., "counteracting the 'bottleneck monopoly power' of cable operators" – has "collapsed," and the "FCC's exclusivity ban thus is no longer necessary to further competition."[28] In other words, competition in today's marketplace has completely eroded the government's justification for interfering with cable-affiliated programmers' First Amendment rights to choose which MVPDs can transmit the programmers' speech,[29] and therefore, the exclusivity prohibition "no longer satisfies the intermediate scrutiny standard set forth by the Supreme Court."[30] That the exclusivity prohibition no longer advances the underlying government interest justifying the prohibition's infringement on programming networks' free speech rights is a serious concern and further solidifies that the time for its sunset has arrived.

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27 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636-37 (1994) (citation omitted; emphasis added).

28 *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1316 (D.C. Cir. 2010) (Kavanaugh, J., dissenting). The majority in *Cablevision* did not address the First Amendment because it concluded that the petitioner had not properly raised a First Amendment argument; Judge Kavanaugh disagreed. *Compare id.* at 1311-12, *with id.* at 1316-19.

29 *See Time Warner Entm't Co., LP v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) (applying intermediate scrutiny to its review of the exclusivity prohibition, and noting that the government's interest in the regulation is the promotion of fair competition in the video marketplace).

30 *Cablevision Sys. Corp.*, 597 F.3d at 1316 (Kavanaugh, J., dissenting).

B. As Documented by the Commission, the Number of Programming Networks Continues to Grow Rapidly While Those Networks Vertically Integrated with Cable Operators Has Declined Drastically.

In addition to the significant increase in competition in the *distribution* of video programming, the *supply* of programming has exploded over the past 20 years. And, while the number and variety of programming networks carried on MVPD systems have increased enormously, the percentage of national cable networks owned by cable operators has decreased dramatically.

In 1992, 57 percent of national cable networks – 39 of only 68 networks – were cable-affiliated.[31] By 2000, that percentage had decreased to 35 percent, and the number of programming networks had increased four-fold to 281 networks.[32] By 2006, the Commission reported that cable operators had interests in only about 22 percent of the then-531 programming networks.[33] Today, less than 15 percent of national programming networks are affiliated in any way with cable operators.[34]

In fact, based on Commission estimates, MVPDs now have over *800* national networks to choose from to fill their channel lineups – nearly twelve times as many networks as compared to

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31 *See* H.R. Rep. No. 102-628, at 41(1992).

32 *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixth Annual Report, 16 FCC Rcd. 6005 ¶¶ 15, 173 (2000); *see also* Comments of Comcast Corporation, MB Docket No. 01-290, at 7 (Dec. 3, 2001).

33 *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503 ¶ 21 (2006).

34 *See Notice* ¶ 26 & app. B (finding that 14.4 percent of satellite-delivered national programming networks are cable affiliated, and that this number decreases to 11 percent if the Comcast-controlled networks are excluded) (the *Notice* suggests that the Comcast-affiliated networks might be excluded from the analysis of the exclusivity prohibition because they are "subject to program access conditions adopted in the *Comcast/NBCU Order* and will continue to be subject to these conditions for six more years[.]" *Id.*).

the 68 networks available in 1992.[35] With so many options to choose from, the exclusivity prohibition cannot possibly be necessary to preserve and protect competition and diversity; the marketplace has done that on its own. For the more than 85 percent of networks (nearly 700 of them) that are not affiliated with a cable operator, the exclusivity prohibition is already irrelevant (and, for many, has never been relevant). And the 14.4 percent of networks that are affiliated with a cable operator face competition from other programmers that would be glad to fill any void left by a cable-affiliated network – which creates powerful incentives for a programmer to license its content broadly.

Finally, allowing the exclusivity prohibition to sunset will create new incentives for investing in innovative programming. Although the statute does allow a cable-affiliated programmer to petition the Commission for permission to enter into exclusive contracts,[36] this process can be long and burdensome. While the Commission has reviewed several such petitions since 1992, it has only granted two, both of which involved regional start-up news channels.[37] Without the impediment of suffering through the extra time and cost to first receive the government's permission – permission that could determine whether a programmer even

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35 *See id.* ¶ 26 & n.89; NCTA, *Other Industry Data*, http://www.ncta.com/StatsGroup/OtherIndustryData.aspx (last visited June 20, 2012).

36 *See* 47 U.S.C. § 548(c)(2)(D), (c)(4). A programmer is required to demonstrate that the exclusive contract is in the "public interest" and submit evidence regarding the effect the exclusive contract would have on "the development of competition in local and national [MVPD] markets," competition from non-cable MVPDs, "the attraction of capital investment in the production and distribution of new satellite cable programming," and "diversity of programming." *Id.* § 548(c)(4).

37 *See 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 & Order, 9 FCC Rcd. 3231 (1994); *Petition for Public Interest Determination Under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of NewsChannel*, Memorandum Opinion & Order, 10 FCC Rcd. 691 (Cable Servs. Bureau 1994). By contrast, the Commission has denied petitions for exclusivity that involved more established and/or "popular" national services. *See Petition for Exclusivity Pursuant to 47 C.F.R. § 76.0002(c)(4) and (5) of Outdoor Life Network and Speedvision Network*, Memorandum Opinion & Order, 13 FCC Rcd. 12,226 (Cable Servs. Bureau 1998); *cf. AT&T Services, Inc. v. Madison Square Garden, L.P*, Order, 26 FCC Rcd. 13,206 ¶ 29 & n.158 (Media Bureau 2011), *application for review denied*, Memorandum Opinion & Order, 26 FCC Rcd. 15,871 (2011).

launches its network – programmers will be more likely to enter into those exclusive arrangements that make good business sense for the network and outweigh the costs of losing broader distribution.

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After nearly 20 years of increasing innovation, competition, and diversity in the marketplace, it is long past time to allow the exclusivity prohibition to sunset. The D.C. Circuit sent a strong message to this effect when it reviewed the Commission's previous order extending the exclusivity prohibition:

> We anticipate that cable's dominance in the MPVD marketplace will have diminished still more by the time the Commission next reviews the prohibition [and] that if the market continue 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.[38]

As evidenced above, the marketplace is more competitive than at any other point in the prior fifteen years and, in such a competitive marketplace, the exclusivity prohibition can no longer be justified under the statute or the First Amendment. Therefore, consistent with the D.C. Circuit's expectation, the Commission should conclude that the exclusivity prohibition should sunset.

III. THE COMMISSION SHOULD NOT FURTHER EXPAND THE PROGRAM ACCESS RULES.

In addition to seeking comment on whether it should finally eliminate a regulation that Congress anticipated would sunset ten years ago, the *Notice* seeks comment on whether the Commission should revise its program access rules to: (1) allow a defendant to a Section 628(b)

[38] *Cablevision Sys. Corp.*, 597 F.3d at 1314, *aff'g Implementation of the Cable Television Consumer Prot. & Competition Act of 1992; Dev. of Competition & Diversity in Video Programming Distrib.: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules & Examination of Programming Tying Arrangements*, Report & Order & Notice of Proposed Rulemaking, 22 FCC Rcd. 17,791 (2007) ("2007 *Extension Order*").

complaint to have 45 days, rather than 20 days, to file its Answer;[39] (2) better address "potentially discriminatory volume discounts";[40] and (3) allow claims that cable-affiliated programmers engaged in "uniform price increases" to be cognizable under the statute.[41] Although increasing the time for a defendant to file an Answer is entirely appropriate, both of the other proposals – each of which would *expand* program access regulations further – are not.

In both 1992 and 1996, Congress emphasized its view that more competition should mean *less* regulation.[42] And more recently, both President Obama and Chairman Genachowski have stressed the need to scale back unnecessary regulation.[43] Quite simply, significant changes to the modern media marketplace since 1992 should not be met with proposed expansion of regulations and new intrusions into private contracts.[44] It is puzzling that the Commission has

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39 *See Notice* ¶ 97.

40 *Id.* ¶ 98.

41 *Id.* ¶¶ 101-102.

42 *See* 1992 Cable Act § 2(b), 106 Stat at 1463 (noting Congress's intent to "rely on the marketplace, to the maximum extent feasible"); 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI of the Communication Act, which regulates cable communications, is to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems"); Telecommunications Act of 1996, Pub. L. No. 104-104, pmbl., 110 Stat. 56, 56 ("1996 Telecom Act") ("An Act To *promote competition and reduce regulation* in order to secure lower prices and high quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." (emphasis added)).

43 On three separate occasions, President Obama has issued Executive Orders that seek to eliminate unnecessary regulation. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011); Exec. Order No. 12,531, 77 Fed. Reg. 28,469 (May 14, 2012). Chairman Genachowski has stated that he will respect and support Executive Order 13,579 (Regulation and Independent Regulatory Agencies). *See* News Release, FCC, *Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies* (July 11, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachment/DOC-308340A1.pdf. On May 18, 2012, the Commission adopted its Final Plan for Retrospective Analysis of Existing Rules in compliance with Executive Order 13,579.

44 *Cf.* Comments of Fox Entm't Group & Fox Television Holdings, Inc., MB Docket No. 09-182, at 3 (Mar. 5, 2012) ("[T]he Commission's regulation of broadcasting remains stuck in a time warp. It is simply unfathomable that the vast changes to the modern media marketplace since the 1996 Act have been met with minuscule changes to the outmoded rules.").

elected to consider new invasive regulation into areas in which it has never regulated before as part of a proceeding nominally dedicated to implementing a deregulatory mandate of Congress.[45]

A. Volume Discounts Are Expressly Permitted by the Communications Act and, as the *Notice* Recognizes, the Record Lacks Evidence of Discrimination Based on Volume Discounts.

In the *Notice*, the Commission seeks comment on whether the program access rules "adequately address potentially discriminatory volume discounts," and if not, how they could be revised to do so.[46] No such revision is necessary because Congress expressly permitted volume discounts in this marketplace and because no evidence exists that would suggest there is a problem with "discriminatory" volume discounts.

1. Volume Discounts Are Expressly Permitted by the Communications Act and Cannot Be Limited Only to Cost-Based Economic Benefits.

Citing to comments the American Cable Association ("ACA") filed in other proceedings, the *Notice* seeks comment on whether price differentials based on volume that are not actually cost-based raise concerns and amount to price discrimination.[47] The statute, however, makes clear that volume discounts may be based on "direct and legitimate economic benefits."[48] That clear language leaves no doubt that volume discounts are *not* limited to those directly resulting

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[45] During the 2007 extension, the Commission similarly asked questions related to the program access rules in the same NPRM that addressed the sunset, but in that NPRM the "scope of the [Commission's] inquiry [wa]s limited to [its] rules governing the program access complaint process," and not whether it should expand its rules to address new theoretical violations. *See Implementation of the Cable Television Consumer Prot. & Competition Act of 1992; Dev. of Competition & Diversity in Video Programming Distrib.: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules & Examination of Programming Tying Arrangements*, Notice of Proposed Rulemaking, 22 FCC Rcd. 4252 ¶ 14 (2007). With this *Notice*, it is most important that the Commission resolve the sunset of the exclusivity prohibition by the October deadline. The other issues in the *Notice* raise new concerns not fundamentally related to the sunset and that need not – and should not – be rushed to a conclusion if they are considered at all.

[46] *Notice* ¶ 98.

[47] *See id.* ("According to some commenters, without a basis in cost, this wholesale practice amounts to price discrimination." (citing ACA Video Competition Comments)).

[48] 47 U.S.C. § 548(c)(2)(B)(iii).

from cost savings.[49] The 1992 Cable Act's legislative history further confirms that the relevant economic benefits need not be cost-based.

Section 628(c)(2)(B) states expressly that volume discounts that yield "cost savings" or "other direct and legitimate economic benefits" are permissible: Cable-affiliated programmers "shall not be prohibited from . . . establishing different prices, terms, and conditions which take into account economies of scale, cost savings, *or other direct and legitimate economic benefits* reasonably attributable to the number of subscribers served by the distributor."[50] The statute makes absolutely no mention of narrowing this permission to only cost-based volume discounts and doing so would conflict with the plain language by rendering the language "other direct and legitimate economic benefits" redundant and meaningless.[51]

The legislative history confirms that Congress intended to allow price differentials based on direct economic benefits attributable to the number of subscribers served by an MPVD, and

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49 *Id.*

50 *Id.* (emphasis added); *see* 47 C.F.R. § 76.1002(b)(3).

51 *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute whenever possible."); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *United State v. Measche*, 348 U.S. 528, 538-39 (1955)); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 105 (1992) (noting that statutes should be construed "to avoid rendering superfluous any parts thereof"); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (explaining that, where "[t]he statute admits a reasonable construction which gives effect to all of its provisions[,] . . . we will not adopt a strained reading which renders one part a mere redundancy"). Indeed, in its Order implementing the program access rules, the Commission rejected interpretations of Section 628(c)(2)(B) that would limit volume discounts to those that are cost-based; instead it found that allowing for non-cost economic benefits that stem from delivering more viewers "*most closely follows the language of Section 628* regarding 'direct, and legitimate economic benefits,' which *distinguishes 'volume differences' from the 'cost differences' considered in the first permissible factor*." *Implementation of Sections 12 and 19 of the Cable Television Consumer Prot. and Competition Act of 1992 et al.*, First Report & Order, 8 FCC Rcd. 3359 ¶ 108 (1993) (emphasis added); *cf.* Comments of Viacom Int'l, Inc., MB Docket No. 92-265, at 45 (Jan. 25, 1993) ("Viacom 1993 Comments") ("Under [Section 628(c)(2)(B)(iii)], a price difference is permissible *even if it is not cost justified; such a justification is required only for (2)(B)(ii)*. A volume discount that provides SNI 'legitimate economic benefits' by inducing distributors to increase the penetration of SNI's programming services is permissible even in the absence of a cost justification." (emphasis added)).

says nothing about such benefits being solely cost-based.[52] As the Commission's rules rightly recognize, "[w]hen relying upon standardized volume-related factors that are made available to all [MVPDs], [a programmer] *will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership*.[53] Thus, it is inconsistent with both the statute and the rules for ACA to contend that volume discounts can only be justified by cost-based savings and that other economic benefits should be ignored. ACA simply cannot get around the broad statutory blessing for this healthy marketplace practice by making vague allegations that non-cost based economic benefits are somehow discriminatory and should be limited or regulated by the Commission.[54]

In all events, volume discounts are not discriminatory and are a rational, positive marketplace practice. Virtually *every* programming network – whether large or small; whether cable-affiliated, DBS-affiliated, broadcaster-affiliated, or totally unaffiliated with any MVPD; and regardless of genre – offers volume discounts, many of which are not based on cost-savings.[55] Such discounts provide significant economic benefits to the network, including, among other things:

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[52] *See* H.R. Rep. No. 102-862, at 92-93 (1992) (removing the undefined term "volume discounts" as used in the House Bill and replacing it during the Conference Report to specifically permit affiliated satellite cable programming vendors to establish different prices, terms, and conditions that take into account economies of scale, cost savings, and other economic benefits reasonably attributable to the number of subscribers the MVPD serves).

[53] 47 C.F.R. § 76.1002(b)(3) note (emphasis added).

[54] *See, e.g.*, *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1258 (D.C. Cir. 2007) (rejecting a narrow definition promulgated by EPA that "constrict[ed] the scope of [the relevant statutes'] plain, broad language"); *cf. Southeastern Cmty. College v. Davis*, 442 U.S. 397, 411 (1979) (noting that an agency's interpretation of a statute is "constrained by . . . the clear meaning of a statute, as revealed by its language, purpose, and history").

[55] Volume discounts are also extremely common in every part of the economy. Walmart, Amazon, Zappos, and even Apple all receive the best prices from their suppliers because they buy in volume. *See, e.g.*, Peter Svensson, Associated Press, *iPad Dominates Due to Apple's Supply Deals*, Boston.com, Mar. 8, 2012, *available at*

- Broader distribution that yields greater license fee revenue, higher advertising revenue, and wider marketing exposure;[56]

- Transactional efficiencies in negotiating carriage agreements;

- Production efficiencies realized from a significant and guaranteed revenue stream for the term of a contract; and

- Numerous operational efficiencies that stem from coordinating with one entity to reach a large number of subscribers.

As Viacom noted nearly two decades ago,

> "Economic benefits reasonably attributable to the number of subscribers served by the distributor" go beyond volume discounts which reflect reduced transaction or administrative costs. Such economic benefits also include the value distributors can confer upon programming by providing access to a large number of subscribers over which programming costs can be amortized.[57]

Moreover, volume discounts are ultimately pro-consumer.[58] As the Commission itself has recognized, if an "entity can secure larger volume discounts from suppliers, and then pass those lower costs through to consumers in the form of lower end-user prices, this [] would constitute a public interest benefit."[59]

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http://articles.boston.com/2012-03-08/business/31136349_1_tablet-computer-ipad-arm-holdings-plc. There is no reason the wholesale video marketplace should be any different.

56 A broader subscriber base increases advertising revenue by (1) increasing the number of viewers and (2) increasing the advertising rate per viewer. The advertising rate increases per viewer because some advertisers are willing to pay more to cable networks with national reach. *See* Opposition to Petitions to Deny & Responses to Comments of Comcast Corp., General Electric Co., and NBC Universal, Inc., MB Docket No. 10-56, at 210-11 (July 21, 2010).

57 *See* Viacom 1993 Comments at 18 n.12. As examples, Viacom noted that achieving and maintaining a critical mass of subscribers "helps assure the continued strength, viability and profitability of the program service," "affords access to more programming," "improves the terms upon which programming can be acquired or developed," and "enables the program service to enter into longer term arrangements with its programming suppliers to further assure the continuity of program service." *Id.*

58 Courts have recognized that volume discounts generally benefit consumers and "offend no antitrust principles." *See Advo, Inc. v. Phila. Newspapers*, 51 F.3d 1191, 1203 (3d Cir. 1995); *W. Parcel Express v. UPS*, 190 F.3d 974, 976 (9th Cir. 1999).

59 *General Motors Corp. and Hughes Elecs. Corp., Transferor, and The News Corp. Ltd., Transferee, for Authority To Transfer Control*, Memorandum Opinion & Order, 19 FCC Rcd. 473 ¶ 343 (2004) ("*News-Hughes Order*"); *see also AT&T Inc. and BellSouth Corp., Application for Transfer of Control*, Memorandum Opinion & Order, 22 FCC Rcd 5662 ¶ 215 n.595 (2007) (citing the *New-Hughes Order* language and suggesting this could be

2. There Is No Evidence That Cable-Affiliated Programming Networks Discriminate Against Similarly-Situated MVPDs.

The *Notice* seeks comment on "specific instances of perceived volume discount discrimination."[60] However, there is no evidence that "discriminatory" volume discounts have ever occurred or are an actual problem for MVPDs. To the contrary, the *Notice* admits that the Commission "has not received program access complaints alleging that particular volume discounts violate Section 628(c)(2)(B) of the Act."[61] The Commission should not waste its time and energy crafting a solution in search of a problem, particularly when it must act on the exclusivity prohibition by October, which is just four months away.

Nor should the Commission take certain parties' past unsupported claims about volume discounts harming small operators as evidence of discriminatory practices.[62] Small cable operators can and do aggregate their buying power, and could obtain more favorable discounts if the National Cable Television Cooperative were to make binding subscriber distribution commitments, as other MVPDs do.[63]

In any event, it makes little sense to address any concerns about prices charged to small cable operators by using a statutory provision that applies only to cable-affiliated programming. The vast majority of video programming – just over 85 percent of national cable networks, and

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another benefit of the AT&T-Bell South merger, which potentially would result in improved pricing from equipment and service providers).

60 *Notice* ¶ 100.

61 *Id.*

62 *See id.* ¶ 98 n.336 (citing various comments by ACA arguing that smaller MVPDs are disadvantaged by volume discounts).

63 *See* Mike Farrell, *Hardly Cooperative: Special Deals Cause Friction Among Small Buyers*, Multichannel News, Sept. 20, 2010, *available at* http://www.multichannel.com/article/457335-Hardly_Cooperative.php. As then-President and CEO of NCTC Jeff Abbas acknowledged, "Programmers routinely lament that the real differentiating factor of the co-op is that we don't make subscriber commitments . . . . Actually, they'll say we can't make subscriber commitments, but that's not true – we can; we've chosen not to." *Id.*

an even higher percentage of aggregate video content – is not cable-affiliated.[64] Disney, Time Warner, and Viacom are the three largest programming suppliers, and any rules adopted in this proceeding will *not* apply to them. They all do, and will continue to, provide volume discounts. Placing unique restrictions on less than 15 percent of programming networks (essentially, the Comcast/NBCUniversal networks, the Discovery networks, and the few networks still affiliated with Time Warner Cable and Cablevision[65]) makes little sense and will only exacerbate marketplace distortions. The Commission's authority to limit volume discounts is significantly constrained by the statutory language of Section 628(c)(2)(B), which expressly permits them, including discounts based on "direct and legitimate economic benefits" that are not cost-related.[66] Moreover, "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns."[67] The Commission should not take such concerns lightly.[68]

B. The Prices Vertically-Integrated Programming Networks Charge MVPDs Reflect Fair Market Value and Are Consistent with Their Competitors.

The *Notice* seeks comment on "whether and how [the Commission] should revise [its] rules to address uniform price increases imposed by satellite-delivered, cable-affiliated

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64 *See Notice*, app. B, tbl. 1 (finding that 14.4 percent of national, satellite delivered programming networks are cable affiliated).

65 *See id.*, app. B, tbl. 2.

66 47 U.S.C. § 548(c)(2)(B)(iii); *see* 47 C.F.R. § 76.1002(b)(3); *supra* notes 48-54 and accompanying text.

67 *Turner Broad. Sys., Inc.*, 512 U.S. at 659.

68 The Commission should give ample consideration before it expands its disparate treatment of First Amendment speakers such as programming networks, particularly given the Supreme Court's recent zealous protection of First Amendment rights, even where freedom of the press is not directly at issue. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2741-42 (2011) (protecting sale of violent video games to minors); *Synder v. Phelps*, 131 S. Ct. 1207, 1220-21 (2011) (protecting anti-gay picketing at funeral of an armed services member); *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (protecting sale of videos depicting animal cruelty).

programmers."[69] The simple answer is that the Commission should not revise its rules because there is absolutely no evidence that cable-affiliated programmers have ever engaged in "uniform price increases."[70] Cable-affiliated programmers do not act any differently than their non-affiliated competitors with respect to price increases. Nor could they, because powerful marketplace forces – the same forces that render the exclusivity prohibition unnecessary – constrain any such practice. The Commission cannot rationally retire the exclusivity ban – as it must – but then adopt a rule attempting to address alleged "uniform price increases."

Intense competition among programming networks to secure carriage on MVPD platforms ensures that cable-affiliated programmers charge prices that are competitive with the networks they compete against. MVPDs have abundant choices. Any programmer that attempts to charge a price that an MVPD believes to be artificially inflated runs the risk that MVPDs will decline carriage of that programming, resulting in the programmer losing viewers, subscription fees, and advertising revenues. The desirability of obtaining access to as many potential viewers as possible ensures that cable-affiliated programmers charge prices that are comparable to the prices charged by similar non-affiliated programmers.

This is even true for programming that may have unique characteristics in terms of its non-replicability and the intensity of consumer demand. Regional sports networks have been characterized by some MVPDs as the ultimate "must-have programming." And yet, Dish Network has competed for years without carrying YES Network – home of the most storied franchise in all of sports.[71] Perhaps YES Network is asking too steep a price, or perhaps Dish

69 *Notice* ¶ 101.

70 *See id.* ¶¶ 101-102.

71 *See* Dish Network, Channel Guide, Standard and HD Chanel Guide, *available at* http://www.mydish.com/programmingGuides/.

Network is too unwilling to pay fair market value, which is what happened when Dish Network chose to drop Comcast SportsNet California after an independent arbitrator determined the "fair market value" for the programming was more than Dish Network wanted to pay.[72] In either case, the marketplace is functioning properly, and there is no reason to believe it would function better if the Commission were to be more involved (or would function worse if YES Network were affiliated with an MVPD or Comcast SportsNet California were not).

Further, the Commission is not authorized to expand program access regulation to encompass "uniform price increases." The statute is clear that the Commission must focus on whether the *differential* between the price a cable-affiliated programmer charges its affiliated cable operator and the price it charges other MVPDs is reasonable – not on whether the price charged to either or both is the "right" price as determined by an MVPD that wants a lower price or by the Commission.[73] To evaluate the "right" price would be tantamount to wholesale rate regulation, and at no time has Congress empowered the Commission to regulate *wholesale* cable prices generally.[74] Yet this is where a rule on "uniform price increases" would inevitably lead. Allowing MVPDs to file program access complaints on the theory that a programming network has engaged in a "uniform price increase" would simply result in more baseless complaints that embroil the Commission in controversies it is not authorized or equipped to handle.

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[72] *See* Mike Reynolds, *Dish Disconnects CSN California After Losing Arbitration Decision*, Multichannel News, Nov. 24, 2010, *available at* http://www.multichannel.com/article/460326-Updated_Dish_Disconnects_CSN_California_After_Losing_Arbitration_Decision.php.

[73] *See* 47 U.S.C. § 548(c)(2)(B)(iii).

[74] In passing the 1992 Cable Act, Congress authorized the Commission to establish rules to govern *retail* cable prices offered by cable systems that were not subject to effective competition. Four years later, Congress terminated, as of March 31, 1999, the Commission's authority to regulate the rates charged for all tiers but the basic service tier. *See* 1996 Telecom Act § 301(b), 110 Stat. at 115 (codified at 47 U.S.C. § 543(c)(4)).

Finally, claims regarding past uniform price increases are pure conjecture.[75] Although it is true that, in the context of its review and approval of certain acquisitions, the Commission sometimes has considered the potential for "uniform price increases" and found that the public interest would be served by adopting an arbitration condition, these conditions were time limited – recognizing that over time, market forces will typically step in to effectively regulate these concerns.[76] Further, these conditions were based on *theories* about the potential to engage in "uniform prices increases"; there has never been any documentation that such an increase has ever occurred.

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[75] The D.C. Circuit has stressed the infirmity of conjecture-based rules. *See, e.g.*, *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1131 (D.C. Cir. 2001) (rejecting the Commission's 30 percent horizontal ownership limit where the collusive harms the Commission attempted to address were "mere conjecture").

[76] *See, e.g.*, *News-Hughes Order* ¶¶ 172-177 (discussing RSN arbitration condition to prevent potential "uniform price increase" for RSN programming post-transaction); *id.* ¶ 179 (noting that the condition will expire six years after release of the Order); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Commc'ns Corp., Assignor and Transferor, to Comcast Corp. & Time Warner Inc., Assignees and Transferees*, Memorandum Opinion & Order, 21 FCC Rcd. 8203 ¶¶ 159, 164 (2006) (same).

IV. CONCLUSION

For the reasons discussed above, the Commission should allow the exclusivity prohibition to sunset, and it should not adopt any new rules expanding program access regulation.

Respectfully submitted,

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