Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 DISCOVERY COMMUNICATIONS, LLC

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Discovery Communications, LLC ("Discovery") hereby submits these comments in response to the Notice of Proposed Rulemaking released on March 20, 2012 by the Federal Communications Commission ("FCC" or "Commission") regarding the Commission's proposed revisions to its program access rules.[1/] Given the increasingly competitive nature of the video distribution marketplace, the time is ripe for the Commission to sunset the prohibition on exclusive arrangements between cable operators and cable-affiliated programming vendors. The Commission also should refrain from imposing restraints on programmers' ability to negotiate fair pricing for their video programming consistent with marketplace realities.

[1/] *Revision of the Commission's Program Access Rules, et al.*, Notice of Proposed Rulemaking, MB Docket Nos. 12-68, 07-18, and 05-192, FCC 12-30 (rel. March 20, 2012) ("*NPRM*").

INTRODUCTION AND SUMMARY

Since their adoption in 1993, the program access rules "have remained largely unchanged."[2/] Yet there have been significant marketplace changes since that time – in terms of market structure, service offerings, and delivery platforms. There is no longer any threat that cable operators will fill their channel line-ups with affiliated channels to the exclusion of others; the percentage of cable-affiliated national programming networks has declined from 35 percent in 2002, to 22 percent in 2007, to approximately 14 percent.[3/] Nor do cable operators' carriage decisions make or break any programmer's ability to survive – cable operators' share of multichannel video programming distributor ("MVPD") customers has fallen from 95 percent in 1992, to 78 percent in 2002, to approximately 58 percent today.[4/] The "imbalance of power" that the program access rules were designed to correct simply no longer exists.[5/]

Ironically, the program access rules are powerless against the real imbalance of power that in today's marketplace prevents customers from seeing the programming they most want to see: the fact that much of today's "must have" programming is controlled by broadcasters, who have the power to force MVPDs to carry all of their programming networks, whether it is high quality or not, and regardless of whether subscribers might prefer access to another programming

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2/ *Id.* ¶ 96.

3/ *Id.* ¶ 26; *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 Exclusivity Contract Prohibition*, Report and Order, 22 Rcd 17791, ¶ 18 (2007) ("*2007 Extension Order*"); *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 Exclusivity Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, ¶ 18 (2002) ("*2002 Extension Order*"). As the Commission notes, this approximate 14 percent figure drops even lower – to 11 percent – if Comcast-affiliated networks are excluded from the calculation. *NPRM* ¶ 26.

4/ *Id.* ¶ 24; *2007 Extension Order* ¶ 23; *2002 Extension Order* ¶ 20.

5/ *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, ¶ 21 (1993) ("*1993 Program Access Order*").

network.[6/] Rather than correct the competitive inequities identified by Congress in the marketplace of 1992, the program access rules now instead create the perverse result of constraining the business decisions of only the handful of programmers unlucky enough to be deemed affiliated with a cable operator, without achieving any real benefits for consumers or competition.

Moreover, the program access rules are triggered by an overbroad notion of affiliation, resulting in arbitrary application of the rules, without regard to whether or not a programmer's affiliated cable operator exercises any actual business control over the programmer's decisions, or whether or not the affiliated cable operator has the geographic reach or market power to exercise the type of control over the programming market that the rules assume exists. The rules simply presuppose a false level of coordination between the programmer and "affiliated" cable operator when the truth is that each entity operates independently according to its own natural market-based incentives and fiduciary responsibilities. Rather than exacerbating the competitive damage by extending or enlarging the rules to the continuing disadvantage of a subset of programmers, the Commission should be updating its rules to reflect the realities of the current video programming marketplace.

First, the Commission should allow the ban on exclusive contracts between cable operators and cable-affiliated programmers to sunset. The ban is no longer needed given the increasingly competitive nature of the programming market. Even without a ban, programmers have a strong disincentive to enter into such exclusive arrangements, and are only likely to do so

[6/] 47 U.S.C. §§ 534, 535. Only one cable operator owns a significant number of programming networks, and that operator is subject to other requirements separate from the program access regime. *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) ("*Comcast/NBCU Order*").

in the limited circumstances where it makes sense for them to do so – for example, as an inducement for carriage of a service that would otherwise not be able to obtain widespread distribution, for niche programming services targeting a very specific audience, or in conjunction with the launch of a new programming service. Sunset of the ban at this time will promote competition and programming diversity for the benefit of consumers and is consistent with Congress's intention that the ban not continue beyond its usefulness.

Second, the Commission should not impose new regulations governing volume discounts. Volume-based discounts are not inherently discriminatory; rather, they reflect the different values that different distribution agreements offer programmers. This value is not simply cost-based, yet attempting to define the non-cost components across all distribution agreements would ignore the particularities of each agreement and the realities of the fast-changing programming distribution market. Banning or placing limits on the use of volume discounts would unduly constrain valid market-based program distribution negotiations and agreements with distributors; moreover, since the limits would only apply to the select group of disfavored programmers subject to these rules, the affected programmers would be placed at a considerable disadvantage in the marketplace vis-à-vis other programmers not subject to such artificial pricing constraints.

Third, the Commission similarly should not impose new regulations governing uniform price increases. A programmer's decision to raise prices uniformly is not due to the desires of a cable operator deemed affiliated with the programmer to raise prices for its MVPD competitors, but rather reflects the growing value of the programming service. Programmers should not be prevented from reaping the benefits of that growing value merely because they are deemed affiliated with a cable operator.

Lastly, the Commission has no authority to regulate uniform price increases or undertake additional regulation of volume-based discounts. Congress has expressly provided programmers with discretion to negotiate the pricing associated with their service offerings without Commission interference.

I. THE COMMISSION SHOULD ALLOW THE BAN ON EXCLUSIVE CONTRACTS TO SUNSET

The Commission's stated justification for the ban on exclusive contracts between satellite cable programming vendors and cable operators[7/] – that vertically integrated programmers have the ability and incentive to enter into exclusive arrangements with their affiliated cable operators that harm or diminish MVPD competition and programming diversity[8/] – has always been misguided and at best, is wholly outdated. Any programmer – whether affiliated with a cable operator or not – has a strong and clear incentive to obtain the widest possible distribution of its programming. This business imperative has only grown stronger in recent years as new MVPD competitors have grown to be among the largest distributors, making it implausible that a programmer would deliberately refrain from agreeing to carriage on their platforms.[9/]

A. Programmers Have No Incentive To Withhold Programming for Anticompetitive Purposes.

Programmer revenues, from both affiliate fees and advertising, depend directly on the number of subscribers programmers are able to reach. While the theory underlying the program access rule is that a programmer will give up potential revenues simply to benefit an affiliated cable operator because the operator's gains outweigh the programmer's losses,[10/] this theory

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7/ 47 U.S.C. § 548(c)(2)(D); *see also NPRM* ¶ 2.

8/ *Id.* ¶ 32.

9/ The ban was originally scheduled to sunset in 2002, but was extended for five years in 2002 and for an additional five years in 2007 and is now set to expire on October 5, 2012. *Id.* ¶ 3; *2002 Extension Order* ¶ 1; *2007 Extension Order* ¶ 1.

10/ *See, e.g.*, *NPRM* ¶ 38 ("[I]f 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 incorrectly assumes that "affiliated" programmers and operators are always part of the same enterprise. As noted above, the opposite is almost always the case. Programmers that operate independently of their "affiliated" cable operators have fiduciary and market incentives to maximize their own revenues. Even where there is true affiliation, a programmer could use exclusivity to benefit a distributor only if it could recoup the significant license fees and advertising revenues lost from forgoing distribution over competing platforms. This becomes more difficult – and expensive – as the number of subscribers to the competing distributor rises, since the affiliated distributor cannot easily implement subscriber rate increases to make up for its increased programming costs.[11/]

In today's market, such a strategy is virtually impossible. As the data reported in the *NPRM* shows, competition in the video distribution market is vigorous and increasing. The percentage of MVPD subscribers nationwide attributable to cable operators has decreased from 78 percent in 2002, to 67 percent in 2007, to 58.5 percent.[12/] The percentage of cable-affiliated national programming networks has declined from 35 percent in 2002, to 22 percent in 2007, to approximately 14 percent.[13/] The percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable multiple system operators ("MSOs") has decreased from between 54 and 56.75 percent to approximately 42.8 percent over

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revenues) by increasing the number of subscribers of its downstream MVPD division."); *2007 Extension Order* ¶ 53 (explaining that "a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy").

[11/] *See 2002 Extension Order* ¶ 36 (stating that "the exclusive distribution contract can be viewed as a kind of 'investment,' in which an initial loss of profits from programming is incurred in order to achieve higher profits later from cable distribution").

[12/] *NPRM* ¶ 24; *2007 Extension Order* ¶ 23; *2002 Extension Order* ¶ 20.

[13/] *NPRM* ¶ 26; *2007 Extension Order* ¶ 18; *2002 Extension Order* ¶ 18.

the last five years,[14/] and online video distributors are posing an increasingly "competitive threat" to MVPD service.[15/] These findings augment the Commission's previous findings that competition has improved since the enactment of the ban.[16/]

While Congress concluded in 1992 that cable operators might choose to withhold affiliated programming in order to disadvantage competing video distributors,[17/] even Congress recognized that this mindset, if it existed, would be temporary, lasting only until MVPD competition emerged. Congress therefore provided for the sunset of the exclusivity ban.[18/] Two years ago, the D.C. Circuit stated its expectation that the Commission would sunset the ban this year, noting that:

> We anticipate that cable's dominance in the MVPD market will have diminished still more by the time the Commission next reviews the prohibition, and expect that at that time the Commission will weigh heavily Congress's intention that the exclusive contract prohibition will eventually sunset. . . . [T]he MVPD market has changed drastically since 1992. We expect that if the market continues to evolve at such a rapid pace, the Commission will soon be able to conclude that the [exclusive contract] prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming.[19/]

Today's market clearly meets Congress's vision of the type of competitive market where the exclusive contract prohibition is not warranted. Non-cable distributors are now firmly

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14/ *NPRM* ¶ 43.

15/ *Id.* ¶ 25.

16/ *See, e.g.*, *2002 Extension Order* ¶ 65 ("The competitive landscape of the market for the distribution of multichannel video programming has changed for the better since 1992."); *2007 Extension Order* ¶ 16 (finding evidence of pro-competitive trends); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Fifth Report and Order, CS Docket No. 98-120, FCC 12-59, ¶ 11 (rel. June 12, 2012) (finding that there have been "dramatic changes in technology and the [video programming] marketplace over the past five years").

17/ *See, e.g.*, *1993 Program Access Order* ¶ 21; *see also NPRM* ¶ 6.

18/ *See, e.g.*, *2007 Extension Order* ¶ 29 (recognizing "that Congress intended for the exclusive contract prohibition to sunset at a point when market conditions warrant" and specifically cautioning "competitive MVPDs to take any steps they deem appropriate to prepare for the eventual sunset of the prohibition, including further investments in their own programming").

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

established in the marketplace. Given the increasing fragmentation of the market among distributors, and programmers' reliance upon affiliation revenues to acquire and develop their content, a programmer has every incentive to enter into arrangements to distribute its programming to as many distributors as possible, and not to limit itself to any particular MVPD. Any competing MVPD simply has too many customers for a programmer to want to withhold its programming from it. There is no need to subject what at this point is an arbitrary subset of programmers and distributors to rules and restrictions different than those imposed on their competitors. The Commission should sunset the prohibition.

B. Exclusive Arrangements Can Serve The Public Interest.

While programmers generally have little incentive to enter into an exclusive distribution arrangement, there are instances in which the ability to offer a distributor exclusivity can serve the public interest by enabling a programmer to gain carriage. The exclusivity ban needlessly interferes with this reasonable exercise of business discretion and forces programmers to seek advance permission before entering into such arrangements. The Commission itself has noted that exclusive arrangements may be pro-competitive in some instances.[20/]

First, a programmer may wish to enter into an exclusive contract when it cannot otherwise obtain widespread carriage. A new service with limited interest from distributors may nonetheless be able to gain carriage from one select distributor if it is able to offer the "additional

[20/] *See, e.g.*, *NPRM* ¶ 88 ("We believe that retaining the exclusive contract prohibition in its entirety as it exists today will result in certain costs, such as unnecessarily restricting procompetitive arrangements that in certain instances may foster competition in the video distribution market and promote competition and diversity in the video programming market."); *2007 Extension Order* ¶ 63 ("We recognize the benefits of exclusive contracts and vertical integration cited by some cable MSOs, such as encouraging innovation and investment in programming and allowing for 'product differentiation' among distributors.").

incentive of exclusivity."[21/] Exclusive distribution may "engender distributor support for a fledgling service to help it gain a foothold in the market;" as such, when a programmer "requires the ability to offer an added incentive to attract investment, carriage and support of the service, such that without the incentive the programming service could not be launched or become viable, exclusivity may be in the public interest."[22/]

Second, it may make sense for a programmer to enter into an exclusive arrangement with respect to niche programming services that target a particular audience. For example, if one distributor serves an area with a substantial population from a certain country, the programmer may wish to offer the distributor exclusivity for a network designed specifically with that group of consumers in mind. Without exclusivity, a distributor might not otherwise agree to carriage of the network, because there might not be enough target customers overall to warrant dedication of limited channel space unless the distributor was reasonably certain of securing a significant amount of the target audience.

Third, a programmer may wish to enter into an exclusive arrangement to reduce or share the risks associated with a new programming service. Developing a new programming service is

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21/ *NewsChannel, a Division of Lenfest Programming Services, Inc. Petition for Public Interest Determination under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of NewsChannel*, Memorandum Opinion and Order, 10 FCC Rcd 691, ¶ 26 (1994) ("*NewsChannel*").

22/ *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, ¶¶ 33-34 (1994). While the Commission has recognized several reasons why exclusivity is in the public interest in the context of granting a waiver of the exclusivity prohibition, such waivers are rarely approved and so ineffective as a means to allow exclusivity in the circumstances in which it would be beneficial. *See, e.g.*, *Cablevision Industries Corporation and Sci-Fi Channel Petition for Public Interest Determination Under 47 C.F.R. § 76.1002(c)(4) Relating to the Exclusive Distribution of the Sci-Fi Channel*, Memorandum Opinion and Order, 10 FCC Rcd 9786, ¶ 7 (1995) (denying exclusivity even though exclusivity was initially offered because "two Florida entrepreneurs were struggling to secure enough carriage commitments and financial backing to launch [a new] service"); *Time Warner Cable Petition for Public Interest Determination Under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of Courtroom Television*, Memorandum Opinion and Order, 9 FCC Rcd 3221, ¶ 17 (1994) (denying exclusivity even though exclusivity was initially needed to attract "capital investments at launch of the service").

inherently risky. If the new service is successful, it gains wide distribution; if not, generally only the programmer bears the consequences of the failure. Allowing exclusivity, however, encourages investment and innovation in programming by reducing the substantial risks associated with developing a new programming service by allowing programmers to share both the risks and rewards of developing a new service with their distributors.[23/] As the Commission has noted, "exclusivity in some circumstances can serve as an investment incentive for cable operators to finance, promote and carry a new service."[24/] A programmer and distributor taking a gamble on developing and launching a new service should have the option of reaping the benefits of their actions through an exclusivity arrangement before the new service is more widely distributed. Indeed, exclusivity is common throughout the entertainment industry, such as when a music label enters into an exclusive recording contract with a new artist.[25/] Such arrangements also enhance the incentives for distributors to market and publicize such content in order to recover the costs of that investment.

In each of the limited instances described above in which exclusive arrangements may make sense for programmers, consumers benefit in the form of increased competition in the programming marketplace and increased diversity in the types of programming offered.[26/] The Commission should not hinder the proper functioning of the marketplace by placing undue

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23/ *See, e.g.*, *NPRM* ¶ 44 (suggesting that one of the benefits of allowing exclusive distribution arrangements could be allowing cable operators to avoid sharing their programming investment with their competitors).

24/ *NewsChannel* ¶ 23.

25/ *See, e.g.*, *1993 Program Access Order* ¶ 63 ("As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized.")

26/ *See, e.g.*, *NPRM* ¶ 44 (seeking comment on how sunsetting the exclusive contract prohibition would impact the creation of new programming and programming diversity).

burdens on certain competitors and by interfering with programmers' independent business judgment regarding the best means of maximizing value and viewership of their content.

In addition to direct benefits, exclusivity has the potential to create indirect benefits. As the Commission has acknowledged, when one distributor offers exclusive content, it can encourage investment by rival distributors to create content of their own.[27/] The end result is increased competition among MVPDs through improved service offerings – a better result for consumers and video competition. Consequently, the Commission should adopt its proposal to sunset the exclusive contract prohibition in its entirety for the benefit of the marketplace and consumers, and instead rely solely on existing protections provided by the program access rules in correcting any discrete instances of market abuses that could arise.[28/]

II. REGULATION OF VOLUME DISCOUNTS AND UNIFORM PRICE INCREASES IS UNWARRANTED AND AMOUNTS TO UNLAWFUL PRICE REGULATION

A. There Is No Need To Regulate Volume Discounts.

The Commission asks whether the existing "program access rules adequately address potentially discriminatory volume discounts."[29/] The answer is yes.

As an initial matter, the proposal to restrict programmers' ability to charge bigger distributors more favorable carriage rates is based on the faulty premise that such volume

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27/ *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, ¶ 9 (2010) (subsequent history omitted) ("[O]ur policies should encourage MVPDs or others to create competing programming, rather than relying on the efforts of others, thereby encouraging investment and innovation in programming and adding to the diversity of programming in the marketplace.").

28/ *NPRM* ¶ 4 (noting that existing protections that will not sunset include (i) the Commission's case-by-case consideration of exclusive contracts pursuant to Section 628(b) of the Act, (ii) the prohibition on discrimination in Section 628(c)(2)(B) of the Act, and (iii) the prohibition on undue or improper influence in Section 628(c)(2)(A) of the Act); *id.* ¶¶ 47-67 (discussing each of these existing protections).

29/ *Id.* ¶ 98.

discounts are "discriminatory."[30/] Such discounts are offered not for the purpose of discriminating against any particular MVPD, but because carriage agreements naturally must reflect the value that a particular distribution agreement offers the programmer. Larger distributors, by their nature, offer programmers more value by distributing to a larger audience. In addition to greater affiliate fees generated from larger numbers of subscribers, distribution to a larger audience allows for a greater advertising platform that provides programmers with more resources to produce more high quality and diverse programming for the benefit of consumers.

Moreover, the added value larger distributors bring to a carriage agreement is not always solely cost-based. There are a wide variety of benefits that are not specifically cost-based and yet constitute real value differences among distributors. The Commission has recognized this by allowing volume-related justifications to establish price differentials among distributors and by providing that such differentials need not be justified solely on the basis of costs or standard volume-related factors, but also may be based on "non-cost economic benefits related to increased viewership."[31/] Non-cost benefits created by distribution to a wider audience include, for example, enhanced talent, program, and brand recognition for the service.[32/] The value of these non-cost benefits necessarily increases as the number of subscribers receiving the service increases.

30/ *See, e.g., id.* (noting the claims of some parties that volume discounts not solely based on cost differences amount to price discrimination).

31/ 47 C.F.R. § 76.1002(b)(3) note; *1993 Program Access Order* ¶ 108 ("[W]e will not require the vendor to provide a strict cost justification for the structure of such standard volume factors, but will also recognize non-cost economic benefits related to increased viewership as identified by the vendor.").

32/ *See, e.g., Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312, ¶ 14 (2001) ("We believe that program[mers] seek to reach the widest range of subscribers for their type of programming on a regional or national basis to increase the value of their programming to advertisers, and to build brand recognition that will in turn spur other MVPDs to carry their programming.").

Attempting to create a list of such non-cost-based benefits as proposed by the Commission[33/] would be unworkable. The nature of the non-cost benefits change with each agreement. In addition, even if a generally applicable list of non-cost benefits could be created (which it likely cannot), any list would become almost immediately outdated due to the dynamic nature of the video programming marketplace. Deeming any certain non-cost benefits to be irrelevant to an agreement would ignore the realities of the particular agreement negotiation and distribution arrangement in favor of an artificial, arbitrarily-imposed model of what should be valued, rather than what is actually valued in a particular agreement. This would be unfair to programmers and distributors, whose jobs are to negotiate and enter into carriage agreements based on the realities of the market and their respective roles in it. Indeed, not recognizing certain types of value could be seen as discriminatory to larger MVPDs.

The most likely result of a rule limiting volume discounts would be a *de facto* appointment of the largest MVPDs as price negotiators for the entire industry. Such MVPDs are unlikely to agree to the increased prices that would result from eliminating the discounts, forcing the unfortunate group of programmers subject to the program access rules to offer all distributors the same relatively lower prices offered to the larger MVPDs, regardless of the value each distribution agreement provides to the programmer. This would effectively strip affiliated programmers' ability to make pricing decisions, further harming their ability to compete with programmers not subject to the rule and further distorting the proper functioning of the competitive marketplace.

Such pricing matters are simply best left to the market. As the Commission found in the context of the Comcast/NBCU transaction, "the specific matter of volume-based discounts is

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[33/] *NPRM* ¶ 100 (requesting comment on whether Commission rules should specifically list non-cost benefits related to viewership that might justify volume discounts).

[already] adequately addressed by the Commission's program access rules."[34/] The Commission need not undertake additional regulation in this regard.

B. There Is No Need To Regulate "Uniform Price Increases."

There is also no need for additional program access rules addressing programmers' "uniform price increases." Contrary to the *NPRM*'s suggestion, programmers do not raise prices across the board to disadvantage non-affiliated distributors.[35/] A programmer's pricing decisions, like other business decisions, are made for the good of the programmer. In fact, in many instances in which the FCC considers a programmer to be "affiliated" with a cable operator, the companies are completely separate from a legal and business standpoint, and the concept that raising prices is an "internal transfer" by the programmer that benefits its affiliated cable operator has no basis in reality.

Cable programmers may raise rates for a variety of reasons, including a legitimate business assessment that the value of the programming service has increased. In such instances, programmers normally will seek to increase prices across the board as carriage agreements are due for renewal. This is a reasonable business negotiation based on properly functioning market dynamics. The Commission's premise in prior merger orders that bargaining power between programming networks and rival MVPDs should be preserved – cited here as justification for regulating price increases[36/] – makes no sense in the greater programming world, where leverage constantly shifts as a programmer's popularity changes. It makes even less sense in these circumstances where a certain subset of market players would be constrained while their competitors would not. When the value of programming increases, the Commission should not

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[34/] *Comcast/NBCU Order* ¶ 56.

[35/] *NPRM* ¶ 101.

[36/] *Id.* ¶ 101 & n.350.

arbitrarily tie certain programmers to their previous prices, thus stripping these programmers of the ability to make valid pricing decisions and removing any motivation for them to improve the quality and popularity of their programming. Instead, it should let market dynamics dictate the terms of carriage for all programmers, allowing vigorous competition and providing programmers with an incentive to develop innovative, diverse programming for the benefit of consumers.

C. The Commission Lacks Authority To Regulate Programmer Pricing.

Not only is new Commission regulation of volume discounts and uniform price increases unwarranted, such regulation is unsupported by existing Commission authority. Such regulations are tantamount to wholesale price regulation, which is outside the bounds of the authority Congress granted to the Commission.[37/]

Specifically, the Communications Act is devoid of any provisions providing the Commission with direct or ancillary authority to regulate the wholesale prices for video programming that programmers charge to distributors. Section 628(b) only gives the Commission authority to regulate conduct that has the effect of preventing or significantly hindering vertically integrated programming from being carried on competitors' distribution systems.[38/] It does not give the Commission blanket authority to broadly interfere in private negotiations to regulate the terms and conditions of programming carriage agreements regardless of whether any access to programming has been withheld. Indeed, Congress prohibited the Commission from engaging in wholesale programming rate regulation when it enacted the

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37/ *See, e.g.*, *Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("An agency's power is no greater than that delegated to it by Congress."); *Friends of the Crystal River v. EPA*, 36 F.3d 1073, 1080 (6th Cir. 1994) ("Agencies are creatures of statutory authority. Thus, they have no power to act . . . unless and until Congress confers power upon them.").

38/ *See* 47 U.S.C. § 548(b).

program access rules.[39/] Further, the Act "expressly permits the establishment of different prices, terms and conditions to take into account differences in the cost of creation, sale, delivery or transmission of satellite cable programming or economies of scale, cost savings or other economic benefits attributable to the number of subscribers served by the MVPD."[40/] The Commission cannot bar what Congress has decided to expressly allow.[41/]

What the Communications Act does provide is a mechanism under Section 628(b) by which instances of price discrimination in the video programming marketplace may be addressed.[42/] Just as one of the Commission's proposals in the *NPRM* is to sunset the exclusive contract prohibition and instead rely on existing protections (including Section 628(b)), Section 628(b) already appropriately protects against any market abuse with respect to the pricing of video programming services. Consequently, such matters must be left to the market and the regulatory backstops currently in place under the existing rules.[43/]

39/ *See* S. Rep. No. 102-92 (1991), at 73 (stating that "when the Committee discusses the regulation of rates [in its analysis of Section 5 – Regulation of Rates], it is referring to the retail rates charged to subscribers" and that it "does not refer to the wholesale rates paid to programmers by cable operators").

40/ 47 U.S.C. § 548(c)(2)(A).

41/ *See, e.g.*, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986).

42/ *See* 47 U.S.C. § 548(b), (d); 47 C.F.R. §§ 76.1001(a), 76.1003(a), (c)(7).

43/ The *NPRM* further cannot justify adoption of new rules governing volume price discounts and uniform price increases because the *NPRM* only asks whether the existing rules are adequate and fails to propose any new rules governing such matters. While the record generated in response to the *NPRM* may inform the Commission's development of such rules, the APA requires the Commission to solicit comment on those rules before their adoption. *See, e.g.*, *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

CONCLUSION

In today's highly competitive video marketplace, the Commission should allow the sunset of the ban prohibiting exclusive arrangements between cable operators and cable-affiliated programming vendors and should avoid adopting regulations restricting programmers from providing volume discounts and adopting uniform price increases. Adopting actions consistent with the views expressed herein will promote competition and diversity in video programming by providing the video distribution marketplace with the freedom to function, ultimately lowering prices and improving the quality of video programming for the benefit of consumers.

Respectfully submitted,

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