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 CENTURYLINK

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SUMMARY

CenturyLink urges the Commission to extend the prohibition on exclusive contracts between cable TV providers and their affiliated satellite programmers. As a new MVPD entrant with its Prism™ TV product, CenturyLink would be seriously disadvantaged if it were deprived of programming its video subscribers seek when they are shopping for an MVPD alternative. Although the video marketplace has undergone changes in the last five years, changes that would warrant sunsetting or relaxing the exclusive contracts prohibition have not occurred. Four of the five largest cable operators are vertically-integrated with satellite-delivered programming vendors and continue to be the dominant presence in the MVPD market, six of the top twenty most popular national networks based on prime time ratings are affiliated with these same cable operators, and more than half of all regional sports networks are affiliated with these same four cable operators. These cable operators and their affiliated programmers retain at least the same ability and incentive to withhold critical programming from new entrant and smaller MVPDs as they did five years ago.

In 2007 the Commission used a five-part analysis from which it concluded that a full extension of the prohibition for five years was warranted. The Commission should use the same approach here and reach the same result. First, the Commission should continue to interpret that the exclusive contracts prohibition is "necessary" if in the absence of the prohibition competition and diversity in the distribution of video programming would not be preserved and protected. Second, the Commission should recognize that today's video distribution marketplace characteristics are noticeably similar to those the Commission evaluated in 2007 and caused the Commission to fully extend the prohibition. The continued dominance of cable operators, and particularly the dominance of the vertically-integrated largest cable operators compels retention

of the prohibition to protect and preserve competition and diversity in the MVPD market. Third, the Commission should recognize that cable-affiliated programmers continue to have the ability and incentive to favor their affiliated cable operators absent the exclusive contracts prohibition. Affiliated programmers have the ability to discriminate in favor of their cable TV affiliates based on the cable TV companies' large size and ability to deliver "eye-balls" to the programmer. And, the current MVPD marketplace still enables affiliated programmers to be motivated to maximize company profits by keeping cable TV subscribers and advertising revenues in the company, by way of an exclusive contract between the programmer and the affiliated cable operator, as opposed to also utilizing a rival MVPD's -- and especially a smaller rival MVPD's -- distribution network. Fourth, the Commission should not relax the prohibition. A bright line rule that prohibits exclusive contracts upfront is a much more certain foothold for new entrant MVPDs than a complaint-based, case-by-case approach to obtaining critical programming. Complaint procedures to acquire programming, albeit well-intended, as a practical matter are burdensome, costly, and time-consuming to employ. In turn, they will not be as effective in preserving competition as an outright prohibition. Fifth, the Commission should extend the prohibition for another five years. Five years is a reasonable amount of time to provide some certainty to the marketplace, without waiting too long to re-evaluate whether changes in the MVPD market warrant changes to the exclusive contracts prohibition.

The prohibition on exclusive contracts between cable operators and affiliated satellite-delivered programming vendors continues to be necessary. In the absence of the prohibition, the development of MVPD competition will likely cease and even decline, contrary to congressional and Commission goals, and to the ultimate detriment of video subscribers throughout the country.

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COMMENTS OF CENTURYLINK

CenturyLink, Inc. files these comments in accord with the *Notice* in the above-captioned proceeding,[1] and urges the Commission to extend the exclusive contract prohibition of its program access rules. CenturyLink is a new multi-channel video programming distributor (MVPD) entrant for its Prism™ TV product in several markets, competing against dominant, entrenched cable TV companies. If these dominant companies are able to enter into exclusive contracts to distribute affiliated, satellite-delivered programming, they will use that exclusivity to the detriment of video subscribers seeking competitive choice in their video content providers. Although the video marketplace has undergone changes in the last five years, changes that would

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[1] *Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, MB Docket Nos. 12-68, 07-18 and 05-192, Notice of Proposed Rulemaking, FCC 12-30 (rel. Mar. 20, 2012) (*Notice*); 77 Fed. Reg. 24302 (Apr. 23, 2012).

warrant sunsetting or relaxing the exclusive contracts prohibition have not occurred. Four of the five largest cable operators are vertically-integrated with satellite-delivered programming vendors and continue to be the dominant presence in the MVPD market, six of the top twenty most popular national networks based on prime time ratings are affiliated with these same cable operators, and more than half of all regional sports networks are affiliated with these same four cable operators. These cable operators and their affiliated programmers retain at least the same ability and incentive to withhold critical programming from new entrant and smaller MVPDs as they did five years ago. Therefore, in applying the same reasoned approach for evaluating the need for the exclusive contracts it used when it last revisited this issue in 2007, the Commission should extend the prohibition on exclusive contracts between a cable TV provider and any cable-affiliated programmer of satellite-delivered programming for five years.

I. BACKGROUND.

A. CenturyLink Is A New MVPD Entrant.

CenturyLink began as a telecommunications company over 80 years ago. More recently, with its acquisition of Qwest Communications International Inc., it is now the third largest telecommunications company in the United States. The company has some existing wireline video service offerings including its Prism™ TV service in certain markets around the country, including Fort Myers, Florida and Las Vegas, Nevada.[2] CenturyLink is planning to expand its Prism™ TV service to other locations in 2012 and in later years. In most instances, CenturyLink is and will be a new MVPD entrant in these markets, and in all instances CenturyLink is a competitive wireline MVPD alternative to the incumbent cable operator in these markets.

[2] CenturyLink also operates a handful of more-established, traditional analog cable TV systems in very small markets such as Eagle, Colorado and Casco, Wisconsin. Because these systems generally serve fewer than 2500 subscribers each, CenturyLink's challenges in obtaining programming extend to these markets as well.

Prism™ TV delivers high-quality video content, a broad range of on-demand content and advanced technology and interactive features over CenturyLink's managed two-way IP network. It provides a competitive video experience to incumbent cable and satellite companies' video offerings.

B. Legal Background.

In areas served by a cable operator, Section 628(c)(2)(D) of the Communications Act generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor (the "exclusive contracts prohibition").[3] The statutory provision was originally scheduled to sunset on October 5, 2002, unless the Commission found that the ban "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[4] Twice now, in 2002 and again in 2007, the Commission has continued the prohibition, each time concluding upon review of the video distribution market that the prohibition remained necessary to preserve and protect competition and diversity in that market.[5] In 2007, the Commission

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[3] 47 U.S.C. § 548(c)(2)(D). Exclusive contracts between a cable operator and an affiliated programmer regarding terrestrially-delivered programming may also be prohibited under Section 628(b), 47 U.S.C. § 548(b). *See The Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010).

[4] 47 U.S.C. § 548(c)(5).

[5] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124 (2002); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order, 22 FCC Rcd 17791 (2007) (*2007 Extension Order*).

engaged in a five-part analysis to reach its conclusion.[6] First, the Commission confirmed its view that the appropriate standard for its review was that the prohibition would continue to be "necessary" if the Commission found that in the *absence* of the prohibition competition and diversity in the distribution of video programming would not be preserved and protected. Second, the Commission reviewed changes in the video programming distribution marketplace since its last review in 2002. Third, the Commission evaluated whether in light of those changes cable-affiliated programmers of satellite-delivered programming had the ability and incentive to favor their affiliated cable operators over non-affiliated MVPDs in the absence of the prohibition such that competition and diversity in video programming distribution would not be protected and preserved, and the Commission determined such ability and incentive existed. Fourth, the Commission assessed certain proposals to narrow or expand the scope of the prohibition and concluded neither was appropriate. Fifth, the Commission considered the appropriate length for an extension of the prohibition and selected five years.

Certain cable operators appealed the Commission's *2007 Extension Order*, but the U.S. Court of Appeals for the District of Columbia fully affirmed the Commission's *Order*. The court held that (1) the Commission's standard of review and interpretation of the term "necessary" was permissible; (2) the Commission's decision to extend the prohibition was appropriately based on the Commission's predictive judgment and technical analysis of the MVPD market; and (3) the Commission's decision not to narrow the prohibition was reasonable.[7]

Through the current *Notice*, the Commission initiates its review as to whether the exclusive contracts prohibition, currently set to expire on October 5, 2012, should be eliminated, modified, or continued in full effect. Congress, in instituting the prohibition in the first place,

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[6] *Id.* at 17800 ¶ 12.

[7] *Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) (*Cablevision I*).

intended to remedy the potential discrimination that is likely to occur if cable TV operators are permitted to enter into exclusive contracts with affiliated satellite-programmers.[8] Congress wanted to ensure that sufficient programming existed so that viable competition would be "preserved and protected." Congress enacted the exclusive contracts prohibition because of the increasing horizontal concentration of cable TV operators, as well as the increasing vertical integration between cable TV providers and programmers.[9] Congress specifically had a preference for promoting new entry by MVPDs over protecting the interests of existing multi-channel operators in order to create a competitive market that could effectively constrain MVPD pricing without regulation.[10] Although Congress recognized that there were some public interest advantages to exclusive contracts, on balance, these advantages were outweighed by the necessity of ensuring competitive entry and access to programming.[11]

II. THE COMMISSION SHOULD CONTINUE TO RELY ON ITS PREDICTIVE JUDGMENT TO DETERMINE WHETHER THE EXCLUSIVE CONTRACT BAN IS NECESSARY TO PRESERVE COMPETITION AND PROGRAM DIVERSITY.

Given the sunset provision, it is clear that Congress anticipated that the exclusive contracts prohibition would not exist indefinitely. At the same time, Congress recognized that the prohibition should only end when competition and diversity in the video distribution market would continue to thrive without the prohibition. And, Congress provided the Commission with the full authority to make that determination. Indeed, given the legislative history of this provision, it is incumbent on the Commission to use its agency expertise to carefully analyze and

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[8] *Cablevision I*, 597 F.3d at 1320-21 (Kavanaugh, J., dissenting).

[9] *Id.*

[10] *See, e.g., 2007 Extension Order,* 22 FCC Rcd at 17795-96 ¶ 5.

[11] *Notice* ¶¶ 8-9.

evaluate the MVPD marketplace and to extend the prohibition if necessary to meet congressional objectives. It is well within the Commission's statutory authority to again extend the prohibition, particularly because the reasons for creation of the prohibition, and the reasons why the prohibition has been extended in the past, continue to exist in the current marketplace.

The Commission should continue to rely on its existing interpretation of the statutory standard of review to determine whether the exclusive contract prohibition is "necessary" to preserve competition and program diversity in the video distribution marketplace. If, "in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected," the Commission should find that the exclusive contracts prohibition remains "necessary" under the statute.[12] Given that a federal appeals court has specifically upheld the Commission's interpretation of its statutory standard of review, the Commission should continue to apply it in implementing the statute.

III. THE VIDEO MARKETPLACE HAS BEEN CHANGING, BUT AS TO ALL MATERIAL FACTORS, REMAINS STRIKINGLY SIMILAR TO THE MARKET THAT EXISTED IN 2007.

Although the video marketplace has seen noteworthy changes in the last five years, it has not changed significantly with respect to the factors most important to the Commission and the court in determining whether the prohibition should be extended. Five years ago, the Commission recognized that cable operator subscribership as a percentage of overall MVPD subscribership has decreased, but still found that other aspects of the market reflected that large, vertically-integrated cable operators continued to dominate the video distribution market. In turn, the Commission found that cable operators and their affiliated satellite-delivered programming vendors retain the ability and incentive to enter into exclusive contracts that would

[12] *2007 Extension Order,* 22 FCC Rcd at 17800-01 ¶ 13.

harm competition and diversity in video programming distribution, such that a full extension of the exclusive contracts prohibition was warranted. Today, cable operator subscribership as a percentage of overall MVPD subscribership has again decreased, but also four of the five largest cable operators based on subscribership hold ownership interests in satellite-delivered national programming networks, including six of the top 20 national networks, and in more than half of all regional sports networks (RSNs).[13] These national video distribution market characteristics are remarkably similar to the circumstances that existed in 2007 when the Commission concluded that it should extend the ban another five years.

A. The Commission Must Consider The Impact Of The Largest Cable Operator's Vertical Integration With Satellite-Delivered Programming Vendors In Its Evaluation Of The Prohibition.

The Commission has asked whether in light of conditions in place with respect to Comcast-controlled programming as a result of the joint venture between Comcast and NBC Universal, Inc. (NBCU), such programming should be excluded from its evaluation of the prohibition.[14] The Commission should not disregard Comcast-affiliated programming in conducting this analysis. First, Comcast's acquisition of NBCU has altered the national landscape of cable-affiliated, satellite-delivered programming, and cannot simply be ignored in evaluating the state of the MVPD marketplace. In 2011, of the top twenty satellite-delivered, national programming networks as ranked by average prime time ratings, there were seven that

[13] *Notice* at Appendix A and Appendix A, note 21, Appendix B, Table 1 and note 16 and Table 2, Appendix C, Tables 1 and 2). The top five cable operators are Comcast, TWC, Cox, Charter and Cablevision. Only Charter is not affiliated with any satellite-delivered programming vendors. Although Time Warner Cable, the second largest cable TV operator by numbers of subscribers, has divested a number of its affiliated programmers, it continues to have extensive RSNs, and is concentrated with clustered systems together with the other four largest cable TV operators.

[14] *Notice* ¶ 35.

are cable-affiliated.[15] But, of the seven, six are now affiliated with Comcast, the largest cable company by number of subscribers in the country. This new concentration of cable-affiliated must-have programming should absolutely be considered in the Commission's evaluation of the nationwide state of competition in the video distribution market.

Second, the Commission has already recognized that this vertical alignment if left unchecked affords Comcast the ability and incentive to withhold its affiliated programming from MVPD competitors.[16] In turn, the Commission implemented measures to limit Comcast's ability to use its vertical power to withhold Comcast-controlled programming. It should be noted that the Commission has acknowledged that not all Comcast-affiliated programming may be subject to the *Comcast/NBCU Merger Order* conditions.[17] Instead, the Commission has interpreted that only Comcast-controlled networks are necessarily subject to those conditions. Thus, while Comcast will continue to be subject to certain conditions that limit Comcast's ability to withhold Comcast-controlled affiliated NBCU programming even if the prohibition on exclusive contracts sunsets, other Comcast-affiliated programming likely will be available for exclusive arrangements if the prohibition sunsets. Comcast will have the incentive, and quite possibly the ability, to withhold that latter programming from MVPD competitors. Additionally, the *Comcast/NBCU Merger Order* conditions are intended to terminate January 20, 2018 unless the Commission determines that it is in the public interest to terminate those obligations sooner.[18] Given the time limit on these conditions, the Commission's analysis of whether to lift the

[15] *Notice* at Appendix B.

[16] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4254-59 ¶¶ 36-47 (2011) (*Comcast/NBCU Merger Order*).

[17] *Notice* at note 91.

[18] *Comcast/NBCU Merger Order*, 26 FCC Rcd at 4353 ¶ 286 and its Appendix A, Section XX and note 11.

exclusive contracts prohibition for all subject MVPDs must evaluate the potential impact of the Comcast/NBCU vertical consolidation on the national video market in the absence of those conditions.

B. As In 2007, The Percentage Decrease In Overall Cable Subscribership Does Not Justify Sunsetting The Prohibition.

One noteworthy change in the last five years is that wireline-based video competition has increased.[19] And, nationally, the four largest cable operators are serving about nine percent fewer subscribers than they did in 2007.[20] But, these changes are simply not enough to justify eliminating the exclusive contracts prohibition. Even with these changes, cable operators and their affiliated satellite-delivered programming vendors retain the ability and incentive to enter into exclusive contracts that would harm competition and diversity in video programming distribution.

The Commission's data reflects that since the 2007 review the cable operators' overall share of MVPD subscribers has decreased from 67% to 58.5% -- a decrease of 8.5%.[21] But, it is interesting to note that in the similar period between the 2002 and 2007 review, cable operator MVPD subscribership changed from 78.1 % to 67% -- a decrease of 11%. Thus, five years ago the Commission declined to alter the prohibition in any manner, when there was a *larger* decrease in the percentage of cable operator MVPD subscribership then the Commission has before it now. Further, while the percentage of MVPD subscribership has grown for both DBS providers and wireline providers in the last five years -- to 33.9% and 7.6% respectively, the fact remains that just the four largest cable operators still command the largest percentage of MVPD

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[19] *Notice* at Appendix A.

[20] *Id.*

[21] *Id.*

subscribers at 43.8%.[22] In fact, just the four largest *vertically-integrated* cable operators still have a dominant percentage of MVPD subscribers at 42.7% -- more than the 41.5% for the DBS and wireline providers combined.[23] While this data reflects that DBS and wireline providers are increasing their presence as a competitive alternative to cable providers on a national scale, it also reflects that just the top five cable operators remain a dominant MVPD presence nationwide. Certainly, in the markets where CenturyLink has entered or is planning to enter as an MVPD, cable operators remain the dominant video providers.[24] This continued dominance of cable operators, and particularly vertically-integrated cable operators strongly weighs in favor of retaining the exclusive contracts prohibition.

C. As In 2007, The Continued Dominance Of Vertically-Integrated Cable Operators Compels Retention Of The Prohibition.

Another noteworthy event during the last five years is the separation of Time Warner and Time Warner Cable which resulted in Time Warner's programming networks no longer being affiliated with Time Warner Cable.[25] While this may have temporarily resulted in a reduction of cable-affiliated, satellite-delivered national programming networks, as a net effect over the last five years, particularly given the Comcast/NBCU transaction, there has been no significant change in the number of satellite-delivered national programming networks that are cable-

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[22] *Id.*

[23] *Id.*

[24] For example, in Las Vegas, in 2011 Cox had approximately 63% of the marketshare. SNL Kagan Special Report, U.S. Multichannel Subscriber Update and Geographic Analysis (2012). SNL Kagan attributes Cox's dominant marketshare in Las Vegas to the lack of telco video competition. *Id.* CenturyLink commercially launched its Prism™ service in Las Vegas in June 2011. CenturyLink estimates that it has obtained about 3% market penetration since the launch.

[25] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Time Warner Inc., and its subsidiaries, Assignor/Transferor To Time Warner Cable Inc., and its subsidiaries, Assignee/Transferee,* Memorandum Opinion and Order, 24 FCC Rcd 879 (2009); *Notice* ¶ 18.

affiliated. As the Commission's data reflects, the total number of such networks was 116 at the 2007 review and 115 in 2011.[26] Additionally, for the same period, the data reflects that the number of Top 20 satellite-delivered national programming networks (as ranked by subscribership) that are cable-affiliated has increased from 6 to 7, the number of Top 20 satellite-delivered national programming networks (as ranked by average prime time rankings) that are cable-affiliated has remained at 7, and the number of cable operators that own programming has increased from 6 to 7.[27] In sum, this data reflects that there has been no net significant change in the marketplace with respect to the extent of satellite-delivered, cable-affiliated national programming networks that would justify sunsetting the exclusive contracts prohibition.

Still further, since the 2007 review there has been a noticeable increase in the total number of regional sport networks, from 39 to 109, and in the number of cable-affiliated RSNs, from 18 to 57.[28] Similarly, the percentage of cable-affiliated RSNs has increased from 46% to 52.3%. These increases in cable-affiliated regional sports networks, not only do not justify sunsetting the exclusive contracts prohibition, but, in fact, affirmatively support its full retention. Whether cable operators deliver this programming via satellite or terrestrially, they have the incentive and -- absent prohibitions -- the ability to withhold this highly sought after programming from competitive MVPDs.[29]

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[26] *Notice* at Appendix B, Table 1. The Commission's data reflects that these numbers correspond to a drop in the percentage of such cable-affiliated networks relative to all satellite-delivered, national programming networks of 22% to 14.4%. The latter percentage, however, is based on an estimate of the total number of satellite-delivered, national programming networks, leaving the validity of the 14.4% calculation less certain.

[27] *Notice* at Appendix B, Table 1.

[28] *Notice* at Appendix C, Table 1.

[29] The Commission has previously recognized a cable operator's incentive to withhold RSN programming from competitive MVPDs as evidenced by their prior exploitation of the terrestrial loophole. *See, e.g.*, *2007 Extension Order*, 22 FCC Rcd at 17827 ¶ 51.

Because of the continued dominance of cable TV providers, the Commission has continued to enact competitive safeguards in other recent proceedings to prevent cable TV companies from destroying MVPD competition. Thus, in recent merger proceedings, after careful analysis of the potential effect of the mergers on competition in the MVPD market, the Commission implemented substantial conditions in order to preserve access to vertically-integrated programming for non-affiliated MVPDs.[30] Additionally, the Commission recently expanded its program access complaint procedures to preserve MVPD access to terrestrially-delivered programming and protect competition in the video distribution market.[31] Still further, the Commission has prohibited exclusive contracts for video service by cable operators and other MVPDs subject to section 628 of the Communications Act in multi-tenant dwelling units that prevent MVPD access to the building and in turn its residents.[32] These Commission decisions consistently seek to protect and promote competition in the MVPD market for the ultimate benefit of MVPD customers. In line with those decisions, the Commission should recognize that while competition in the MVPD market is growing, it remains fragile. If the Commission acts

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[30] *See, e.g., Comcast/NBCU Merger Order*, 26 FCC Rcd at 4250-59 ¶¶ 28-48 and its attached Appendix A. *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, News Corporation. and The DIRECTV Group, Inc., Transferors, to Liberty Media Corporation., Transferee,* Memorandum Opinion and Order, 23 FCC Rcd 3265, 3280-88 ¶¶ 28-50, Appendix B (2008) (*Liberty Media Order*); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.,* Memorandum Opinion and Order, 21 FCC Rcd 8203, 8234-84 ¶¶ 61-180 (2006).

[31] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* First Report and Order, 25 FCC Rcd 746, 761-76 ¶¶ 25-40, 777-88 ¶¶ 46-61 (2010) (*2010 Program Access Order*), *affirmed in part and vacated in part sub nom. Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011).

[32] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20244-47 ¶¶ 17-23, 30 (2007), *rev. den., Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

too soon to remove the protections of the exclusive contracts prohibition, all of the Commission's efforts to encourage competition and diversity of programming distribution will be severely undermined. Ultimately, from the comparison of the MVPD marketplace as reviewed in 2007 with current MVPD marketplace only one conclusion is possible: the MVPD marketplace factors that the Commission determined justified the extension of the prohibition in 2007 continue to exist today and again justify a similar extension.

IV. CABLE-AFFILIATED SATELLITE-DELIVERED PROGRAMMING VENDORS CONTINUE TO HAVE THE ABILITY AND INCENTIVE TO FAVOR AFFILIATED CABLE OPERATORS OVER OTHER MVPDS.

In light of the MVPD marketplace reflected above, cable-affiliated programmers have the ability and incentive to favor their affiliated cable operators absent the exclusive contract ban. This ability and incentive is no different from the incentive that existed at the time of the *2007 Extension Order*. In 2007 the Commission concluded that affiliated programmers had the ability and incentive to discriminate in favor of their cable TV affiliates especially where the cable operators' large size and ability to deliver "eye-balls" to the programmer was significantly greater than competitor MVPDs. The Commission noted that certain trends "increase [cable TV operator] incentive to withhold programming, such as the increase in horizontal consolidation of the cable industry, the increase in cable clustering, and the recent emergence of new competitors."[33] The Commission found that these trends outweighed the decrease in cable operator national subscribership levels that might have supported an alternative view at the time.[34]

As in 2007, cable-affiliated programmers today have the ability to favor their affiliated cable operators absent the ban. This is particularly true for certain of the most popular cable

[33] *2007 Extension Order*, 22 FCC Rcd at 17810 ¶ 29.

[34] *Id.*

programming that new MVPDs need to remain viable competitors to cable TV operators. As the Commission stated in 2007, it is not the sheer number of available satellite-based cable TV programming that should govern an evaluation of incentives, but rather it is the customer demand for, *e.g.*, popularity, of the affiliate-programming that matters most to competitive viability.[35] The Commission recognized that not all channels are fungible, and that in a subscriber's mind, they believe that access to a number of networks is essential to inform their selection of a video provider.[36] If cable-affiliated programmers enter into exclusive arrangements for the distribution of highly desirable or important niche programming, they can seriously harm and potentially eliminate smaller MVPDs in the distribution marketplace.

The effects of prolonged blackouts as a result of retransmission consent disputes can provide a glimpse of the potential impact of exclusive programming contracts that would withhold desirable programming from a smaller MVPD. In the last quarter of 2010, when DISH temporarily lost 19 regional sports networks and some cable channels in its retransmission dispute with News Corp., it also experienced a 156,000 subscriber loss for the period -- the worst subscriber loss in the company's history.[37] One source has stated that a blackout from a retransmission consent dispute that lasts several months can cost the MVPD as much as 10% of its subscribers, who leave for another MVPD that is carrying the highly viewed local station at issue.[38] The effects of an exclusive contract arrangement that withheld similar highly-desired

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[35] *Id.* at 17814-15 ¶ 37.

[36] *Id.* at 17816 ¶ 38.

[37] Katy Bachman, LIN, DISH Fight a Godsend for Retrans Reform Advocates?, Mar. 2, 2011, http://www.adweek.com/news/television/lin-dish-fight-godsend-retrans-reform-advocates-125885.

[38] Robert Marich, Broadcast's $1 Billion Pot of Gold, With Jan. 1 deadline approaching, Cable Retransmission Deals could be lucrative -- or contentious, Broadcasting & Cable, 7/6/2008.

programming from a competing MVPD indefinitely could simply be fatal to the MVPD's success in the impacted markets.

Exclusive contracts by dominant, vertically integrated MVPDs, can exact damage to MVPD competitors far beyond what one might expect from nationwide horizontal market share. By definition, MVPDs offer multiple channels of video programming. These video packages cater to customers' desire for both a diversity of programming but also specific, key programming -- some of which is highly desired by many (most popular nationally) and some of which is highly desired on a more localized basis. If competitive MVPDs are unable to acquire this key programming because the programmer has an exclusive contract with an affiliated MVPD, this will prevent the competing MVPD from being a viable competitor.

Affiliated programmers continue to have an incentive to favor their cable TV affiliates over MVPD rivals. As in 2007, the current MVPD marketplace still enables affiliated programmers to be motivated to maximize company profits by keeping cable TV subscribers and advertising revenues in the company, by way of an exclusive contract between the programmer and the affiliated cable operator, as opposed to also utilizing a rival MVPD's -- and especially a smaller rival MVPD's -- distribution network.[39] A small entrant like CenturyLink cannot begin to counter such an incentive until it has a sufficient market presence to alter this profit-maximizing motive. Such market presence is years away. The Commission summed it up this way in 2007: "Thus, particularly where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the

[39] *2007 Extension Order*, 22 FCC Rcd at 17827 ¶ 51.

revenues foregone by pursuing a withholding strategy . . . ." even when MVPD competitors held a third of the national market.[40] This remains true today.

V. THE COMMISSION SHOULD NOT RELAX THE EXCLUSIVE CONTRACTS PROHIBITION, BUT RETAIN IT IN ITS CURRENT FORM.

The Commission in 2007 considered whether the ban on exclusive contracts should be extended, recognizing that it was possibly both under- and over-inclusive in terms of the anticompetitive conduct it addressed. Faced with those circumstances, however, the Commission determined that the full prohibition was necessary to ensure MVPD competitive viability.[41] The Commission should again conclude that retention of the full prohibition is necessary to protect and preserve competition and diversity in the video distribution market.

A. Retention Of The Full Prohibition Is Necessary To Preserve The Competitive Presence Of Smaller And New Entrant MVPDs.

The competitive viability of smaller and new entrant MVPDs, such as CenturyLink, is likely to be significantly hampered without the full prohibition on exclusive contracts. Even though competition from MVPDs has generally continued to increase, cable operators remain the dominant video distributor in most markets.

In today's MVPD market, a new entrant cannot hope to compete with the entrenched cable TV provider if it cannot offer certain programming that subscribers have come to expect from a video provider. At the same time, smaller MVPDs simply offer fewer "eyeballs" compared to larger MVPDs, and thus are at greater risk that a cable-affiliated programmer would either decline to provide that programming to the MVPD or would demand terms and/or prices

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[40] *Id.* at 17827-29 ¶ 52.

[41] *Id.* at 17838-39 ¶ 66.

that were more onerous than those provided to larger MVPDs for the same programming.[42] To be a viable competitor in the MVPD market, an MVPD needs at least two attributes: (1) a sufficient range of customer-desired programming and (2) a reasonably comparable price point (but probably lower) for the similar services of the incumbent video provider. But if the smaller MVPD is unable to acquire the first attribute, the second is necessarily unobtainable. Thus, the ability to have a wide range of familiar and popular programming from over-the-air TV stations, pay channels, popular cable programs (both those which have high prime time ratings as well as significant niche audiences), is essential. Subscribers are most likely to select the MVPD that gives them the best selection of the programming they want at a reasonable price. Indeed, the Commission in 2007 concluded that "access to vertically integrated programming is essential for new entrants in the video marketplace to compete effectively."[43] This conclusion is no less applicable today than it was five years ago.

This adverse impact to competition is most acutely implicated by the need for access to "must have" programming. The Commission has already recognized that access to RSNs and presumptively "must have" programming is necessary when it established special protections regarding MVPD access to such RSNs.[44] The need for such programming, however, is not limited to RSNs, but also exists with respect to other popular programming, such as over-the-air

[42] CenturyLink and other MVPDs obtain a substantial portion of their national programming through the National Cable Television Cooperative (NCTC). NCTC negotiates on behalf of its members to obtain better pricing than each member might be able to negotiate individually. But, it is not at all clear that this approach to obtaining programming would be sufficient to deter a cable-affiliated programmer from withholding the programming in the first instance. Furthermore, it does not address the other programming negotiations that CenturyLink handles directly with programmers including for locally and regionally-available sports programming.

[43] *2007 Extension Order*, 22 FCC Rcd at 17819-20 ¶ 41.

[44] *2010 Program Access Order,* 25 FCC Rcd at 782-83 ¶¶ 52-53.

broadcasting stations, popular cable programming such as news channels, USA Network, Discovery and the Travel Channel.

Smaller MVPDs like CenturyLink are not likely to own any programming, and are unlikely to do so in the future. Even if the exclusive contract ban were to sunset, this situation is not likely to change, and it certainly will not change with respect to must-have programming due to the price tag, because small MVPD entrants simply do not have the financial ability or scale to launch such programming successfully. Sunsetting the exclusive contract prohibition is likely to drive more consolidation in the market, further harming smaller MVPDs and eviscerating video subscribers' MVPD options.

Access to programming is essential to enabling smaller MVPDs' continued investment in expanding the distribution markets they serve. Because the same network is used to provide broadband and video, the inability to commit adequate investment to developing markets could impact adversely not only video competition, but also broadband competition, a likely detrimental consequence that the Commission has already recognized in the program access area.[45] Therefore, it is likely that eliminating the exclusive contracts prohibition could have an adverse ripple effect in the broadband market as well, a consequence that the FCC would find repugnant to its public policy goals.[46]

As such, the Commission should reject arguments to narrow the exclusive contracts prohibition at this time.[47] In 2007, in the face of arguments that the exclusive contract ban

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[45] *Id.* at 771-72 ¶ 36.

[46] Federal Communications Commission, Connecting America: The National Broadband Plan, GN Docket No. 09-51 (rel. Mar. 16, 2010) (National Broadband Plan).

[47] Although promotion of program diversity is also a goal of the provisions regarding exclusive contracts, the Commission has recently concluded that there is little reason to believe that these program access provisions adversely affect the diversity of programming. *2010 Program Access Order,* 25 FCC Rcd at 773-74 ¶ 38. The sheer increase in the number of programs outlined in

should be narrowed to exclude new or unpopular programming, programming offered by small cable TV operators, or where an MVPD had not been in the market for more than five years, the Commission continued the nationwide ban.[48] Because Congress in enacting the statutory ban made no distinctions based on the type of operator or programming, the Commission should today refuse to narrow the exclusive contract ban, particularly at this critical stage in the development of MVPD competition.

B. The Existing Complaint Procedures Established Under Section 628(b) For Access To Affiliate-Programming Are Insufficient To Take The Place Of The Exclusive Contract Ban.

The *Notice* points out that the Commission has established complaint procedures that allow an MVPD to seek access to programming from a cable TV-affiliated programmer pursuant to Section 628(b). The Commission noted that it also has created a rebuttable presumption that such programmers should provide competing MVPDs access to covered RSNs, finding that such programming is "must-have." The Commission seeks information about whether such complaint procedures can effectively replace the exclusive contract ban.[49]

CenturyLink appreciates the Commission's creation of such procedures. Notwithstanding, these procedures are burdensome, costly, and time-consuming to employ, and therefore are of limited use to a smaller MVPD entrant. First, it should be noted that these procedures have only been available for a relatively short period of time. Therefore, it is unclear whether they will actually achieve sufficient access to programming to preserve and protect video competition. The exclusive contract ban, however, has been in place for a much longer

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the *Notice*, demonstrate that the existing rules are not affecting the diversity of programming. *Notice,* Appendix B, Table 1.

[48] *2007 Extension Order*, 22 FCC Rcd at 17842 ¶ 74.

[49] *Notice* ¶¶ 48-49.

period of time, and has been effective in achieving MVPD access to applicable programming. Second, the few cases that have been brought under the new complaint provisions amply demonstrate the burdensomeness of the procedures, particularly when prosecuted against the deep-pocket, entrenched cable TV providers.

For instance, AT&T and Verizon, which are both nascent video providers, but substantially larger and better heeled than CenturyLink, filed complaints against Cablevision for access to the Madison Square Garden Channel, an RSN. These new entrants have so far been successful, but only after years of litigation and court appeals which have entailed substantial sums of money and other burdens to prove their cases, even though a rebuttable presumption applied to the network at issue.[50] And these complaints only involved a single channel in one regional market. Smaller providers simply do not have the capital to both prosecute such actions and to build out their networks at the same time. A case-by-case process could easily damage a small, competitive MVPD in a market that could preclude it from gaining a competitively sustainable position. Because an entrenched cable TV operator has the incentive and ability to run up a rival MVPD's costs, a protracted complaint process is ineffective in the short run to guarantee access to necessary programming.

Furthermore, a bright line rule that bans exclusive contracts is a much more certain benefit to new providers. Cable TV providers and affiliated programmers are much less likely to prevent access to a competitive MVPD under an outright ban because they know they will ultimately lose. The case-by-case, complaint-based procedures are simply inadequate to

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[50] *Verizon Tel. Cos., et al. v. Madison Square Garden, L.P., et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011), *appeal pending sub nom. Cablevision Sys. Corp.* v. FCC, No. 11-4780 (2d Cir.); *AT&T Servs. Inc. et al. v. Madison Square Garden, L.P., et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011), *appeal pending sub nom. Cablevision Sys. Corp. v. FCC*, No. 11-4780 (2d Cir.).

effectively protect new entrants' access to needed programming at this stage in the development of video delivery competition.

VI. THE COMMISSION SHOULD EXTEND THE BAN FOR FIVE MORE YEARS.

CenturyLink agrees with the D.C. Circuit's admonition that Congress expected the exclusive contracts prohibition to eventually sunset.[51] But, it is also clear that Congress expected the Commission to extend the prohibition if market conditions warranted that result. In providing for the sunset, Congress seemingly expressed a hope that its new exclusive contracts prohibition would foster a new competitive era for video programming delivery. Once that new era existed, Congress recognized that exclusive contracts could benefit consumers by promoting programmers' interest in creating new and diverse types of programming. While Congress anticipated a highly competitive video distribution market that would enable the prohibition to sunset in ten years, it was also wise enough to know that its hopes might not pan out quickly, and thus gave the Commission the power to extend the prohibition to continue to promote MVPD competition as needed. The Commission should ask itself whether Congress, if it were enacting the provision today, would include the prohibition. CenturyLink submits that it would.

The Commission should recognize that the efforts involved in program development, programming contracts, and the life cycle of popular programming networks, extend over a number of years. Therefore, the nature of competition in the marketplace will not suddenly change in a year or two. In addition, there is a serious need for certainty about the rules of the road and what products MVPDs will be able to provide. Growing a subscriber base takes years to accomplish, with concerted efforts to gain the trust and interest of the subscribers. On the other hand, if popular programming is withdrawn from new entrants, subscribership at smaller

[51] *Cablevision I*, 597 F.3d at 1314.

systems can plummet rapidly. If the time period for the exclusive contract ban is too short, or is uncertain, a new entrant may not be able to attract sufficient capital to expand its entry into multiple markets, particularly outside of the top urban markets. Given all these factors, CenturyLink submits that a five-year extension is reasonable, and will further give the market a chance to become truly competitive.

VII. CONCLUSION.

For the foregoing reasons, CenturyLink urges the Commission to fully extend the exclusive contracts prohibition for five years. The prohibition continues to be necessary to enable the development of effective video competition, while maintaining the diversity of existing programming, as smaller MVPDs build their systems and achieve a critical mass of subscribers. Without the programming that has been and could be subject to such exclusive contracts, the development of MVPD competition will be damaged, contrary to congressional and Commission goals, and to the ultimate detriment of video subscribers throughout the country.

Respectfully submitted,

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