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

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| In the Matter of | ) | |
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| 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 |

# REPLY COMMENTS OF NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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**REPLY COMMENTS OF**
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The National Cable & Telecommunications Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

## INTRODUCTION AND SUMMARY

The comments filed in the initial round confirm what is plain to the naked eye. Competition among multichannel video programming distributors ("MVPDs") is vigorous and intense, surpassing what Congress could have expected or hoped for in 1992. And vertical integration of cable programming networks and cable systems is a shadow of what existed two decades ago. Much of this transformation of the video marketplace had already occurred when the Commission last considered, five years ago, whether to allow the rules to sunset, prompting the United States Court of Appeals for the D.C. Circuit to "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."[1] In fact, as the record shows, the trends *have* continued during the last five years, and, as the United States Court of Appeals for the D.C. Circuit expected, the time has come to sunset the ban.

Not surprisingly, the beneficiaries of the program access rules – both well-established DBS and telephone company competitors and newer entrants in the video marketplace – urge the Commission to extend the exclusivity ban once again. At this point, 20 years after enactment of Section 628, their arguments cannot be squared with Congress's clear "intention that the exclusive contract prohibition will eventually sunset" – an intention that the D.C. Circuit expected the Commission to "weigh heavily" in this proceeding.[2] It is more than a little late in the game for sturdy and established competitors like DIRECTV, Dish Network, Verizon, and AT&T to be portraying themselves as frail new entrants who need access to cable-owned programming in order to gain a foothold and ensure that competition takes hold in the MVPD marketplace. Meanwhile, if the arrival of new entrants required extension of the prohibition until they, too, achieved the competitive foothold that the established DBS and telephone company providers have already attained, then the ban would never expire so long as there were new entrants into the highly competitive video marketplace. The issue is not whether particular competitors would benefit from the ban, but whether competition is now vibrant, which it plainly is.

To avoid the obvious implications of the changes in the competitive marketplace, the proponents of yet another extension of the sunset attempt to move the goalposts in exactly that manner. Instead of asking whether marketplace competition is sufficiently established so that

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[1] *Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010).

[2] *Id.*

Section 628(c)'s blanket prohibition on exclusive contracts is no longer even arguably "necessary to preserve and protect competition and diversity in the distribution of programming,"[3] they try to shift the focus to whether vertically integrated cable operators and program networks might still have an incentive to enter into exclusive contracts and whether such contracts might disadvantage competitors and give cable operators a competitive edge. But when there are strong, established competitors in the marketplace, attempting to gain a competitive advantage through product differentiation – including the development and acquisition of unique and attractive programming – is the essence of competition.

Indeed, most of the parties who seek to extend the ban as to cable operators, routinely themselves employ exclusivity in order to achieve differentiation. There is no reason to prohibit these parties or all competitors from competing in this manner, and there is especially no reason for barring only one set of competitors – cable operators – from the use of such a competitive approach. And the statute, with its explicit sunset provision, was not intended to do so. It is clear that proponents of the ban seek to have it extended in order to reduce competition, not to enhance it.

## I. THE RECORD DEMONSTRATES THAT MARKETPLACE DEVELOPMENTS SINCE 1992 REQUIRE SUNSET OF THE PROHIBITION.

Numerous commenters have submitted evidence confirming the fierce, dynamic, and sturdy competition that NCTA documented in its initial comments. For example, Comcast points to the fact that "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."[4] Time Warner Cable notes that "satellite providers

3 47 U.S.C. § 548(c)(5).

4 Comcast Comments at 7 (citation omitted); *see also* NCTA Comments at 2; Cablevision Comments at 4; Madison Square Garden Comments at 7.

now serve 34 percent of all MVPD subscribers, telco providers are rapidly gaining market share, and Internet-based distributors play a significant role in the broader video distribution marketplace."[5] And Cablevision provides data showing the "continued drop in the number and percentage of vertically-integrated cable networks" and the "ample supply of video content from non-affiliated cable programmers."[6]

Even comments filed by parties that support maintaining the prohibition recognize not only the transformative competitive developments that have occurred since 1992, but also the continuation of the competitive trends in the last five years.[7] AT&T, DIRECTV, and Verizon each introduce their comments by acknowledging these changes. According to AT&T, "the MVPD market undoubtedly has changed [since] 2007,"[8] DIRECTV states that "[m]uch has changed in the market for delivery of video programming since the exclusive contract prohibition was enacted by Congress in 1992, *and even since it was last extended by the Commission in 2007*,"[9] and Verizon explains that "[t]o be sure, the video marketplace has changed substantially over the last decade" and notes that "as a general rule, regulations should recede when competition develops."[10] Other proponents of the prohibition likewise reference the

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5 Time Warner Cable ("TWC") Comments at 16.

6 Cablevision Comments at 3.

7 *See* Independent Telephone & Telecommunications Alliance ("ITTA") Comments at 3 ("[C]ompetition in the video distribution market has increased since the exclusive contract prohibition was introduced in 1992."); United States Telecom Association ("US Telecom") Comments at 2 ("[M]uch has changed in the MVPD marketplace in the years since the initial passage of the 1992 Cable Act"); OPASTCO/NTCA Comments at 9-10 (noting the "myriad changes in the marketplace" since 1993).

8 AT&T Comments at 1.

9 DIRECTV Comments at 1 (emphasis added).

10 Verizon Comments at 1.

substantial changes in the competitive landscape, and, in particular, the competitive impact and effect that telco video and DBS providers have had on cable operators.[11]

In the short period since the comments were filed in this proceeding, new developments continue to track the firmly established trends in competition among MVPDs that require the Commission to finally allow the exclusivity prohibition to sunset. For example, updated subscribership data rank Verizon as the sixth largest MVPD and indicate that AT&T is also quickly moving up the subscribership number ranks.[12] If existing trends continue, Verizon and AT&T may soon rank as the fifth and sixth largest MVPDs – bypassing all but two of the traditional cable operators in subscribership count.[13]

While acknowledging the ever-increasing competition among MVPDs, some commenters attempt to show that vertical integration had not significantly changed since five years ago, when the Commission decided not to allow the rules to sunset. Even if this were true, it would hardly warrant a further extension of the sunset. By five years ago, vertical integration had already diminished to a fraction of what existed in 1992. When the D.C. Circuit signaled its expectation that the rules should be allowed to sunset if competitive trends continued, it certainly did not mean that there needed to be significant further disappearance of vertical integration to

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11 *See, e.g.*, Dish Network Comments at 4 (noting that "cable operators have less of a hold on the MVPD market today than they did five years ago"); CenturyLink Comments at 1 (noting the changes in the video marketplace in the last five years); CenturyLink Comments at 9 (noting the increase in wireline competition in the last five years); AT&T Comments at 21 (noting that DBS providers serve 33.9 percent of MVPD subscribers); US Telecom Comments at 3 (noting that "two of the top three MVPDs are DBS providers").

12 *See* NCTA, *Top 25 Multichannel Video Programming Distributors as of Mar. 2012, at* http://www.ncta.com/Stats/TopMSOs.aspx (last visited July 11, 2012).

13 *See* Tom Adams, *AT&T U-verse Closes In On Verizon FiOS in Battle for Telco TV Leadership*, IHS iSuppli, Mar. 12, 2012 (estimating that U-verse and FiOS will each have over 5 million video subscribers at the end of 2013), *at* http://www.isuppli.com/Media-Research/News/Pages/ATT-U-verse-Closes-in-on-Verizon-FiOS-in-Battle-for-Telco-TV-Leadership.aspx (last visited July 12, 2012).

Moreover, as many commenting parties point out, online video distributors are continually adding a multiplicity of new programming options to those that exist in the already competitive MVPD marketplace. *See, e.g.*, Cablevision Comments at 6; TWC Comments at 7; US Telecom Comments at 17; Interstate Communications, *et al.* Comments at 3; Verizon Comments at 1.

accompany any further erosion of cable operators' market shares. Indeed, in a competitive marketplace, exclusive arrangements between programmers and distributors, whether affiliated or not, can enhance competition, rather than reduce it, by leading to the creation of more programming choices, not fewer.

Nevertheless, cable operator/programmer vertical integration *has* continued to diminish to even lower levels since 2007. The recent announcement that Comcast will sell its interest in the A&E Television Networks to Hearst and Disney further diminishes the percentage of programming networks that are affiliated with a cable operator.[14] When the deal closes later this year, only 12.3% of programming networks will be affiliated with a cable operator.[15] At that time, the number of top-20 satellite-delivered, national programming networks that are cable-affiliated as ranked by subscribership will drop to just 4 of the Top 20 networks. When ranked by average prime time ratings, only 3 of the Top 20 networks will be cable-affiliated.

Thus, the transformation of the video marketplace has turned the *per se* prohibition on exclusive contracts into "an outmoded relic, premised on an early-1990s view of video programming distribution ill-suited to today's dramatically changed and vibrantly competitive marketplace."[16] Allowing the ban to sunset "will promote competition and programming diversity for the benefit of consumers."[17] As Discovery explained, "the 'imbalance of power'

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14 *See* Mike Farrell, *Disney, Hearst Agree to Buy AETN Stake for $3 Billion*, Multichannel News, July 10, 2012, *available at* http://www.broadcastingcable.com/article/486944-Disney_Hearst_Agree_to_Buy_AETN_Stake_for_3_Billion.php.

15 *See id.*; *see also In re Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413 (2012) at App. B, Table 1 (indicating that there are currently 115 satellite-delivered national programming networks that are cable-affiliated or 14.4% – after the closing of the deal, there will be 98 such networks or 12.3%).

16 TWC Comments at 10; *see also* Comcast Comments at 5 ("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.").

17 Discovery Comments at 4.

that the program access rules were designed to correct simply no longer exists."[18] It is clearly time for the Commission to allow the prohibition to sunset.

## II. PROPONENTS OF CONTINUATION OF THE PROHIBITION APPLY AN INCORRECT – AND IMPOSSIBLE – LEGAL STANDARD.

The proponents of extending the prohibition go to great lengths to prove that it may, in some circumstances, be profitable for some cable operators to be the exclusive providers of programming that they own. They argue that revenue that operators would obtain from the additional cable customers that such exclusive programming would attract would exceed the revenue that they would have obtained from selling the programming to competing MVPDs. But the mere fact that it may be profitable for some cable operators to become the exclusive providers of their own programming cannot be a sufficient basis for continuing the ban. If it were, the sunset provision of Section 628(c) would be senseless. Exclusive contracts would continue to be banned – but only so long as such contracts might actually exist!

As Congress specifically recognized, exclusive contracts can *promote* competition and often exist in highly competitive markets.[19] Therefore, the relevant question cannot be whether such contracts are profitable, or whether some cable operators have incentives to be exclusive providers of their programming, but whether banning such exclusivity is "necessary to preserve and protect competition and diversity in the distribution of video programming."[20] And here the proponents of continuing the ban stumble. Instead of showing that the vibrant head-to-head MVPD competition that has steadily established itself in the past two decades would be likely to decline or disappear if the exclusivity ban were sunsetted, the commenters argue only that

18 *Id.* at 2.

19 *See* S. Rep. No. 102-92, at 28 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161.

20 47 U.S.C. § 548(c)(5).

exclusivity may "disadvantage" cable's competitors,[21] and that it may disserve the public interest by enabling cable operators to charge higher prices.[22] But these claims provide no basis for delaying the sunset mandated by Congress.

First, consider the claim that exclusivity will "disadvantage" competitors. Such a claim, even if true, does not imply that an exclusivity ban is needed to "preserve and protect competition and diversity." The competitive process results in – indeed *relies on* – firms taking actions that give themselves competitive advantages and therefore disadvantage competitors. Such competitive strategies, when pursued by one firm, give rise to competitive responses from other firms. In the end, consumers benefit from unfettered, vigorous competition.

For example, in a vibrantly competitive marketplace, as explained above, a competitor seeks ways to differentiate its product and make it more attractive than its competitors' products. Such actions are taken precisely in order to gain a competitive advantage, and, correspondingly, to "disadvantage" competitors. Rather than prohibiting vigorous competitive strategies, these types of strategies are and should be encouraged because they benefit consumers, even as they "disadvantage" competitors.

An example of such competitive differentiation is the "business strategy" of DIRECTV, which, according to its website, is "to provide customers with the best video experience in the United States both inside and outside of the home by offering subscribers unique, differentiated and compelling programming," including "exclusive content and services."[23]

> For example, we offer content which is not offered by other MVPD providers such as NFL SUNDAY TICKET where subscribers can watch up to 14 games

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21 *See e.g.*, ITTA Comments at 3; DIRECTV Comments at i, 27.

22 *See*, *e.g.*, DIRECTV Comments at 32.

23 DIRECTV, *Business Strategy – DIRECTV U.S.*, *at* http://investor.directv.com/businessStrategy.cfm (last visited July 16, 2012).

> each week, most of which are offered in HD. We have also signed agreements to be the exclusive MVPD provider of NCAA® MEGA MARCH MADNESS®.[24]

Similarly, DIRECTV Latin America's "strategy focuses on leveraging [our] competitive advantages that differentiate our service offerings from those of our competitors."[25] To this end, DIRECTV notes that

> in most of the territories in which we operate we will be the only provider of television services where subscribers can see all of the 2010 FIFA World Cup™ games, and we are the only operator distributing all of the games in high definition. In some cases, we have exclusive rights to 2010 FIFA World Cup games. Similarly, Sky Brazil, PanAmericana and Sky Mexico have licensed exclusive rights through the 2011-2012 season to the Spanish soccer league, which in most countries is the second most popular soccer league, behind the local country leagues.[26]

To delay the sunset of the ban on exclusive contracts, the Commission would have to determine that the sunset would result in harm to competition, and thereby harm to consumers – not just that any particular company would find it more difficult or inconvenient to compete. Indeed, if the prohibition had to remain in effect to protect and insulate every potential new entrant from the strong competition that already exists in the MVPD marketplace, the sunset that Congress expected to occur ten years ago would *never* occur. Keeping that focus in mind, there is no reason to believe that lifting the ban would today have any adverse impact on competition and consumers.

When Congress required the Commission to prohibit, for ten years, exclusive contracts between cable-owned programming networks and cable operators unless they could be shown to be in the public interest, there were virtually no multichannel competitors to cable that could respond to such exclusivity with their own competitive efforts to differentiate their product to

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24 *Id.*

25 DIRECTV, *Business Strategy – DIRECTV LATIN AMERICA*, *at* http://investor.directv.com/businessStrategy.cfm#dtvLA (last visited July 16, 2012).

26 *Id.*

attract customers. The exclusivity ban was designed specifically to prevent cable operators from thwarting the birth and development of such competition. But with vibrant competition in place today, exclusivity and product differentiation, whether the exclusive programming is owned by the MVPD or is licensed from an unaffiliated network for distribution,[27] are likely to be legitimate *pro*-competitive tools that result in new, attractive choices for consumers – and that drive competitors to offer new and innovative services and options of their own. There is no longer any basis for an exclusivity ban that, in effect, presumes that exclusive contracts are *anti*-competitive – especially when the general provisions of Section 628(b) and the antitrust laws provide an opportunity for examining, on a case-by-case basis, whether any particular contract would harm competition and consumers.

The competitors who have successfully eroded cable's share of the MVPD marketplace argue as if they are incapable of coming up with their own competitive responses to exclusive programming on cable. It's true that in the 20 years since enactment of Section 628, neither the DBS companies nor the telephone companies have invested in, acquired, or created very much unique programming of their own – although they have created some.[28] But this cannot be because these large companies lack the resources to do so.

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[27] Nothing in the language or legislative history of Section 628 evidences any intention to extend that section's prohibitions to contracts between cable operators and *unaffiliated* networks. With the disappearance of the specific marketplace conditions that worried Congress in 1992 – the lack of MVPD competition and the large degree of ownership of cable program networks by cable operators – cable operators and their competitors alike should be able to compete using exclusive contracts regardless of whether the programming is or is not cable-owned.

[28] They have created some such programming. *See* Press Release, DIRECTV, *DIRECTV's The 101 Network Becomes The Audience Network On June 1* (May 16, 2011) (announcing the new name of DIRECTV's "exclusive programming" channel), *available at* http://www.directvpresscenter.com/press/index.php?p=666-directvs-the-101-network-becomes-the-au; Press Release, Verizon, *Verizon Launches FiOS1 Channels on Long Island and in Northern New Jersey; Verizon FiOS Brings Consumers an Exciting, New Source for Hyper-Local Content With News, Sports, Traffic, Weather and So Much More* (June 22, 2009) (announcing FiOS1 channels that "won't be found on cable TV"), *available at* http://newscenter.verizon.com/press-releases/verizon/2009/verizon-launches-fios1.html.

In any event, there are other ways for an MVPD to respond to the exclusive programming of its competitor. For example, an MVPD that chose not to invest in the development or acquisition of unique programming could charge a lower price to consumers. Indeed, it is likely pro-competitive and consumer-friendly to have at least one MVPD in a market pursuing such a low-price strategy.

In addition, over the years, cable, DBS and telephone companies have jockeyed for position by introducing new, unique, and in some cases exclusive innovations other than programming to differentiate their products and attract or retain customers. Innovative and interactive program guides, video on demand, digital video recording enhancements, and smart phone and tablet apps for selecting, recording, and viewing programming are among the diverse and constantly improving services and equipment that MVPDs have introduced as ways of competing with each other.[29]

In the end, the proponents of delaying the sunset have not demonstrated that the "disadvantage" to any particular competitors that may result from eliminating the prohibition will result in harm to competition and consumers. Competition requires that rivals take actions that disadvantage competitors, with the benefits accruing to consumers. And, rival MVPDs have already shown themselves to be capable of responding to the more vigorous competitive environment that would result from removing the ban.

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[29] *See, e.g.* Doug Aamoth, *DirecTV NFL Sunday Ticket Gets More Features, iPad Streaming*, TIME Techland, Aug. 2, 2010 (announcing exclusive NFL Sunday Ticket content streaming on the iPad), *available at* http://techland.time.com/2010/08/02/directv-nfl-sunday-ticket-gets-more-features-ipad-streaming/; Tanzina Vega, *With a Click of the Remote, Impulse Purchases,* N.Y. Times, Dec. 4, 2011, at B8 (announcing that Verizon customers may purchase televised products with their remote control); Press Release, AT&T, *AT&T Brings More Second-Screen Features, Content to U-verse Customers on iPhone, iPad & iPod Touch, and Online* (July 9, 2012) (announcing an app allowing AT&T customers to control their DVR), *available at* http://www.att.com/gen/press-room?pid=23064&cdvn=news&newsarticleid=34776&mapcode=mk-att-applications.

Second, consider the claim that prohibiting exclusivity results in lower prices, and so sunsetting the ban would allow cable companies to raise prices. If an MVPD is not able to purchase a network offering expensive sports programming, it also is, of course, not required to *pay* for that programming – and, therefore, it can charge a lower price to customers than if it carried the programming. While customers who highly value that network might be likely to choose the MVPD that carries it, others who value it less might be attracted to other MVPDs that charged less.

DIRECTV suggests that consumers would be better off if this product differentiation and price differential were eliminated by prohibiting exclusive contracts.[30] But it is hardly obvious that this would be the case. As economists Jeremy Bulow and Bruce Owen have explained, "where one firm offers an array of programming while another offers the same array plus some exclusives," consumers will benefit because "they would effectively have the option of whether or not to pay for the exclusives."[31] Prohibiting exclusivity may, by encouraging homogeneity among service offerings, sometimes promote competitive pricing of those homogeneous offerings. But it also effectively diminishes the ability to compete via product differentiation and it denies consumers the opportunity to choose between higher priced and lower priced services.

It is not generally the government's task to determine, in lieu of the marketplace, which form of competition best serves consumers. And, in any event, the Commission's task in determining whether to allow the exclusivity prohibition to sunset, is simply to determine

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[30] *See* DIRECTV Comments at 32.

[31] Jeremy I. Bulow & Bruce M. Owen, *Analysis of Competition and Consumer Welfare Issues in AT&T's Program Access and 628(b) Complaint Against Cablevision and Madison Square Garden* at 17, n.21 (citing Beggs and Klemperer) (attached to Cablevision/Madison Square Garden Answer to Program Access Complaint, *AT&T Services Inc. et al. v. Madison Square Garden et al.*, File No. CSR-8196-P (filed Sept. 17, 2009) at Exhibit 1).

whether the prohibition remains necessary to preserve and protect competition – not to determine how competition should manifest itself.

None of the proponents of extending the prohibition on exclusive contracts offer any explanation of why they would be incapable of responding effectively to exclusive programming with their own form of product or pricing differentiation, and, therefore, why the ban on such contracts is "necessary to preserve and protect" the vibrant competition that exists today. Nor do studies or data requests aimed at determining whether exclusive contracts between cable operators and their affiliated program networks would be profitable or whether particular programming is or is not "replicable" prove, on their own, that exclusive contracts between cable operators and affiliated networks are harmful to competition. Yet this is what the Commission must find in order to extend the sunset yet another time.

A *per se* ban on certain contractual arrangements, organizational forms, or business strategies makes sense if the banned behavior is very likely to have anti-competitive effect and *has no legitimate pro-competitive purpose*. In the absence of a finding that a *per se* ban meets this high standard, cases of suspected anti-competitive behavior should be dealt with on a case-by-case basis. For example, a ban on exclusivity arrangements may make sense if such arrangements would deny access to an essential input and result in vertical foreclosure, harming competition in downstream markets. Vertical foreclosure – the use of vertical integration to foreclose competition – exists more in theory, however, than in actual antitrust cases.[32] There are also few examples of "essential facilities" that have been found to be such critical inputs of

[32] For a theoretical discussion of the conditions under which vertical integration may lead to vertical foreclosure, *see* Michael Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q. J. Econ. 345 (1988); and Janusz Ordover, Steven Salop, & Garth Saloner, *Equilibrium Vertical Foreclosure*, 80 Am. Econ. Rev. 127 (1990). For a comprehensive survey of the economic literature that discusses also the efficiency rationales and procompetitive effects of vertical integration, *see* Michael Riordan, *Competitive Effects of Vertical Integration*, Handbook of Antitrust Econ., Paolo Buccirossi (ed.), MIT Press (2008).

production that they must be shared with all competitors to preserve a competitive marketplace – and those that have been found are much more fundamental to the production of a particular good or service than is any cable to network to the production of MVPD services.[33]

There may conceivably be circumstances in which a particular exclusive contract has anticompetitive impact. But determining when and whether these circumstances exist in any particular case requires a fact-intensive inquiry involving an array of marketplace variables that go far beyond the simple "is it profitable?" or "does it seem to be 'must have' programming?" analysis that the proponents of extending the sunset have put forward and that the Commission seems to be focused on in its data requests to several companies.

Where competitive problems do exist, antitrust agencies and courts have the tools, the expertise, and the authority to conduct such inquiries under laws of general applicability. Even if more truncated factual inquiries specifically regarding cable-owned programming were warranted – which they are not – the Commission would still have authority under Section 628(*b*) to consider, on a case-by-case basis, complaints of unfair conduct that significantly hinders competition – with the burden of proof on the complainant to demonstrate the elements of the alleged offense. But continuation of the *per se* prohibition in 628(c), which presumes *all* exclusive contracts between a vertically integrated satellite program network and a cable operator to be likely to significantly impair competition when in fact it is unlikely that *any* will have such an effect, is no longer warranted.

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[33] For a discussion of the limited cases in which U.S. courts have accepted an essential facilities argument, *see* Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 Antitrust L.J. 443 (2002-2003). The authors describe the few circumstances in which the essential facilities doctrine has been found to be applicable to be "rare and exceptional" or "extraordinary." *Id.* at 461 ("In those rare and exceptional circumstances where a facility is truly essential to competition, the anticompetitive effects of denial of access are severe, and there is no business justification (and particularly when there is evidence of a specific intent to injure a rival), U.S. courts will impose antitrust liability for a monopolist's refusal to license access to an essential facility."); *see also id.* at 447 (U.S. courts have found "the essential facilities doctrine potentially applicable in those extraordinary circumstances where one firm uses its control of a bottleneck to eliminate actual or potential competitors.").

## **CONCLUSION**

For the foregoing reasons, and for the reasons set forth in NCTA's initial comments, there is no basis for any further extension of the full sunset of the prohibition on exclusive contracts that Congress mandated in Section 628(c). The prohibition should, as Congress intended, "cease to be effective" in its entirety.

Respectfully submitted,

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