Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF THE MADISON SQUARE GARDEN COMPANY

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

I. THE RECORD DEMONSTRATES THAT THE MARKET FOR VIDEO PROGRAMMING DISTRIBUTION IS VIGOROUSLY COMPETITIVE AND THAT A SUNSET OF THE EXCLUSIVITY BAN WOULD ENHANCE CONSUMER WELFARE. 4

II. PROPONENTS OF EXTENDING THE EXCLUSIVITY BAN OFFER STRAINED AND MERITLESS ARGUMENTS FOR ITS RETENTION. 8

III. THE COMMISSION SHOULD DISREGARD ISSUES UNRELATED TO THE CORE QUESTION OF WHETHER TO SUNSET THE EXCLUSIVITY BAN. 13

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REPLY COMMENTS OF THE MADISON SQUARE GARDEN COMPANY

The Madison Square Garden Company ("MSG") submits the following reply comments in response to the Notice of Proposed Rulemaking issued by the Commission and the comments of other parties in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

Commenters agree that the market for video programming distribution is vigorously competitive, marked by substantial growth of competitors to incumbent cable operators and new platforms offering video service since the Commission's last review in 2007. The record confirms that competition among multichannel video programming distributors ("MVPDs") is well established, and the twenty-year ban on exclusive contracting for cable-affiliated programmers can and should finally be lifted as Congress intended. Sunsetting the ban will

[1/] *Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413 (2012) ("*NPRM*").

eliminate an anomaly that has deprived programmers deemed affiliated with a cable operator the opportunity to consider using a common business tool that benefits consumers by fostering investment and innovation and promoting competition.

Supporters of the ban err by suggesting that programmers deemed affiliated with cable operators will react to a sunset by engaging in exclusive arrangements that harm MVPD competition. Those arguments misapprehend both the nature of the market and the business goals of programmers – particularly programmers that are deemed cable-affiliated under Commission rules, but in fact operate separately (including as separate public companies) from the cable companies with which they are deemed affiliated. These programmers are bound by a fiduciary duty to their own shareholders, not the cable company with which they are deemed affiliated under Commission rules, and will enter into an exclusive arrangement only where it makes good business sense for them as a programmer – they simply cannot and would not sacrifice revenues in order to benefit the cable company they are deemed affiliated with, as proponents of the exclusivity ban erroneously assume.

AT&T and Verizon, now well-established and major MVPDs in their own right, point to their previous complaints to obtain access to terrestrially delivered, high definition ("HD") regional sports networks ("RSNs") MSG HD and MSG+ HD as examples of unfair withholding that would occur if the exclusivity ban is allowed to sunset. MSG HD and MSG+ HD were developed with Cablevision in the 1990s, at a time when MSG was a subsidiary of Cablevision and there was little or no demand for HD programming and well before the telephone companies entered the MVPD marketplace. These facts and circumstances are very different from the characteristics of the marketplace that would be the backdrop for any new exclusivity arrangements that might appear post-sunset.

Suggestions by some commenters that government-guaranteed access to RSNs is essential to the preservation of a competitive marketplace are unsupported by evidence or marketplace realities. While AT&T and Verizon highlight their complaints over access to MSG HD and MSG+ HD, they disregard the fact that during the years in which those services were absent from their channel lineups, both companies steadily and significantly grew their video subscriber bases in the New York metropolitan area and made repeated statements testifying to the strength and popularity of their video offerings. Further, AT&T and Verizon both submit survey data from the complaint proceedings that purport to demonstrate the competitive significance of RSN programming, even though both surveys were shown to be unreliable, and that unreliability was confirmed by Bureau orders that declined to afford any decisional weight to them. Given the ample evidence to support doing so, the Commission should allow the exclusivity ban to sunset as scheduled, particularly since continuation of the ban would perpetuate the unfairness of restricting a small minority of programmers deemed affiliated with cable operators from employing a common business tool that over 85 percent of other programmers are free to use.

The Commission should also decline to adopt any new rules addressing volume discounts or uniform price increases. The current record offers no basis for adopting such rules under the Administrative Procedure Act, due to the lack of notice regarding the nature and content of such rules. Further, such measures would be unnecessary, counter-productive, and exceed the Commission's authority.

I. THE RECORD DEMONSTRATES THAT THE MARKET FOR VIDEO PROGRAMMING DISTRIBUTION IS VIGOROUSLY COMPETITIVE AND THAT A SUNSET OF THE EXCLUSIVITY BAN WOULD ENHANCE CONSUMER WELFARE.

The record demonstrates that there is no need to continue the *per se* prohibition on exclusive contracting by programmers deemed to be affiliated with a cable operator.

First, commenters highlight the undeniable evidence that durable and robust competition has taken hold in the video marketplace, making the exclusivity prohibition unnecessary to protect what may have once been nascent competition.[2/] The exclusivity prohibition was adopted by Congress in "a radically different era than today."[3/] Since adoption of the rule in 1992, there has been "a steady decline in cable's share of the multichannel video programming marketplace, accelerating growth of competing MVPDs such as Direct Broadcast Satellite ("DBS") and the telephone companies."[4/] Today, cable operators are just one part of a "robust, dynamic, and fiercely competitive marketplace,"[5/] and "consumers in every market served by cable have a minimum of three – and often four or five – MVPDs to choose from."[6/] Video service markets have become so competitive that "it is hard to imagine" that the Congress that adopted the exclusivity prohibition would not consider them sufficiently competitive to "trigger

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[2/] *See*, *e.g.*, Time Warner Cable Comments at 5-10. When Congress adopted the exclusive programming ban in 1992 cable television operators had a market share of over 95 percent. Today, cable's market share is less than 58 percent and continues falling, with DBS now holding more than 33 percent of the market and telephone companies growing from almost zero in 2007 to over 8 percent of the market in 2011. NCTA Comments at 9.

[3/] Comcast Comments at 2.

[4/] Cablevision Comments at 2.

[5/] Comcast Comments at 2.

[6/] Comcast Comments at 7.

the sunset."[7/] Indeed, even commenters that support retaining the ban are forced to acknowledge the breadth and durability of competition in video.[8/]

In contrast to the marketplace existing at the time of adoption of the ban, strong and durable competition has taken hold in the marketplace. Two out of the top three, three out of the top six, and four of the top eight MVPDs in the country are rivals to incumbent cable operators. "DirecTV, Dish, Verizon and AT&T . . . are entrenched competitors, with more subscribers than most cable multiple system operators."[9/] And newer competitors are also gaining a significant and growing foothold in video markets.[10/] Online video service providers include such major companies as Apple and Amazon, with Google set to also enter the market.[11/] Online video distributors like Netflix, YouTube, and Hulu have each announced substantial investments in original and exclusive programming content for their online video offerings.[12/] Netflix now has more subscribers than Comcast, the nation's largest cable operator.[13/] With 75 percent of American households possessing a broadband connection capable of streaming online video, "the number of viewers reachable by Internet distribution . . . far exceeds the number of viewers who subscribe to any single MVPD service."[14/]

Second, commenters correctly note that vertical integration in the video marketplace has declined to the point that it can no longer be considered a threat to competition in video

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7/ NCTA Comments at 2.

8/ *See e.g.* US Telecom Association Comments at 16-18 ("The development of the MVPD marketplace over the last two decades has been a resounding success story.").

9/ NCTA Comments at 7, 9.

10/ Comcast Comments at 7-9; Time Warner Cable Comments at 6-7.

11/ NCTA Comments at 10.

12/ NCTA Comments at 10.

13/ Comcast Comments at 8.

14/ Time Warner Cable Comments at 7.

programming. The percentage of satellite-delivered national programming services deemed affiliated to cable operators has consistently and dramatically declined from 35 percent in 2002 to 22 percent by 2007 to only 14.4 percent today – and only 11 percent if the Comcast-affiliated programmers prohibited from exclusive contracts by the Commission's merger condition are excluded.[15/] At the same time, the overall number of programming networks available to MVPDs has increased dramatically – from 68 networks in 1992 to over 800 national networks today.[16/] Thus even should a cable-affiliated programmer enter into an exclusive contracting arrangement with a cable operator, there are plenty of alternative programming options available to competing MVPDs.[17/] To the extent there ever was an inclination by vertically-integrated programmers to consider foreclosure strategies under the marketplace conditions of twenty years ago to sacrifice programmer revenue for the benefit of the affiliated cable operator, current marketplace conditions and the importance to programmers of the revenue stream generated by alternative MVPDs negate consideration of such a strategy today.[18/]

<u>Third</u>, the record highlights the benefits to consumers that would arise from allowing programmers deemed cable-affiliated the same opportunities as currently afforded to all other programmers to pursue exclusive arrangements that make business sense for the programmer and that help to bring new and innovative programming into the market.[19/] The competitiveness of both the programming and the MVPD marketplace ensures that, post-sunset, programmers will

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15/ NCTA Comments at 12. *See* Comcast Comments at 11; Time Warner Cable Comments at 8-9.

16/ Comcast Comments at 11-12.

17/ Comcast Comments at 12.

18/ *See* NCTA Comments at 13-14; Discovery Comments at 6-8; Comcast Comments at 7.

19/ Comcast Comments at 12-13; Time Warner Cable Comments at 13-14 ("[F]ar from 'furthering' any interest in competition and diversity among video programming distributors, the exclusivity ban is thwarting competition by reducing cable operators' incentive to invest in new and existing programming.").

consider only exclusivity arrangements that benefit the programmer's business (such as by strengthening viewership and market reach) and thereby enhance competition and consumer welfare.[20/]

Consumers gain when the ability to offer exclusivity allows "a fledgling service to . . . gain a foothold in the market" by ensuring sufficient carriage to warrant the investment in developing the programming.[21/] Consumers gain when the ability to obtain exclusivity allows a cable operator to offer a channel to a niche programmer – such as foreign language programming developed for a particular immigrant population – because exclusivity will ensure the cable operator of a sufficient audience to justify the channel allocation, which it might not be able to do if the channel's audience were split among many MVPDs.[22/] And consumers benefit when an exclusivity arrangement encourages a cable operator to share in the investment and risks associated with launching a new programming network, without which the programmer might not be able to develop the programming.[23/] Consumers who are customers of other MVPDs also benefit from exclusivity by a programmer deemed cable-affiliated when their provider, in response to an exclusive arrangement, develops new programming, cuts prices, or offers quality and service improvements to offset the attractiveness of the exclusive offering.[24/]

Thus the sum of the evidence on competition and vertical integration in today's video programming marketplace leads directly to the conclusion that allowing the exclusivity ban to

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[20/] *See* Comcast Comments at 9 ("[C]ompetition creates robust market forces that incentivize programmers to . . . enter into an exclusive arrangement only where the benefits provided to the programmer in exchange for such exclusivity exceed the benefits of broad distribution.").

[21/] Discovery Comments at 8-9 (quoting *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)).

[22/] Discovery Comments at 9.

[23/] Discovery Comments at 9-10.

[24/] Discovery Comments at 11.

sunset at this time is consistent with – indeed compelled by – the statutory mandate to maintain the ban only so long as it was "necessary to preserve and protect competition and diversity in the distribution of video programming."[25/]

II. PROPONENTS OF EXTENDING THE EXCLUSIVITY BAN OFFER STRAINED AND MERITLESS ARGUMENTS FOR ITS RETENTION.

Unable to deny the vigorous competition in the video programming marketplace, commenters urging the Commission retain the exclusivity prohibition rely on unconvincing arguments based on inaccurate and unrealistic assumptions about how the programming market works.

First, commenters mistakenly contend that following a sunset programmers will readily engage in withholding in order to foreclose competition from alternative MVPDs.[26/] As noted by MSG and other commenters, however, programmers deemed affiliated with cable operators benefit from MVPD competition and have no incentive to reduce the number of distributors in the marketplace.[27/] Alternative MVPDs offer service to over 40 percent of the potential viewership for a national programming service.[28/] Except in "extraordinary circumstances," it would simply be "economically irrational" for any programmer – whether deemed to be cable-affiliated or not – to cut itself off from such a large part of the potential market.[29/]

25/ 47 U.S.C. § 548(c)(5).

26/ *See, e.g.*, DIRECTV Comments at 25-34; DISH Comments at 5-10, 13-14.

27/ Comcast Comments at 7; Discovery Comments at 5-8; MSG Comments at 14.

28/ *See* NCTA Comments at 13 ("[T]he very success of DBS and telco video providers means that any decision for a program network to deal exclusively with cable operators would require it to forgo viewership and revenues from more than 40 percent of MVPD households.").

29/ Comcast Comments at 7. *See also* Discovery Comments at 8 ("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.").

Second, the foreclosure argument proffered by supporters of the ban is rooted in the specious assumption that a programmer deemed cable-affiliated will readily agree to forego the significant revenue that could be had from alternative MVPDs in an attempt to boost subscribership for a cable company with which it may be only nominally affiliated. [30/]

As Discovery points out, the predicate for this argument in support of the exclusivity ban "presuppose[s] 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."[31/] In fact, the theory essentially presupposes that the programmer will be a wholly-owned (or nearly wholly-owned) subsidiary of the cable operator, because it is only in such a close corporate relationship that losses in one "arm" of the company could theoretically be offset by gains in another "arm" of the company.

Contrary to the straw-man foreclosure theories espoused by DISH, DIRECTV, and others, programmers that may be deemed "cable-affiliated" under Commission rules,[32/] but that operate separately and are subject to fiduciary obligations to maximize their own profits, simply cannot sacrifice programming revenues in an attempt to bolster the subscription revenue of a cable operator with which the programmer is affiliated only in the eyes of the Commission.[33/]

30/ DIRECTV Comments at 24 ("[W]ithholding will be profitable (and therefore rational) for a vertically integrated cable operator if the carriage and advertising fees lost by its programming arm are more than offset by the additional revenue earned by its distribution arm from subscribers who switch from the foreclosed rival").

31/ Discovery Comments at 3.

32/ Rules that consider a programmer to be cable-affiliated when one person holds as little as 5 percent of the stock of the programmer while also holding as little as 5 percent of the stock of a cable operator, or where a person that is, for example, one of 10 members of the board of directors of the programmer is also one of 10 members of the board of a cable operator. 47 C.F.R. § 76.1000(b).

33/ Discovery Comments at 5-6; *id*. at 14 ("[I]n 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.").

Thus, the basic premise of the foreclosure theory that is the foundation of arguments for continuing the ban is undermined by actual business realities – as well as fiduciary obligations – that compel programmers like MSG to maximize their profits and act in the best interests of their shareholders (as opposed to any cable operator with which they may be deemed affiliated).

Third, in addition to misunderstanding the business incentives of programmers deemed affiliated with cable operators, supporters of the ban err in averring that exclusivity arrangements involving such programming could actually harm competition and consumer welfare.[34/] As the record demonstrates, rival MVPDs are too strong and too entrenched in the marketplace – and there are too many programming networks and substitutes for programming networks – for competition to be adversely affected by any particular exclusivity strategy.[35/] The billions of dollars in sunk costs incurred by DBS and the telephone companies represent a significant investment for them, and they will continue to offer video service irrespective of whether a handful of networks are unavailable to them.

Further, supporters simply disregard the possibility that exclusivity strategies could be neutralized by competitive counter-measures. Verizon, AT&T, DIRECTV, and DISH Network are multi-billion dollar enterprises and are among the largest communications companies in the nation.[36/] There is nothing to prevent these companies from responding to an exclusivity strategy through counter-measures such as price cutting, service improvements, emphasis on unique offerings (such as the telcos' mobile phone business), and development of alternative programming.[37/] Indeed, such a dynamic enhances competition and consumer

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34/ *See*, *e.g.*, CenturyLink Comments at 16-19; DIRECTV Comments at 27-34.

35/ Comcast Comments at 5-10; Discovery Comments at 2; NCTA Comments at 8-12; Time Warner Cable Comments at 6-8.

36/ *See* Comcast Comments at 6; MSG Comments at 8-9; NCTA Comments at 7.

37/ Discovery Comments at 11; MSG Comments at 19-21.

welfare. Thus, not only does the record contradict suggestions that programmers deemed affiliated with cable operators will be motivated to participate in anti-competitive foreclosure strategies, it also fails to show that such strategies would have a credible prospect of actually damaging competition.[38/]

Fourth, contrary to contentions by AT&T and Verizon, the history of their efforts to obtain access to MSG HD and MSG+ HD has no predictive value for the issues in this proceeding. As terrestrially-delivered programming, MSG HD and MSG+ HD were never subject to the *per se* exclusivity ban and therefore are dissimilarly situated from satellite-delivered programmers that have established licensing arrangements with competing MVPDs. Moreover, the factual background relating to the MSG HD and MSG+ HD disputes is also significantly different from the post-sunset circumstances that will be faced by satellite-delivered programmers now subject to the ban.

MSG HD was the very first HD RSN, developed in the 1990s with risk capital from its then-parent company, Cablevision, at a time when there was little or no demand for HD programming. The telephone companies had not even begun to enter the video marketplace, and it was nearly five years before any other MVPD even showed interest in delivering the HD channel. Further, at the time the exclusivity arrangement was initiated MSG was a subsidiary of Cablevision, while now it is a wholly separate public company. In short, the factual

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[38/] Of course, the fact that an exclusivity strategy might make it harder for an MVPD to compete offers no basis for extending the ban. Every exclusive arrangement imposes some measure of competitive hardship on competitors, but it is simply the nature of competitive markets that companies attempt to differentiate their products, sometimes through exclusive offerings, and competitors respond by developing their own differentiators, including their own exclusive products. *See, e.g*., Jeremy I. Bulow and 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 14-21 (attached as Exhibit 1 to *AT&T Services Inc. v. Madison Square Garden, L.P. and Cablevision Systems Corp.,* CSR-8196-P, Answer to Program Access Complaint (Sept. 17, 2009)).

circumstances surrounding the MSG HD/MSG+ HD complaints offer no predictive value regarding the dynamics of the satellite-delivered programming marketplace post-sunset.

Indeed, the most relevant predictor of a post-sunset marketplace is the behavior of the more than 85 percent of programmers in the market today that are free to enter into exclusive arrangements with cable operators. There is no evidence that cable operators have been able to use any of the hundreds of cable networks with which they are free to pursue exclusivity to foreclose competition from rival MVPDs. To the contrary, rival MVPDs have vastly increased their market share notwithstanding the ability to enter into exclusivity with a wide array of programmers.

Fifth, commenters asserting that access to RSNs is essential to their competitive viability fail to present any evidence demonstrating that they are unable to effectively compete without that access. AT&T and Verizon highlight their program access complaints brought to gain access to MSG HD and MSG+ HD,[39/] but prior to entering those complaints, and during the pendency of the complaints, both telcos steadily grew their subscriber bases in the same New York market where they claimed lack of the RSNs was significantly harming their ability to compete.[40/] At the same time, both were also making repeated statements testifying to the popularity of their video offerings, notwithstanding the absence of the RSN programming.[41/]

[39/] Verizon Comments at 3.

[40/] *See, e.g.*, *AT&T Services Inc. v. Madison Square Garden, L.P. and Cablevision Systems Corp*., File No. CSR-8196-P, Defendant's Answer to AT&T's Supplement to Program Access Complaint, 33-49 (Jan. 6, 2011) ("MSG AT&T Complaint Answer"); *Verizon Telephone Companies and Verizon Services Corp. v. Madison Square Garden, L.P. and Cablevision Systems Corp*., File No. CSR-8196-P, Defendant's Answer to Verizon's Supplement to Program Access Complaint, 27-37, 40-45 (Oct. 12, 2010) ("MSG Verizon Complaint Answer").

[41/] *See, e.g.*, MSG AT&T Complaint Answer at 29-33, 49-51; MSG Verizon Complaint Answer at 24-27.

To support their contentions about the competitive significance of RSNs, and thus the supposed need to extend the exclusivity ban, both AT&T and Verizon submitted consumer surveys conducted to support their complaints about lack of access to MSG HD and MSG+ HD.[42/] But both surveys were repeatedly debunked as unreliable in those proceedings,[43/] and the Bureau orders resolving the complaints failed to give either survey significant weight.[44/] With that background, the surveys cannot serve as any basis in this proceeding to support retention of the exclusivity prohibition.

<u>Sixth</u>, DISH Network's behavior in the marketplace is a clear demonstration that government-guaranteed access to so-called "must have" programming is not essential to ensure competition. DISH has voluntarily opted not to carry RSNs in a number of markets,[45/] most prominently in New York, where DISH now does not carry any of the four RSNs in the market, yet continues to serve as a major competitor there.[46/] DISH has also repeatedly dropped other popular programming channels – most recently dropping AMC,[47/] home to such popular shows as Mad Men and Breaking Bad – yet remains competitively viable and among the largest MVPDs in the nation.

III. THE COMMISSION SHOULD DISREGARD ISSUES UNRELATED TO THE CORE QUESTION OF WHETHER TO SUNSET THE EXCLUSIVITY BAN.

The record developed in this proceeding does not demonstrate any need to address

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42/ AT&T Comments at Attachment 6; Verizon Comments at 7-8.

43/ *See* MSG AT&T Complaint Answer at 63-67; MSG Verizon Complaint Answer at 56-61.

44/ *See AT&T Services Inc. v. Madison Square Garden, L.P. and Cablevision Systems Corp*., Order, 26 FCC Rcd 13206, n.359 (MB 2011); *Verizon Telephone Companies and Verizon Services Corp. v. Madison Square Garden, L.P. and Cablevision Systems Corp*., Order, 26 FCC Rcd 13145, n.224 (MB 2010).

45/ Comcast Comments at 21-22; MSG Comments at 23-24.

46/ MSG Comments at 23-24.

47/ *See* Brian Stelter, *Dish Network Drops Home of 'Mad Men' in Cable Dispute*, NEW YORK TIMES, B4, July 2, 2012.

additional issues unrelated to the question of sunset of the exclusivity prohibition.

First, there is no evidence that the Commission's current guidance regarding volume price discounts is in need of revision, and several commenters agree that doing so would disrupt the programming market, distort competition, and fuel higher prices for programming, and thus for pay television service.[48/] Volume discounts based on "direct and legitimate economic benefits" are expressly allowed by the statute,[49/] and both the statutory language and the legislative history make clear that such discounts are not limited to only those that are cost-based.[50/]

In any case, there is no evidence that volume discounts harm competition. Small cable operators complain that they are placed at a competitive disadvantage by volume discounts.[51/] But small operators can and do aggregate their buying power through consortiums or cooperatives and can negotiate for their own volume discounts.[52/] And even if the Commission were to adopt rules restricting volume discounts for cable-affiliated programmers, it would be insufficient to resolve any identified problem small operators may experience because more than 85 percent of programming networks are not cable-affiliated and therefore would not be subject to any new rules that might be adopted.[53/] Instead, the most likely result of any Commission action on volume discounts – apart from higher retail cable prices due to the likely withdrawal or

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48/ Comcast Comments at 20-23; Discovery Comments at 14-15; MSG Comments at 33-36.

49/ 47 U.S.C. § 548(c)(2)(B)(iii).

50/ Comcast Comments at 15-17; Discovery Comments at 12 ("There are a wide variety of benefits that are not specifically cost-based and yet constitute real value differences among distributors.").

51/ *See* Interstate Communications, et al., Comments at 5-6; ITTA Comments at 11-12.

52/ Comcast Comments at 19.

53/ Comcast Comments at 19-20. Rules restricting volume discounts applicable only to cable-affiliated programmers would also "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." Discovery Comments at 13.

curtailment of volume price discounts – would be to distort competition in the programming marketplace in favor of programmers not subject to any new constraints on such discounts.

<u>Second</u>, nothing in the record justifies adoption of new rules addressing uniform price increases.[54/] To the contrary, as noted by a number of commenters, such a step would harm content providers, distort competitive markets, and exceed the Commission's authority.[55/] Commenters correctly observe that there is no evidence that cable-affiliated programmers have ever actually imposed uniform price increases.[56/] The idea that a programmer even could impose a uniform price increase ignores basic market forces and ascribes to a single programmer market power that simply does not exist in today's competitive markets.[57/] As Comcast observes, any programmer attempting to dictate an inflated uniform price "runs the risk that MVPDs will decline carriage of that programming, resulting in the programmer losing viewers, subscription fees, and advertising revenues."[58/] In any case, there is no statutory authority for the Commission to adopt any rules attempting to regulate or prohibit "uniform price increases."[59/] "Such regulations are tantamount to wholesale price regulation, which is outside the bounds of the authority Congress granted to the Commission."[60/]

54/ Discovery Comments at 14 ("Contrary to the *NPRM*'s suggestion, programmers do not raise prices across the board to disadvantage non-affiliated distributors."). *Cf.* American Cable Association Comments at 34-43 (proposing a resolution to the "uniform price increases loophole" without providing any evidence that uniform price increases by cable-affiliated programmers are a legitimate problem for non-cable MVPDs).

55/ Comcast Comments at 20-23; Discovery Comments at 15-16; MSG Comments 33-36.

56/ Comcast Comments at 21. *See also id*. at 23 (explaining that where the Commission has adopted an arbitration condition in a merger review to address the potential for uniform price increases by a cable-affiliated programmer, "the[ ] conditions were based on *theories* about the potential to engage in 'uniform prices increases'; there has never been any documentation that such an increase has ever occurred").

57/ Comcast Comments at 21-22; MSG Comments 34-35.

58/ Comcast Comments at 21.

59/ Comcast Comments at 22.

60/ Discovery Comments at 15.

Finally, the Commission cannot create new rules addressing volume discounts or uniform price increases based on the current record, which consists of little more than "unsupported claims about volume discounts harming small operators" and "claims regarding past uniform price increases [that] are pure conjecture."[61/] Not only is such "flimsy, anecdotal evidence" an insufficient basis for establishing a rule that could pass muster under the Administrative Procedure Act,[62/] the absence of any guidance at all regarding the nature or content of any such rules would deprive parties of the requisite "fair notice" required by the APA.[63/]

CONCLUSION

For the reasons described above, the Commission should allow the exclusive contracting prohibition in Section 628(c)(2)(B) to sunset in October 2012, without adopting any new *per se* exclusivity prohibitions related to RSNs or other programming. The Commission should also refrain from adopting any new rules restricting volume discounts or uniform price increases.

Respectfully submitted,

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61/ Comcast Comments at 19, 23.

62/ *See Penobscott Indian Nation v. United States Dep't of Housing and Urban Dev.*, 539 F. Supp. 2d 40, 53 (D.D.C. 2008) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.").

63/ MSG Comments at 33.