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

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

REPLY COMMENTS OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

James L. Casserly
Ryan G. Wallach
Jessica F. Greffenius
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006

Attorneys for Comcast Corporation

Kathryn A. Zachem
James R. Coltharp
Regulatory Affairs

Lynn R. Charytan
Brian A. Rankin
Catherine Fox
Legal Regulatory Affairs

COMCAST CORPORATION
300 New Jersey Avenue, N.W., Suite 700
Washington, DC 20001

Margaret L. Tobey
NBCUNIVERSAL MEDIA, LLC
300 New Jersey Avenue, N.W., Suite 700
Washington, DC 20001

July 23, 2012

Table of Contents

Page

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

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

REPLY COMMENTS OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

Comcast Corporation and NBCUniversal Media, LLC ("NBCUniversal") (collectively, "Comcast") hereby reply to the comments submitted in response to the above-captioned Notice of Proposed Rulemaking ("*Notice*").[1] The comments demonstrate that the Commission should not further prolong the already-delayed sunset of the exclusivity prohibition and that it should not entertain proposals for expanded regulation of the wholesale programming marketplace.

I. INTRODUCTION AND SUMMARY

Nearly a decade ago, the Commission determined that the exclusivity prohibition continued to be necessary to preserve and protect competition and diversity and extended it for

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

five years, even as one Commissioner dissented from that decision and another called it a "very close call." It's unfortunate, but predictable, that ten years later a handful of parties have shown up again to plead for a continuation – and expansion – of the Commission's regulation of the wholesale marketplace for video programming. Perceiving that the regulatory process offers them an opportunity for an artificial competitive advantage, these parties plead their preexisting agendas, no matter how unjustified by current marketplace circumstances, how irrelevant to the issue at hand, or how inconsistent with Congressional intent.

But the Commission should not lose sight of the immediate issue here – whether it should extend to a full quarter-century a provision that Congress intended to sunset after one decade. Under the statute, the pivotal consideration in extending the prohibition is whether it "continues to be necessary to preserve and protect competition and diversity" in video programming distribution. The facts are undeniable, as the comments in this proceeding make clear: competition and diversity are firmly established – well beyond any conceivable expectation established in 1992. In light of such marketplace evidence of competition, extending the exclusivity prohibition is utterly unnecessary, and expanding the program access rules in new and previously unimagined ways is unjustified.

As the record in this proceeding shows, video competition and diversity have increased enormously just in the past five years. DBS and the telcos have gained millions of customers, and grown their market share, at the expense of established cable operators. And online video services like Netflix, YouTube, Hulu, Amazon, Vudu, Vimeo, and countless others have experienced explosive growth. So there is no logical basis for the Commission to prolong the life of the exclusivity prohibition – not in its current form or alternative forms; not for geographic areas where effective competition determinations have yet to be made; and not for regional sports networks or top 20 networks. Such alternatives would cause more problems and complexities than they would solve, and make no sense in this competitive marketplace. And there is no basis to *expand* the program access rules at a time when the Commission should be focused on scaling back unnecessary regulation.

Nor should the Commission utilize other provisions of the Act to effectively reinstitute the exclusivity prohibition. MVPDs that profess to be concerned about exclusive contracts will be able to bring claims under Section 628(b) alleging that any particular exclusive contract is "unfair" and will "hinder significantly or prevent" any MVPD from providing video programming. But, that standard is rigorous and should not be used to preclude conduct that Congress has declared legal or be abused by shifting the complainant's burden of proof to the defendant, which the Commission cannot do.

Not only is there no basis for extending or reinstituting the exclusivity prohibition, but the record also makes clear that the *Notice*'s proposals to address volume discounts or "uniform price increases" similarly lack factual justifications and legal authority. There is no evidence of actual problems that need fixing (or that can be fixed) in this proceeding, which only impacts cable-affiliated programmers and would not affect the more than 85 percent of unaffiliated programmers. And limiting volume discounts to those that are solely cost-based, or attempting to choose the "right" price for a cable-affiliated programmer to charge MVPDs, would be both contrary to the statute and beyond the Commission's authority. As for the even more outlandish proposals that certain parties have advanced here – to end the confidentiality of programming agreements, to require tariff-type rate schedules for programming, and so on – the Commission should outright reject them.

II. THE RECORD CONFIRMS THAT THE VIDEO MARKETPLACE IS MORE COMPETITIVE THAN EVER AND JUSTIFIES SUNSET OF THE EXCLUSIVITY PROHIBITION.

The record provides overwhelming evidence that today's video marketplace is fiercely competitive and dynamic and that the exclusivity prohibition has long outlived its usefulness. Numerous commenters explained how the competitive landscape of the video marketplace has changed. These and other commenters agreed with Comcast that the exclusivity prohibition is no longer "necessary to preserve and protect competition and diversity,"[2] and any further extension would needlessly perpetuate outdated and asymmetrical regulations that have no place in today's marketplace and raise serious First Amendments concerns.

Today's marketplace has changed significantly in the five years since the Commission last reviewed the propriety of the exclusivity prohibition, and it bears no resemblance whatsoever to the marketplace in 1992. Even those commenters calling for continued regulation concede that the video marketplace is dramatically different today.[3] The evidence is irrefutable:

- Today, consumers enjoy numerous choices for their video service provider; consumers in almost every community in America have the option of at least three MVPDs, and many can choose from four, or even five, providers.[4]

- Four of the ten largest MVPDs by subscriber count are either DBS or telco providers.[5] Cable's share of MVPD subscribers has declined drastically from over 95 percent in 1992 to under 58 percent today.[6]

---

2 47 U.S.C. § 548(c)(5).

3 *See* AT&T Comments at 1 ("[T]he MVPD market undoubtedly has changed since the Commission last extended the exclusive contract prohibition in 2007[.]"); Interstate Communications, *et al.* Comments at 3 ("The current MVPD marketplace has indeed changed since the 1992 enactment of the Cable Act."); USTelecom Comments at 3 (acknowledging that "the MVPD marketplace has changed dramatically").

4 *See* Comcast Comments at 7; NCTA Comments at 2.

5 NCTA, *Top 25 Multichannel Video Programming Distributors as of Mar. 2012*, http://www.ncta.com/Stats/TopMSOs.aspx/ (last visited July 23, 2012). DBS providers have experienced significant growth in market share since 1992, with DirecTV and Dish Network becoming the second and third largest MVPDs in the country. *See id.* And telcos such as AT&T and Verizon have entered the video marketplace and compete aggressively against traditional cable operators. *See id.* (listing Verizon and AT&T as the sixth and eighth largest MVPDs, respectively); Time Warner Cable ("TWC") Comments at 6-7 (quoting the Department of Justice finding that telco-

- OVDs give consumers even more choice for where, from whom, and how they access their video programming.[7] Over 180 million U.S. Internet users watched online videos in May 2012, with the average viewer watching 21.9 hours of online video in one month.[8] Popular OVDs such as Netflix and Hulu have attracted over 24 million subscribers.[9]

- Today, fewer than 14.4 percent of national programming networks are cable-affiliated,[10] and the supply of programming has skyrocketed, with over 800 national networks now available to MVPDs.[11] Vertical integration will decline even further after NBCUniversal completes the sale of its interest in A&E Television Networks.[12]

Despite these marketplace changes, some commenters insist that the Commission should continue to apply – and even expand – outdated, monopoly-era regulation. These commenters generally claim the number of popular vertically-integrated programming networks, the number of cable-affiliated RSNs, and the total number of cable subscribers somehow necessitate an extension of the exclusivity prohibition.[13] Commenters, however, already have explained how

---

provided video has been "[t]he most significant development" in the MVPD marketplace); USTelecom Comments at 5-6.

6 NCTA Comments at 9; *see also* Cablevision Sys. Corp. ("CVC") Comments at 4; Madison Square Garden Co. ("MSG") Comments at 3.

7 NCTA Comments at 10; MSG Comments at 10-11.

8 Press Release, comScore, *comScore Releases May 2012 U.S. Online Video Rankings* (June 18, 2012), *available at* http://www.comscore.com/Press_Events/Press_Releases/2012/6/comScore_Releases_May_2012_U.S._Online_Video_Rankings; *see also* TWC Comments at 7.

9 *See* Comcast Comments at 8 (stating that Netflix has 23.4 million subscribers as of Q1 2012 and that Hulu Plus reached over 1.5 million paying subscribers as of January 2012).

10 *Notice* app. B; *see also* Comcast Comments at 11; NCTA Comments at 12; TWC Comments at 8.

11 *Notice* app. B.

12 *See generally* Comcast Corp., *Form 8-K* (July 10, 2012), *available at* http://www.cmcsa.com/secfiling.cfm?filingid=950103-12-3539. Using the Commission's methodology, which treats HD feeds as if they were separate networks, there are seventeen A&E networks that will no longer be vertically integrated with NBCUniversal post-transaction. The number of national programming networks that are deemed to be affiliated with cable operators will fall from 14.4 percent to 12.3 percent. Further, using the Commission's data, the number of cable-affiliated networks in the top 20 by subscribership will fall to four, and the number of cable-affiliated networks in the top 20 by average prime-time ratings will drop to three. *See Notice* apps. A & B.

13 *See, e.g.*, AT&T Comments at 9-12, 20-23; DirecTV Comments at 13-26; Dish Network Comments at 3-10; Verizon Comments at 3-10. DirecTV's efforts to justify continued application of the exclusivity prohibition through mere speculation of future vertical integration based on hypothetical transactions amounts to a scare tactic and ignores the decline in vertical integration since 1992. *See* DirecTV Comments at 21-23. Furthermore, DirecTV's argument that the prohibition is necessary in light of "coordinated activity" among cable operators is a red herring. *See id.* at 17-18. Cable operators' participation in the Information Technology Joint Venture and CableWiFi have no bearing on this proceeding because these initiatives are wholly unrelated to video programming. There is absolutely *no* coordination among these cable companies with respect to *programming*.

these arguments fail to provide adequate justification to override Congress's unambiguous intent that the exclusivity prohibition sunset.

First, in this vibrantly competitive video marketplace, cable-affiliated programming networks – just like other programming networks – have powerful incentives to distribute their content as widely as possible.[14] A strategy based on exclusivity precludes significant potential revenues and, except in the rare cases where it is in the best interest of the programming network, as Discovery noted, "such a strategy is virtually impossible" given the significant production costs and the increasing number of subscribers of competing distributors.[15] Commenters noted that the most likely outcome of allowing the exclusivity ban to sunset would be to create incentives for MVPDs to invest in innovative and diverse programming, which would benefit consumers.[16]

Second, OVDs' successes makes clear that program access rights are *not* necessary to preserve and protect competition.[17] Even without program access rights, OVDs have secured numerous major content deals – including with cable-affiliated programmers.[18] Moreover, some OVDs have begun to develop their own exclusive content.[19] Claims that the exclusivity prohibition remains necessary to preserve and protect competition, therefore, ring hollow.

In all events, the exclusivity prohibition has outlived its usefulness. Cable's competitors were once fledgling new entrants, but they are now well established companies with significant

---

14 *See* Comcast Comments at 3; NCTA Comments at 13; MSG Comments at 16-17.

15 Discovery Comments at 6.

16 *See* Comcast Comments at 12-13; Discovery Comments at 11; MSG Comments at 17-22.

17 *See* CVC Comments at 6; NCTA Comments at 10; MSG Comments at 10-11; TWC Comments at 7-8; Comcast Comments at 8-9.

18 *See* Comcast Comments at 8-9; NCTA Comments at 10.

19 *See* CVC Comments at 6.

subscriber bases and large revenues.[20] As DirecTV's exclusive rights to the NFL Sunday Ticket show, and its ownership of three RSNs reflects, these companies *can* invest in programming if they choose to do so. They are also free to choose not to do so and instead rely on the open marketplace to assemble programming packages. But they do not need continued regulatory handouts. Indeed, the public interest in promoting increased diversity in the marketplace would be better served at this point by allowing the exclusivity prohibition to sunset, thereby providing cable's competitors with increased incentives to develop programming and alternative programming packages.

Relatedly, commenters highlighted how today's competitive marketplace makes it impossible to justify continued interference with cable-affiliated programmers' First Amendment rights. The exclusivity ban amounts to a government regulation that favors one speaker over another in contravention of the First Amendment, a regulation "the Commission cannot possibly justify."[21] And the continued decline of vertical integration further erodes any justification the Commission might have for continued application of the prohibition.[22] As a result of these marketplace changes, the exclusivity prohibition no longer satisfies intermediate scrutiny.[23]

The marketplace is even more dynamic and competitive than it was in 2007, and it is drastically changed from 1992. If the 1992 marketplace had looked like today's marketplace, there would have been no basis for Congress to enact this prohibition and Congress would not have acted. Because consumers have a multitude of choices for where, from whom, and how to

---

[20] As MSG noted, "Cable's MVPD competitors are not small, besieged newcomers, needing government assistance to gain a competitive toehold." MSG Comments at 8.

[21] TWC Comments at 16; *see also* Comcast Comments at 9-10.

[22] The exclusivity ban applies only to a small fraction of programmers – those that are affiliated with a cable operator – and is completely irrelevant to over 85 percent of all national networks. *See Notice* app. B; *see also* Comcast Comments at 12; MSG Comments at 11-12.

[23] Comcast Comments at 9; *see also* NCTA comments at 17-18; TWC Comments 12-14.

access programming, the Commission should allow the exclusivity prohibition to sunset in its entirety, as Congress intended.

III. THE COMMISSION SHOULD REJECT PROPOSALS TO PARTIALLY SUNSET THE EXCLUSIVITY PROHIBITION.

The Commission should not adopt its proposals to sunset the exclusivity prohibition on a partial basis, either by relaxing the prohibition on a market-by-market basis or by retaining the prohibition for RSNs and other alleged "must-have" programming. Given the vibrant and robust competition in today's marketplace, the Commission can and should sunset the prohibition entirely, not partially.

A. The Commission Should Not Relax the Exclusivity Prohibition on a Market-by-Market Basis.

Relaxation of the exclusivity prohibition on a market-by-market basis would be contrary to Section 628(c) and the First Amendment, and commenters overwhelmingly opposed such an approach. As NCTA pointed out, "[c]able operators should not be required to demonstrate, on a case-by-case basis, that their service areas are competitive before they are permitted, like their competitors, to create and enter into exclusive contracts."[24]

Commenters correctly explained why the market-by-market approach cannot be squared with Section 628(c) or with the First Amendment.[25] Section 628(c)(5) clearly places the burden on the Commission to show that the exclusivity prohibition is "necessary to preserve and protect competition."[26] Yet the *Notice*'s proposed market-by-market approach effectively would shift

---

[24] NCTA Comments at 15.

[25] *See* TWC Comments at 17.

[26] *See* 47 U.S.C. § 548(c)(5) (explaining that the prohibition "shall cease to be effective 10 years after October 5, 1992, unless the *Commission finds* . . . that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." (emphasis added)).

the burden to cable operators.[27] When the government restricts speech, it is the government that bears the burden of proving the restriction's constitutionality.[28] That burden cannot properly be off-loaded in the manner the *Notice* proposes.[29]

Even if it did not raise statutory and constitutional concerns, the market-by-market approach would be bad policy. Requiring a cable operator to petition the Commission to remove the exclusivity prohibition in a particular market would be unduly complicated, add enormous cost and time to contract negotiations, and likely prevent contracts that would otherwise promote competition.[30] Were a cable operator permitted to offer exclusivity in some markets but not others, "it would face the daunting and unwieldy task" of negotiating a different agreement for each market area.[31] Tellingly, no commenter – including those that support extension of the exclusivity prohibition – supported relaxing the prohibition on a market-by-market basis.[32] So the market-by-market approach is a total non-starter, and should be abandoned.

---

27 *See Notice* app. D § III; TWC Comments at 17. "Section 628(c) imposes a burden on the *Commission* to demonstrate why the ban remains necessary – not a burden on *cable operators* to show why the ban remains necessary." TWC Comments at 18 (emphasis in original).

28 TWC Comments at 18 & n.68 (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000)).

29 *See id* at 18.

30 *See, e.g., id.* As Time Warner Cable noted, if the process for seeking an effective competition determination is any guide, the process for a petition to sunset could take years. *See id.* And sunset petition proceedings would be even more complex and time-consuming than effective competition proceedings, which primarily look to whether competing MVPDs meet subscribership thresholds "and do not turn on holistic (and vague) assertions of 'diversity.'" *Id.* Moreover, a market-by-market framework would also be unworkable from a business standpoint because cable operators and affiliated programmers usually find it most efficient to negotiate carriage agreements covering the operator's entire footprint. *See id.* at 19.

31 *Id.*

32 DirecTV, for example, explained that the market-by-market sunset process "would not comport with the realities of how [DBS providers] purchase and distribute programming" and would make "'Swiss cheese' of a DBS operator's distribution capabilities, creating a logistical, marketing, and customer relations nightmare." DirecTV Comments at 34-35; *see also* OPASTCO & NTCA Comments at 8 (arguing that the market-by-market approach is "as problematic today as it was when the Commission first inquired in 2007, if not more so," and that technological and marketplace developments render geographic market borders less relevant today).

B. The Commission Should Not Retain the Exclusivity Prohibition for RSNs and "Must-Have" Programming.

Similarly, there is no basis for the Commission to retain the exclusivity prohibition for RSNs or other alleged "must-have" programming, and doing so would raise First Amendment concerns. Moreover, any attempt to determine which programming is "must have" and thus subject to additional government regulation would be a subjective and arbitrary process.

First, nothing in Section 628(c)(5) authorizes the Commission to pick and choose what programming is "must have" and should continue to be subject to the exclusivity prohibition.[33] Congress clearly stated its expectation that, once sufficient competition took hold of the marketplace, the prohibition would "cease to be effective," period.[34]

Second, retaining the exclusivity prohibition for some cable-affiliated programming based solely on its *content*, as the *Notice* proposes to do with RSNs, would compound the already serious First Amendment concerns inherent in program access regulation. Distinguishing between different types of programming, as the Commission itself has admitted,

---

33 Although the *Notice* correctly notes that Cablevision and Comcast previously stated that Section 628(c)(5) grants the Commission authority to partially sunset the exclusivity prohibition, it incorrectly cites to Cablevision and Comcast's joint reply brief and implies that they endorsed the Commission's authority to partially sunset the exclusivity prohibition *based on particular types of programming*. *See Notice* ¶ 74. In their appeal of the Commission's 2007 extension of the exclusivity prohibition, Cablevision and Comcast did challenge the Commission's refusal to partially sunset the exclusivity prohibition with respect to a cable operator whose network passes only a small number of households, a cable operator and a programming network affiliated with another cable operator, and affiliated cable operators that face competition from both DBS and telephone companies. Brief for Petitioners at 63-64, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. July 2, 2008). Cablevision also challenged the Commission's refusal to exempt "new and niche" programming services, *see id.* at 67-69, a proposal the Commission concluded was not "rational and workable," Brief for Respondents at 57-59, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. Aug. 13, 2008). None of these arguments, however, supports the Commission's proposal to distinguish between "must-have" programming and other programming and preserve the exclusivity prohibition for the former. In fact, as explained below and as the Commission acknowledged with respect to Cablevision's proposal for determining what programming is "new and niche," such a proposal is not rational or workable.

34 47 U.S.C. § 548(c)(5). As NCTA explained, "In a competitive MVPD marketplace, competitors will always seek to obtain an advantage by making their product uniquely attractive to consumers . . . . Congress could not have intended to prevent this pro-competitive back and forth by endlessly prohibiting cable operators from acquiring exclusive rights to any programming in which they have invested if such programming is uniquely appealing to some audience segment." NCTA Comments at 15.

"would place [it] in the untenable position of designating certain programming as more essential than others and thus raise constitutional questions,"[35] and would trigger strict scrutiny.[36] Given today's competitive marketplace and the extreme subjectivity involved in crafting a "must-have" exclusivity ban, this approach "would not come close to satisfying [the] extremely exacting [strict scrutiny] standard."[37]

Third, even aside from the First Amendment concerns, the Commission cannot and should not be in the business of determining what content is "must-have" programming. What is "must have" for any particular customer is not necessarily "must have" for another customer. As DirecTV pointed out, in the *2002 Extension Order* proceeding, the Commission itself declined to create an exemption from the exclusivity prohibition for certain types of programming because of the "'difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition.'"[38] In today's increasingly diverse marketplace, it is even harder to imagine how the Commission could formulate an objective process for determining that any particular programming is "must have."[39]

---

[35] *Implementation of the Cable Television Consumer Prot. & Competition Act, et al.*, Report & Order, 17 FCC Rcd. 12,124 ¶ 69 (2002) ("*2002 Extension Order*"); *see* TWC Comments at 19 (citing same).

[36] *See* TWC Comments at 19. Strict scrutiny review would mean that the ban must be narrowly tailored to further a compelling governmental interest. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

[37] TWC Comments at 19.

[38] DirecTV Comments at 37 (quoting the *2002 Extension Order* ¶ 69).

[39] For example, at what level of popularity does programming become "must have"? Even if the Commission relied on ratings, which are arguably objective, to discern popularity, how would it set thresholds for what level of ratings makes a network "must have"? What if only certain programs on networks were popular and arguably "must have"? How frequently would the list of "must have" programming be revised? If the Commission used overall primetime ratings as a proxy for popularity, would a programming network that was not in the top 20 and is therefore allowed to enter into an exclusive contract be required to terminate that contract if it were to climb into the top 20? Clearly, this would be a complex, burdensome, and, at bottom, completely subjective and arbitrary process.

Finally, as a factual matter, in a mature and competitive marketplace, "no single programming service – including an RSN – can make or break the competitive viability (or lack thereof) of an MVPD in any particular local market."[40] As Comcast and MSG pointed out in their initial comments, despite prior Commission findings and commenters' ongoing claims that all RSN programming is "must have" to ensure the viability of an MVPD,[41] multiple MVPDs have thrived without licensing certain RSNs:

- In the expansive New York marketplace, Dish Network has never carried YES Network, ceased carriage of MSG Network and MSG Plus in 2010, and dropped SportsNet New York in 2011.
- Cablevision went a full year without carrying YES Network, and only lost 2.1% of its subscribers that year (not all of which, of course, were attributable to the dropped RSN).
- Dish has dropped all of the Fox RSNs and Comcast SportsNet California for some period of time.
- DirecTV has never carried Cox Sports Television in New Orleans, and Charter went two years without carrying that network.
- DirecTV, Dish, and Charter have declined to carry the RSN serving Portland, Oregon (Comcast SportsNet Northwest) since that RSN launched in 2007.[42]

In addition to these examples, both Dish Network and DirecTV have chosen not to carry Comcast SportsNet Philadelphia, despite the fact that the network is available to them.[43] That DirecTV and Dish have made the *choice* not to license the network, for whatever reason they may have, is no sign of nefarious behavior that requires Commission action. Rather, it just shows the fallacy in thinking that this programming is truly "must have." Of particular note,

---

[40] Cablevision Comments at 5; *see also* MSG Comments at 22.

[41] *See Notice* ¶ 28.

[42] *See generally* Comcast Comments at 21-22; MSG Comments at 22-25.

[43] WGAW states that "satellite providers in the Philadelphia area have still not been able to license Comcast's sports programming due to high costs." WGAW Comments at 8. As noted above, CSN-Philadelphia is available to Dish and DirecTV at rates that reflect the fair market value of the programming rights. Other competitive MVPDs have licensed this programming, including RCN and Verizon.

despite their lack of carriage of Comcast SportsNet Philadelphia, as of Q1 2012, DirecTV and Dish served 16.2 percent of all MVPD households in the Philadelphia DMA,[44] which is higher than the percentage of MVPD households they serve in New York (13.9 percent) and Providence, RI (11.4 percent) and comparable to other markets such as Boston (16.2 percent), Tampa-St. Petersburg (16.8 percent), Norfolk (17.4 percent), Hartford (17.7 percent), and Baltimore (18.9 percent),[45] markets where at least one of the DBS providers, and typically both, carry the local RSN. Not only do these examples refute the notion that RSN programming is "must have," but they demonstrate that the marketplace is functioning properly.[46]

Given the proliferation of sources for sports content, retaining the prohibition for RSNs makes even less sense. The vast majority of sports content available in today's marketplace is not cable-affiliated and thus not subject to the exclusivity prohibition.[47] From the hundreds of out-of-market NFL games that are only available on an exclusive basis from DirecTV, to team-owned RSNs unaffiliated with any MSO, to national networks that collectively show thousands of live sporting games per year (a number of which are owned by the professional leagues and collegiate conferences themselves), professional and college sports are available from a plethora of non-cable-affiliated sources.[48] A blanket ban on exclusive contracts for only cable-affiliated RSNs in all markets makes little sense with this wealth of sources for sports content.

---

[44] Contrary to the assertion in the *Notice*, "the share of MVPD subscribers attributable to [incumbent] cable operators" in Philadelphia *does not* "exceed[] the national cable market share of 67 percent deemed significant in the *2007 Extension Order*." *Compare Notice* ¶ 41 & n.137, *with* SNL Kagan, *U.S. Multichannel Operator Comparison by Market* (Q1 2012). The "incumbent cable operator[']s" market share in Philadelphia is 56.1 percent, *see* SNL Kagan, *U.S. Multichannel Operator Comparison by Market* (Q1 2012), which is plainly not larger than 67 percent.

[45] *See* SNL Kagan, *U.S. Multichannel Operator Comparison by Market* (Q1 2012). Notably, in all of these markets, Verizon and AT&T serve anywhere between 9.9 percent and 26.4 percent of MVPD subscribers. *See id.* (New York, 16.2 percent; Philadelphia, 18.2 percent; Boston, 13.5 percent; Tampa, 18.1 percent; Baltimore, 26.4 percent; Hartford, 9.9 percent; Norfolk, 18.4 percent).

[46] *See* Comcast Comments at 21-22.

[47] *See* MSG Comments at 24.

[48] *See id.*

IV. THE COMMISSION SHOULD NOT ENTERTAIN COMPLAINTS UNDER OTHER PROVISIONS OF THE ACT THAT WOULD CIRCUMVENT CONGRESS'S CLEAR INTENT TO ALLOW EXCLUSIVES AFTER SUNSET.

The *Notice* sought comment on whether the Commission can continue to "preserve and protect competition" by "relying solely on existing protections provided by the program access rules that will not sunset."[49] Congress, however, clearly intended exclusive contracts to be lawful once the exclusivity prohibition has sunset, as the competitive marketplace now requires. Accordingly, rather than propose and promote creative interpretations of other statutory authority as means to prohibit exclusives that Congress intended to permit, the Commission should make clear that, after the exclusivity prohibition sunsets, any MVPD bringing a complaint regarding an exclusive contract under another provision of the Act bears a heavy burden of demonstrating that the exclusive contract is inconsistent with the Act. Section 628(b) cannot properly be used to foreclose conduct that would be otherwise legal and pro-competitive were the exclusivity prohibition to sunset. Further, as several commenters indicated, the Commission cannot use the other provisions of Section 628(c) to continue to enforce the exclusivity prohibition post-sunset.[50]

A. Section 628(b) Should Not Be Interpreted to Prohibit Contracts Permitted After Sunset, and Any Complaint Under Section 628(b) Regarding an Exclusive Contract Should Carry a Heavy Burden to Prove a Violation.

The Commission's responsibility is to discern and implement Congressional intent, not to develop arguable legal justifications for its own policy predilections. Congress clearly intended that the exclusivity prohibition expire and, once it does, the Commission cannot properly allow MVPDs to rely on Section 628(b)'s general prohibition on "unfair acts" that significantly hinder

---

49 *Notice* ¶¶ 46, 47.

50 *See* NCTA Comments at 15-16.

an MPVD from providing video programming as a back door to retain the very prohibition that Congress has instructed should expire.

In the event that the Commission nonetheless entertains complaints about specific exclusive contracts under this provision, the complainant must bear a heavy burden to demonstrate that the exclusive contract is inconsistent with the Act. As the Commission acknowledged in the *Notice*, under Section 628(b), a complainant "would have the burden to establish that the exclusive contract at issue is 'unfair'" and that the "exclusive contract has the 'purpose or effect' of 'significantly hindering or preventing' the MVPD from providing satellite cable programming or satellite broadcast programming."[51] A would-be complainant, however, cannot meet these burdens simply by showing that it has been deprived of programming because of an exclusive contract. Nor is there any legal basis to shift the initial burden of justifying an exclusive contract to a program access defendant, as certain commenters propose.[52] As NCTA stated, "complainants who attempt to utilize Section 628(b) as a means to challenge an exclusive contract should bear a heavy burden";[53] the Commission cannot and should not adopt any presumptions that weaken or shift that burden.

First, the Commission must preserve the burdens placed on complainants in order to comply with the Administrative Procedure Act. Under that law, "[e]xcept as otherwise provided by statute, the proponent of a rule or order [in an adjudication] has the burden of proof."[54] The program access statute does not "otherwise provide[]," so the burden of providing each element of a statutory violation must lie with the complainant. As the D.C. Circuit recently made clear,

---

[51] *Notice* ¶ 50.

[52] For example, DirecTV and AT&T argued that, even after sunset, cable-affiliated programmers should have the initial burden of demonstrating that an exclusive contract does not violate Section 628(b). *See* DirecTV Comments at 41-42; AT&T Comments at 19-20.

[53] NCTA Comments at 17.

[54] 5 U.S.C. § 556(d).

"[u]nder the APA, agencies may adopt evidentiary presumptions provided that the presumptions . . . shift the burden of production and not the burden of persuasion."[55]

Second, the Commission must preserve the burdens placed on complainants in order to give full effect to the sunset provision. If the Commission finds that the exclusivity prohibition is not "necessary to preserve and protect competition and diversity" and permits it to sunset – as it should – it cannot then effectively reinstitute it by requiring cable-affiliated programmers to demonstrate that an exclusive contract is not "unfair" and that a complainant is not significantly hindered or prevented from providing satellite programming to consumers.[56] To do so would moot the sunset altogether.[57]

Third, any finding that exclusive contracts are presumed to be either "unfair" or a "significant hindrance" under Section 628(b) would be inconsistent with court precedent. Of particular note, the D.C. Circuit previously struck down as arbitrary and capricious a Commission finding that entering into exclusive contracts for terrestrially-delivered programming was categorically unfair within the meaning of Section 628(b).[58] After sunset, there is no basis for a different finding with respect to exclusive contracts more generally.[59] Because Congress, in accordance with generally accepted views in antitrust law, recognized that some exclusive contracts may be procompetitive, the Commission cannot establish a

---

55 *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011).

56 *See* 47 U.S.C. §§ 548(c)(2)(D), (c)(5).

57 Moreover, the Commission can only adopt presumptions that bear a sound and rational connection between the proved and inferred facts. *See Cablevision Sys. Corp.*, 649 F.3d at 716.

58 *See id.* at 722 (reversing in part *Review of the Commission's Program Access Rules & Examination of Program Tying Arrangements*, Order, 25 FCC Rcd. 746 (2010) ("*Terrestrial Exemption Order*") and finding the Commission's action arbitrary and capricious for failing to "articulate a satisfactory explanation for its action").

59 The D.C. Circuit recognized that "[b]y creating [the public interest] exception [in Section 628(c)(2)(D)], as well as by building a sunset provision into the exclusive contract prohibition, Congress sought to balance the need for regulatory intervention . . . with its recognition that vertical integration and exclusive dealing arrangements are not always pernicious and, depending on market conditions, may actually be procompetitive." *Id.* at 720-21.

presumption that such contracts are categorically unfair.[60] Any such presumption would fail the requirement that the existence of an exclusive contract "renders the existence of" unfairness "so probable that it is sensible and timesaving to assume" it.[61] The fact that "unfairness" is an inherently ambiguous statutory term also renders any presumption of unfairness too infirm to be permitted.[62]

Nor should the Commission presume that exclusive contracts significantly hinder or prevent an MVPD from providing video programming to consumers.[63] Such a presumption would fail to meet the D.C. Circuit's test because: (1) it bears no "sound and rational connection" between the marketplace evidence and the "inferred fact" that an MVPD would be hindered significantly or prevented from providing programming to consumers; and (2) simply proving that an exclusive contract exists does not make it "so probable" that an MVPD will be significantly hindered or prevented from providing programming to consumers "that it is sensible

---

60 *See United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001) ("Permitting an antitrust action to proceed any time a firm enters into an exclusive deal would . . . discourage a presumptively legitimate business practice . . . ."); 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1803a, at 104 (3d ed. 2011) (describing output contracts as "presumptively procompetitive").

61 *Cablevision Sys. Corp.*, 649 F.3d at 716.

62 After the D.C. Circuit warned the Commission that "it must grapple with whether its definition of unfairness would apply to conduct that appears procompetitive and, if so, whether that result would comport with section 628," *id.* at 721, the Media Bureau utilized four different tests examining many factors to determine whether Madison Square Garden's withholding of its HD versions of MSG and MSG+ was unfair. *See AT&T Servs., Inc. & S. New England Tel. Co. v. Madison Square Garden, L.P. & Cablevision Sys. Corp.*, Order, 26 FCC Rcd. 13,206 ¶¶ 25-42 (Media Bureau 2011). It is obvious from the Bureau's decision that "unfairness" is a very fact-specific inquiry that cannot rationally be reduced to an evidentiary presumption.

63 With respect to whether an exclusive contract "hinders significantly or prevents" an MVPD from "providing" video programming, once the exclusivity prohibition sunsets, that requirement cannot properly be construed to mean that the requirement is met when an MVPD is prevented from distributing the particular programming network that is the subject of the exclusive contract. Such an interpretation would render the second prong meaningless. As the Commission acknowledged in the *Terrestrial Exemption Order*, "The focus of the statute is not on the ability of an MVPD to provide a particular . . . programming network, but on the ability of the MVPD to compete in the video distribution market by selling satellite cable and satellite broadcast programming to subscribers and consumers." *Terrestrial Exemption Order* ¶ 39.

and timesaving to assume the truth of [it] until the adversary disproves it"[64] In fact, as discussed above, there are numerous examples in the marketplace where MVPDs have chosen not to carry cable programming – at times, the very programming these same MVPDs claim is essential to their viability – and they have not been significantly hindered or prevented from providing programming to consumers.[65]

B. The Commission Cannot Rationally Rely on the Antidiscrimination Provision in Section 628(c)(2)(B) to Prohibit Exclusives After Sunset.

The Commission should make it clear that MVPDs cannot rely on other provisions of the Communications Act, such as Section 628(c)(2)(B), as a means of resurrecting the exclusivity prohibition that Congress has instructed should sunset. As NCTA noted, "because Congress intended the prohibition to 'cease to be effective,' the Commission may not continue to enforce it through the prohibition on discrimination in Section 628(c)."[66]

Section 628(c)(2)(B) requires the Commission to prohibit discrimination by cable-owned programmers "in the prices, terms, and conditions of sale or delivery" of satellite programming between cable operators and MPVDs.[67] At the same time, Congress expressly stated that, if an exclusive contract satisfied the public interest test in Section 628(c)(2)(D), then not only was it a permissible exclusive contract but it also could not be deemed a form of unlawful discrimination under Section 628(c)(2)(B).[68] The same should be the case if the Commission determines that

---

64 *Cablevision Sys. Corp.*, 649 F.3d at 716-17 ("[A]n evidentiary presumption is only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact . . . until the adversary disproves it." (internal quotations and citations omitted)).

65 *See supra* notes 42-43 and accompanying text. As a general matter, there is no such probability that an exclusive contract would render another MVPD so significantly hindered that it should be presumed so.

66 *See* NCTA Comments at 15-16 ("Once the exclusivity prohibition sunsets, "*all* exclusive contracts are permissible under Section 628(c)(2)(D) – and *none* are prohibited by the discrimination ban in Section 628(c)(2)(B)." (emphasis in original))

67 47 U.S.C. § 548(c)(2)(B).

68 *See id.* § 548(c)(2)(B)(iv); *see also id.* § 548(c)(4); NCTA Comments at 16.

Section 628(c)(2)(D) is no longer necessary to preserve and protect competition and diversity. If the same exclusive contracts that were prohibited under the sunset continue to be prohibited under the discrimination ban, despite a finding that the prohibition is no longer necessary, then the sunset provision is rendered moot. The Commission cannot rationally interpret the program access provisions in such a way as to render them meaningless.[69]

V. THERE IS NO JUSTIFICATION FOR THE COMMISSION TO AMEND THE PROGRAM ACCESS RULES TO ADDRESS VOLUME DISCOUNTS.

Numerous commenters agreed with Comcast that the Commission should not *expand* its program access rules when it should be cutting back on regulation. In particular, there are no legitimate bases for limiting permissible volume discounts to those that are strictly cost-based and there is no evidence of any problems with volume discounts generally that require changes to the program access rules.

A. Non-Cost-Based Economic Benefits Are Permissible Under the Statute.

As Comcast explained in its initial comments, the statute, legislative history, and the Commission's own regulations all expressly permit differences in the price, terms, and conditions a cable-affiliated programmer offers an MVPD, if those differentials are based on "cost savings" *or* "*other direct and legitimate economic benefits* reasonably attributable to the number of subscribers served by the [MVPD]."[70] Notably, there is no mention anywhere of limiting such benefits to only those that are cost-based, and doing so would be contrary to

---

69 *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute whenever possible."); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 105 (1991) (noting that statutes should be construed "to avoid rendering superfluous any parts thereof"); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (explaining that, where "[t]he statute admits a reasonable construction which gives effect to all of its provisions[,] . . . we will not adopt a strained reading which renders one part a mere redundancy").

70 47 U.S.C. § 548(c)(2)(B)(iii) (emphasis added); 47 C.F.R. § 76.1002(b)(3); *see* H.R. Rep. No. 102-862, at 92-93 (1992); *see also* 47 C.F.R. § 76.1002(b)(3) note (explaining that a programmer relying on volume-related factors "will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but *may also identify non-cost economic benefits to increased viewership*" (emphasis added)).

Congress's intent.[71] As Discovery explained, programmers – whether cable affiliated or not – offer volume discounts *not* for the purpose of discriminating against any particular MVPD, but because "[l]arger distributors, by their nature, offer programmers more value by distributing to a larger audience," and this "added value larger distributors bring to a carriage agreement is *not always solely cost-based.*"[72] Such non-cost benefits include, among many other things, "enhanced talent, program, and brand recognition for the service";[73] greater license fee revenue, higher advertising revenue, and wider marketing exposure; and transactional, production, and operational efficiencies.[74]

The Commission consistently has recognized the value of non-cost-based economic benefits since implementing the program access rules,[75] and there is no evidence whatsoever of discriminatory non-cost-based volume discounts to now justify a change in that view.[76] Nor could the Commission change its view, when, as mentioned above, Congress has statutorily blessed *any* "direct and legitimate economic benefit" that justifies a volume discount.[77]

Comcast also agrees with other commenters that the Commission's proposal to create a list of non-cost-based economic benefits that can justify volume discounts is not only unnecessary, but also would be entirely unworkable.[78] The Commission should not attempt to

---

71 *See* Comcast Comments at 15-17.

72 Discovery Comments at 12 (emphasis added).

73 *Id.*

74 *See* Comcast Comments at 18.

75 *See Implementation of Sections 12 and 19 of the Cable Television Consumer Prot. & Competition Act of 1992, et al.*, First Report & Order, 8 FCC Rcd. 3359 ¶ 108 (1993); *Implementation of Section 11 of the Cable Television Consumer Prot. & Competition Act of 1992, et al.*, Further Notice of Proposed Rulemaking, 16 FCC Rcd. 17,312 ¶ 14 (2001).

76 *See* Comcast Comments at 19; MSG Comments at 30.

77 *See* Comcast Comments at 16 n.51.

78 *See* Discovery Comments at 13. As Discovery explained, "The nature of the non-cost benefits change with each agreement. . . . [E]ven if a generally applicable list of non-cost benefits could be created (which it likely cannot), any list would become almost immediately outdated." *Id.*

fix what is not broken, and thus should leave the value of non-cost based economic benefits to the parties actually at the negotiating table.

In all events, as commenters explained, volume discounts in general are a healthy and positive marketplace practice – one that is extremely common in the video distribution marketplace and has Congress's blessing.[79] Volume discounts are used by virtually every programming network – regardless of affiliation, size, or genre – and the existence of such discounts is "deeply ingrained in current markets."[80] New restrictions on volume discounts at this point in time would likely lead to rate increases for MVPDs, and ultimately for consumers, and would unnecessarily disrupt the marketplace for no good reason.[81] Moreover, because any new restrictions adopted in this proceeding would not apply to the 85 percent of national programming networks that are not affiliated with a cable operator, such restrictions would "necessarily distort the market for satellite-delivered cable programming by artificially favoring programmers that are not cable-affiliated[.]"[82] The Commission should be moving closer toward regulatory parity in today's extremely competitive marketplace, not further expanding the asymmetries between cable-affiliated and non-cable-affiliated programmers.

B. The Commission Should Reject ACA's and Mediacom's Proposals to Create Rate Schedules for Video Programming.

Certain parties attempt to use allegedly "discriminatory" volume discounts as an opportunity to rewrite the program access rules to their benefit and gain leverage in negotiations.

---

79 *See* Comcast Comments at 17-18; MSG Comments at 29-31. As MSG notes, the Commission itself has recognized that "[t]he mere existence of rate differentials between larger and smaller MVPDs is . . . a reflection of a normal market dynamic and not a competitive concern." *See* MSG Comments at 30 & n.92 (citing *DirecTV SportsNet Pittsburgh, LLC v. Armstrong Utilities, Inc.*, Order on Review, 26 FCC Rcd. 12,574 ¶ 37 (2011)).

80 MSG Comments at 31.

81 *See id.* at 31-32. Quite naturally, if restricted in their ability to provide volume discounts based on the cost savings and other economic benefits they receive from dealing with certain MVPDs, programmers are more likely to attempt to reduce the discounts they currently provide rather than extend those discounts more broadly.

82 *Id.* at 32.

The Commission should reject these attempts to override marketplace negotiations with video programming "rate schedules," which sound akin to common carrier tariffs, simply because those parties are unhappy with the longstanding, nondiscriminatory practice of volume discounts.

Among other things, ACA proposes that cable-affiliated programmers should be required to provide buying groups like NCTC, which already enjoy the benefits of the program access rules, with rate schedules applicable to differing subscribership levels.[83] Under this proposal, a cable-affiliated programmer that refused to offer a non-discriminatory schedule of prices based on the *potential* number of subscribers a buying group's members *could* provide would violate the discrimination prong of Section 628(c). Putting aside the fundamental problem that the Commission could not lawfully adopt this proposal that was not part of the *Notice*,[84] requiring a rate schedule for varying levels of potential subscribership is simply not contemplated, and certainly not required, under Section 628(c) or any other portion of the program access rules – nor should it be. What is at issue here is video programming – not transmission services that must be tariffed by common carriers. And what makes the most sense is for the programmer to provide NCTC (or any other buying group) with an offer for specific prices, terms, and conditions once it is sitting at the bargaining table with NCTC, and once NCTC knows what it can actually offer in terms of subscriber numbers, geographic coverage, or other issues relevant to the master agreement at hand.[85] Time and energy should be saved for productive negotiations,

83 ACA Comments at 32.

84 *See* 5 U.S.C. § 553(b)(3) (requiring an agency to provide public notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved"); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (APA requires an agency to give "fair notice" of the rule ultimately adopted); *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) (agency must "fairly apprise interested persons of the subjects and issues" of the rulemaking).

85 As Comcast explained in its initial comments, small cable operators can and do aggregate their buying power, and could obtain more favorable discounts if the NCTC were to make binding subscriber distribution commitments. *See* Comcast Comments at 19; ACA Comments, Decl. of Frank Hughes, SVP of Member Services for NCTC, at 2 ("NCTC negotiates master agreements and their renewals with video programmers. NCTC then

not spent creating generally applicable rate schedules. There simply is no reason to disrupt normal marketplace negotiations by bringing the government into the equation.

Plus, this proposal has nothing to do with the issue of cable-affiliated, vertically-integrated programming. ACA does not allege, much less prove, that it needs cable-affiliated networks, but not other networks, to bargain in this way. But the Commission has no authority over non-cable-affiliated networks, and even if it did, it would be competition-distorting for the Commission to impose this requirement only on cable-affiliated networks.

The Commission should likewise reject Mediacom's similar call to require that the net effective rate for video programming be *the same* for all MVPDs, regardless of size, and require programmers to "waive existing confidentiality provisions and disclose the net effective rates that various MVPDs actually pay (as well as other material contract terms)."[86] There is absolutely no basis in law or policy for such requirements. To the contrary, as discussed above, price differentials are *expressly allowed* when based on the statutory factors, so Mediacom's rate proposal is in direct conflict with the statute. Similarly, with respect to Mediacom's disclosure proposal, as Mediacom well knows, carriage agreements are among the most sensitive and highly confidential business agreements between programmers and MVPDs, and the Commission's rules expressly protect from disclosure the rates, terms, and conditions of "[p]rogramming contracts between programmers and [MVPDs]."[87] At bottom, Mediacom seeks access to a programmer's various carriage agreements to gain leverage at the bargaining table, and should not be allowed to do so.

---

allows its members to opt in to the master agreements . . . . Programmers have accepted the role NCTC plays in this manner and NCTC has generally been able to provide significantly lower license fees for its members than its members could obtain by negotiating individually with the programmers.").

86 Mediacom Comments at 11.

87 47 C.F.R. § 0.457(d)(1)(iv).

VI. THERE IS NO JUSTIFICATION OR AUTHORITY FOR THE COMMISSION TO REGULATE WHOLESALE PROGRAMMING PRICES TO ADDRESS CONJECTURAL UNIFORM PRICE INCREASES.

In response to the *Notice*'s request for comment on alleged "uniform price increases" by cable-affiliated programmers,[88] some commenters urged the Commission to fashion an entirely new regulatory regime to regulate the wholesale prices of cable-affiliated programming.[89] Not a single party, however, provided a legal rationale or cited any Commission authority for doing so. Moreover, the record makes clear that allegations of uniform price increases by cable-affiliated programmers are mere speculation and that what these commenters really are concerned about is rising programming costs generally.

As a number of commenters explained, the Commission's Section 628(c) authority does not extend to the regulation of "uniform price increases."[90] The discrimination prohibition in Section 628(c)(2)(B) is limited to determining whether any differential in prices offered to MVPDs is reasonable and based on "actual or reasonable differences" in the costs associated with providing programming to an MVPD or "other direct and legitimate economic benefits" reasonably attributable to the number of subscribers an MVPD serves.[91] In today's competitive marketplace, buyers and sellers are perfectly capable of negotiating competitive prices; and the parties can simply walk away if the price is not "right" from their perspective, as Dish, AT&T, and DirecTV all have done in recent months.[92] If the Commission were to step into the middle

---

88 *Notice* ¶¶ 101-102.

89 For example, ACA argued that the Commission should adopt a "fair market value" standard for adjudicating whether a cable-affiliated programmer has engaged in unlawful discrimination. ACA Comments at 38. ACA proposed that the fair market value be determined by comparing the price for the cable-affiliated programming network to the price the programming network's cable affiliate pays to other programming networks that are similar to the cable-affiliated network. *Id.* at 40-41.

90 *See* Comcast Comments at 22, MSG Comments at 33-34, Discovery Comments at 15-16.

91 47 U.S.C. § 548(c)(2)(B)(ii)-(iii).

92 *See* Brian Stelter, *DirecTV-Viacom Dispute Turns Into Blackout Reality*, NY Times, July 11, 2012; Press Release, Dish Network, *DISH to Replace AMC with Commercial-Free HD Movies* (June 29, 2012) (explaining that

of such negotiations and determine its version of the "right" price, it would amount to full-blown rate regulation of wholesale programming prices, which it has no authority to regulate.[93]

In addition, the theory that cable-affiliated programmers can engage in uniform price increases is fraught with assumptions that are not borne out in the marketplace. Specifically, the notion of "uniform price increases" is based on the theory that it is profitable for a cable operator to raise rivals' costs by increasing the price for an affiliated network for all MVPDs, treating the increased price to its cable affiliate as an internal accounting transfer. This theory, however, is premised on the false assumption that cable-affiliated programmers have sufficient market power to impose unwarranted price increases on competing MVPDs. Powerful marketplace forces constrain the ability of a programmer – be it cable-affiliated or not – from engaging in such price increases. In particular, MVPDs have not hesitated to walk away from prices they believed were too high. And, programmers have strong incentives to distribute their content to as many viewers as possible so as to maximize their subscriber fees and advertising revenues, which ensures that they charge prices that are competitive with the networks they compete against.

The uniform price increase theory also assumes that the affiliated operator is sufficiently insulated from competition such that it can pass through unwarranted price increases to its own

Dish decided not to renew its contract for IFC, WE, and AMC), *available at* http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=687810; *Dish, AT&T Threaten to Drop AMC Channels as Fee Dispute Reaches Fever Pitch*, Huffington Post, June 29, 2012, *available at* https://www.google.com/search?q=AT%26T+threatens+to+drop+AMC&rls=com.microsoft:en-us&ie=UTF-8&oe=UTF-8&startIndex=&startPage=1; Steve Cavendish, *AT&T's U-verse Drops Food Network, HGTV and Other Scripps Networks*, Chicago Tribune, Nov. 5, 2010.

93 *See* MSG Comments at 34, Discovery Comments at 15-16.; *see also* Reply Comments of Comcast Corp., MB Docket No. 04-207, at 20-21 (Aug. 13, 2004) ("[T]he government's recent attempts to regulate program pricing and packaging created lasting harm to programmers, cable operators, and consumers alike . . . . The Commission issued over 20 separate rate orders and hundreds of regulations, fact sheets, notices of inquiry, and notices of proposed rulemaking, comprising thousands of pages in the Federal Register. And the results of these efforts were: severe cutbacks in programming and infrastructure investment; reduced program diversity; a nearly decade-long delay in the digital transition; and no improvement in consumer welfare.").

customers.[94] But it is obvious from the comments that the MVPD marketplace is buzzing with competition, which requires cable operators, as well as their competitors, to keep consumer prices as low as possible.[95]

Claims alleging problems with uniform price increases are pure conjecture. Although the Commission may have found that the potential for merger applicants to engage in uniform price increases warranted the imposition of time-limited conditions in the context of particular transactions involving the combination of distributors and programmers, that same theory cannot be extended to justify rules of general applicability without evidence of a marketplace problem that needs correcting.[96] And based on the record in this proceeding, it is clear that there is no such evidence. Those commenters that urge regulation of uniform price increases fail to identify a single instance of a uniform price increase. Even ACA's long-winded discussion of its theories of harm fails to mention any actual evidence of uniform price increases in the marketplace.[97]

Finally, the Commission is not equipped to put in place a regime that would regulate wholesale programming prices in this manner.[98] Regulation of wholesale prices would be just as, if not more, complicated than regulation of retail cable prices, and that was a quagmire that no sensible policymaker would want to reenter.[99] And if the Commission attempted to design a

---

94 *See* MSG Comments at 34-35.

95 *See id.*

96 *See, e.g.*, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985) ("[T]he Commission has failed entirely to determine whether the evil the rules seek to correct 'is real or merely a fanciful threat.'" (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir. 1977))).

97 *See* ACA Comments at 34-39.

98 As MSG observed, "[t]he Commission would face considerable challenges in identifying and distinguishing unfair uniform price increases from across-the-board, market-based rate adjustments reflecting the cost and appeal of a program network." MSG Comments at 33.

99 The Commission revised its cable rate regulation rules for cable programming services innumerable times before Congress took away its authority to do so less than four years after granting it. *See, e.g.*, *Implementation of Section of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, Fourteenth Order On Reconsideration, 12 FCC Rcd. 15,554 (1997) (fourteenth Commission order reconsidering its rate regulation rules);

regime that mandated a "fair market value" determination of every programming network, the Commission, along with operators and programmers, would be stuck in a morass of quasi-rate cards and resulting litigation that was always far behind the marketplace.

VII. CONCLUSION

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

Respectfully submitted,

/s/ Kathryn A. Zachem
Kathryn A. Zachem
James R. Coltharp
Regulatory Affairs

Lynn R. Charytan
Brian A. Rankin
Catherine Fox
Legal Regulatory Affairs

COMCAST CORPORATION
300 New Jersey Avenue, N.W., Suite 700
Washington, DC 20001

Margaret L. Tobey
NBCUNIVERSAL MEDIA, LLC
300 New Jersey Avenue, N.W., Suite 700
Washington, DC 20001

James L. Casserly
Ryan G. Wallach
Jessica F. Greffenius
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006

Attorneys for Comcast Corporation

July 23, 2012

1996 Telecom Act § 301(b), 110 Stat. at 115 (codified at 47 U.S.C. § 543(c)(4)) (terminating the Commission's authority to regulate the retail rates charged for all tiers but the basic service tier).