DISSENTING STATEMENT OF
COMMISSONER KATHLEEN Q. ABERNATHY

Re: Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition, CS Docket No. 01-290 (adopted June 13, 2002).

I respectfully dissent from today's decision. The ban the majority extends today is over-inclusive, inconsistent with today's marketplace, and no longer "necessary" as defined by the statute. Congress enacted a limited ban on exclusive programming agreements between affiliated programmers and cable operators, providing that it would sunset October 5, 2002, unless the Commission determined that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[1] In enacting the 1992 Cable Act, Congress stated that it was its policy to "rely on the marketplace, to the maximum extent feasible to achieve" the "availability to the public of a diversity of views and information through cable television and other video distribution media."[2] Thus, in order to survive our review, the ban on exclusive agreements needs to be more than beneficial or desirable; the record must demonstrate that the prohibition is needed to preserve and protect competition. The burden falls on those advocating retention of the ban to demonstrate that the restriction is, in fact, necessary. The record in this case demonstrates that increased competition in both the video distribution and programming markets jointly render the ban on exclusive agreements no longer necessary. I understand the majority's reluctance to trust in the market, since it is necessarily less predictable and more volatile than regulatory mandates. Nevertheless, time and again markets have been proven to deliver greater innovation and choice to consumers and this is no exception. I believe today's marketplace supports placing our trust in markets over mandates and lifting the ban.

The video distribution marketplace has changed significantly since enactment of the 1992 Cable Act both in terms of increased competition and programming. When the ban on exclusivity was enacted, cable operators served over 95% of the market and DBS operators were just at the horizon of offering service.[3] Today, the two largest DBS competitors, DirecTV and Echostar, serve almost 11 million subscribers and over 7 million subscribers, respectively -- making DirecTV the third largest multichannel video programming distributor ("MVPD") and Echostar the seventh largest MVPD.[4] Collectively, DBS now serves over 18% of the market, while cable's market penetration has been reduced to 78%.[5] DBS penetration also has been growing at a rapid pace. From

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[1] 47 U.S.C. § 548(c)(2)(D).
[2] 1992 Cable Act §2(b)(2), (1).
[3] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, 16 FCC Rcd 19074, 19078 (2001).
[4] *Annual Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1341 (2002) ("*Eighth Annual Report*").
[5] *Eighth Annual Report*, 17 FCC Rcd at 1272.

June 2000 to June 2001, DBS's subscriber growth rate was 19 percent.[6] Two new terrestrial-based competitors, RCN and WideOpen West, rank among the nation's top 15 MVPDs.[7] Overall non-cable subscribership has grown nearly ten-fold from 2,330,000 in December 1992 to more than 20,876,000 in September 2001.[8]

There are nearly three times as many cable programming networks as there were since the first report on competition in 1994 (294 compared to 107), and a significantly lower percentage of those networks are vertically integrated.[9] In fact, the number of vertically integrated programming networks has dropped from 53% to 35%,[10] and the underlying number of programming services offered nationally that have no attributable cable ownership has increased from 50 to over 190.[11] The programming market is highly competitive and access to shelf space is limited. Thus, there are a substantial number of programming choices available beyond those provided by networks that are vertically integrated. And, with respect to the most popular programming, the number of vertically integrated networks among the top 15 most watched cable programming services has been cut in half.[12] In 1994, 12 of top 15 satellite-delivered programming networks (prime-time), or 80%, were vertically integrated with cable operators, whereas in 2001 that number was reduced to 6 of the top 15, or 40%.[13]

Based on the dramatic changes in the marketplace, I do not believe that the ban on exclusive agreements continues to be *necessary* to preserve and protect competition and diversity. Furthermore, the record does not support a finding that affiliated cable programmers have both the *ability* and the *incentive* to withdraw and withhold programming from competing MVPDs. Moreover, I believe removing this artificial regulatory constraint will foster more rigorous competition and diversity in the programming and video delivery marketplace.

In the vast majority of cases, withholding programs through exclusive arrangements is simply not rational. With respect to the *incentive* to withhold programming, any attempt to use exclusivity to foreclose competition by withdrawing or withholding services would entail a sacrifice of existing or potential profits that were not existent in 1992. Programmers rely upon subscription fees and advertising sales. Thus, the economic incentive for programmers is to reach as many eyeballs as possible. As noted above, non-cable subscribership has grown nearly ten-fold from 2,330,000 in December 1992 to more than 20,876,000 in September 2001. DBS operators alone account for approximately 18 million of those subscribers. Moreover, the existing

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[6] *Id*.

[7] Reply Comments of Cablevision Systems Corp., January 7, 2002, at 10. As of the last annual report on competition, RCN had 443,011 subscribers and WideOpen West had approximately 300,000 subscribers. *Eighth Annual Report*, 17 FCC Rcd at 1295.

[8] Comments of the National Cable & Telecommunications Association, December 3, 2001, at 6 (Source: 1992-June 2000 FCC Competition Report, Sept. 2001: NCTA Research).

[9] *Eighth Annual Report*, 17 FCC Rcd 1309*; Annual Assessment of the Status of Competition in the Market for the delivery of Video Programming*, 9 FCC Rcd 7442, 7589-92 (1994) ("*First Report on Competition*").

[10] *Id*.

[11] *Eighth Annual Report*, 17 FCC Rcd at 1309; *First Report on Competition*, 9 FCC Rcd at 7522.

[12] *Eighth Annual Report*, 17 FCC Rcd at 1364; *First Report on Competition*, 9 FCC Rcd at 7522.

[13] *Eighth Annual Report*, 17 FCC Rcd at 1364; *First Report on Competition*, 9 FCC Rcd at 7600.

programming that is cited in the order as being the "must have," or "marquee," programming is already being carried by competing providers to millions of subscribers. There is nothing in the record to support a conclusion that affiliated programmers have a rational economic reason to *withdraw* this programming from competing providers and *lose* up to 20 million subscribers along with the corresponding ratings and revenues. This is particularly true, where the marginal gain from such conduct for any individual MVPD is so limited. A cable provider would have to conclude that the revenue reduction caused by cutting off an audience of 20 million viewers could somehow be trumped by the possible increased revenues from prying away some viewers from competitive providers in their own service areas. Such an incremental market gain is not only highly speculative, but in many cases it is simply not mathematically possible.[14]

An essential element of the majority's analysis is that without universal mandatory access to vertically integrated programming, competition and diversity would be not be preserved or protected. With respect to new programming, access to this programming by all MVPDs is not vital or even obviously helpful to the twin statutory goals of competition and diversity. A competitor that does not offer such programming may arguably be disadvantaged if it does not provide competing programming, but such is the nature of the marketplace. A marketplace that pressures competitors to produce new original programming fosters diversity and competition; it certainly does not harm it. Aside from this market dynamic regarding new programming, there are also substantially more choices of programming in the marketplace today and increasingly popular non-affiliated programming available to alternative MVPDs further undermining the notion that there is any harm from permitting exclusive contracts for new vertically integrated programming.

Furthermore, I do not believe that concern over access to regional programming alone – particularly, regional sports – is sufficient to find that this prohibition continues to be necessary. First, some regional networks are terrestrial-delivered and, therefore, not subject to the statute. In this regard, there is little comprehensive data in the record analyzing the real world impact of exclusive contracts for regional sports in those markets where such agreements are in place. I believe such a showing would be essential to demonstrating the "necessity" of the ban. Indeed, even if I was to concede that such harms would accrue for this limited subset of programming in these discrete geographic regions where such vertical integration exists, such isolated cases cannot justify the prophylactic rule that the majority extends today.[15]

Similarly it is important to recognize that the Commission does not need this over-inclusive prophylactic rule to address these issues because Congress has provided

[14] Moreover, any incentive to sacrifice programming revenue for a potential long-term gain of increased subscribership to the cable distribution system is proportionally weakened where the affiliated cable operator does not wholly own the programming entity. In other words, a cable operation with a 10% interest in a programmer has only 10% of the incentive that a wholly owned programmer would have. Once again, this demonstrates the over-inclusiveness of the current ban that sweeps in cable operators who have a 5% ownership stake in the programmer.

[15] *See, e.g., United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir., May 24, 2002) (reversing Commission order based on failure to justify sweeping national rules).

the Commission with other tools to address discriminatory conduct after the statutory sunset. Specifically, (i) Section 628(c)(2)(B) prohibits non-price discrimination, which the Commission has stated "could occur through a vendor's 'unreasonable refusal to sell,' including refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor;"[16] (ii) Section 628(c)(2)(A) prohibits a cable operator that has an attributable interest in a satellite programming vendor from "unduly or improperly influencing the decision of such vendor to sell . . . to any unaffiliated multichannel video programming distributor;"[17] and (iii) Section 628(b) prohibits "unfair methods of competition . . .the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[18] Thus, in the unlikely event that a provider discriminatorily withheld programming from an in-region overbuilder, the Commission has other more precise regulatory tools to address such conduct.

Overall, in light of the significant competitive changes in the marketplace – including the dramatic increase in both competition and availability of programming – and the existence of other provisions that protect competing MVPDs from discriminatory treatment, including "unreasonable refusals to sell," I cannot find that this provision continues to be necessary to preserve and protect competition and diversity in the delivery of video programming. In fact, I believe that eliminating this prohibition likely would foster the development of new, innovative services that allow competitors to distinguish themselves and provide additional value and services to consumers. Mandating that vertically integrated programmers share the rewards, but not the risks, of their investment reduces the willingness of those programmers to develop innovative new programming in the first place. Congress wanted to rely on market forces to the extent feasible to achieve a diversity of views and information through cable television and other video distribution media. Allowing the prohibition on exclusive contracts to sunset as envisioned by Congress would allow market forces to work to provide such diversity to the benefit of all Americans.

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[16] 47 U.S.C. § 548(c)(2)(B); 47 C.F.R. § 76.1002(b); *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3412 (1993); *recon*. 10 FCC Rcd 1902 (1994), *further recon*. 10 FCC Rcd 3105 (1994).
[17] 47 U.S.C. § 548(c)(2)(A); 47 C.F.R. § 76.1002(a).
[18] 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001.