STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL
APPROVING IN PART, CONCURRING IN PART

Re: *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68 et al.

In this order, we eliminate the rule prohibiting exclusive contracts between cable operators and cable-affiliated programming vendors for satellite-delivered programming. In mandating that the Commission adopt the exclusivity ban as part of the Cable Act of 1992, Congress provided that this prohibition would expire in October 2002, unless the FCC found that it remained necessary to preserve competition and diversity in multichannel video programming distribution.[1] By extending this prohibition twice in 2002 and 2007, the Commission has already retained this rule for a decade longer than Congress required.

In short, the marketplace has evolved substantially since Congress last spoke on this subject a generation ago. The exclusivity ban served its purpose, but now the facts justifying its existence have changed in favor of consumers. Accordingly, this creaky relic must be shown the door.

Although I supported the 2007 extension of the exclusivity ban to further encourage competition in the video distribution market, I recognized, at the time, that "[m]ore competition in a particular market obviates the need for regulation."[2] The United States Court of Appeals for the D.C. Circuit, when reviewing the 2007 extension, came to a similar conclusion, in finding that, if the market continued to evolve, the FCC would be able to conclude that the exclusivity ban is no longer necessary. In fact, the court went so far as to say that "[w]e anticipate that cable's dominance will have diminished still more by the time the Commission next reviews the prohibition, and expect that at that time the Commission will weigh heavily Congress's intention that the exclusive contract prohibition will eventually sunset."[3]

Indeed, since the last review of this rule in 2007, the multichannel video programming distribution market has continued to evolve and become more competitive. Despite this increased competition, I recognize that vertical integration between cable operators and programmers could raise concerns in certain instances, especially for non-replicable programming, such as regional sports networks. To the extent that any such issues arise, the Commission can perform a case-by-case review of exclusive contracts under the remaining program access rules using established complaint processes to ensure that anticompetitive effects do not occur, consumers are not harmed and the marketplace continues to flourish. In today's vibrant marketplace, a prophylactic exclusivity ban is not supportable when we have a more competitive market, as well as a Congressionally-required alternative means to protect competition and diversity in the distribution of video programming.

For these reasons, I support the sunset of the prohibition on exclusive contracts. I anticipate that its elimination will spur the creation of even more new programming and provide

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[1] 47 U.S.C. § 548(c)(2)(D), (c)(5).

[2] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17934 (2007) (stating that, although the video distribution market had changed significantly, there was increased consolidation in the cable industry and regional clustering of cable systems).

[3] Cablevision Systems Corp. v. FCC, 597 F.3d 1306, 1314 (D.C. Cir. 2010).

American consumers more choices through product differentiation. I do, however, have significant concerns that many of the positive steps we take today could be undermined by our inquiry into whether the FCC should establish a series of rebuttable presumptions that would apply to certain exclusive contracts challenged under our remaining program access rules.

Despite the Commission's finding that exclusive contracts can be procompetitive and should be reviewed on a case-by-case basis, the FCC seeks comment on whether there should be rebuttable presumptions that certain exclusive contracts should be considered, by their very nature, to be "unfair" regardless of the specific market conditions. The Commission also inquires as to whether there should be a rebuttable presumption for obtaining a standstill arrangement while certain contracts are challenged. Such a presumption does not appear to be consistent with Commission precedent finding that a standstill is an extraordinary remedy that may be awarded only upon a factual showing that the plaintiff is entitled to such relief. If we proceed, these contradictions will undoubtedly result in legal challenges under the Administrative Procedure Act.[4] Also, is this the beginning of a back-handed attempt to resurrect the exclusivity ban for certain exclusive contracts using the remaining program access rules and rebuttable presumptions?

I am also concerned about attempts to extend the rebuttable presumption established for regional sports networks to exclusive contracts for cable-affiliated national sports networks. Such questions could result in content-based regulations – obviously raising First Amendment concerns – with no actual evidence of market failure. In fact, the arguments presented in support of such a presumption are based, in part, on the hypothetical harms that could arise if a high-profile national sports network is acquired by cable operators. Once again, the Commission may be trying to tinker with a market that may function quite well if left alone. In the absence of a *bona fide* market analysis and resulting evidence of market failure, we should avoid *ex ante* regulation and its unpredictable and unintended costs.

For these reasons, I concur to the sections of the further notice seeking comment on these rebuttable presumptions. I look forward to reviewing the comments and appreciate that there are questions contained in the further notice that provide participants the ability to opine on the various legal issues raised by these presumptions. Further, I am hopeful that all stakeholders will continue to engage with the Commission to suggest improvements to our complaint processes if issues arise. We should always strive to do better. I thank the Media Bureau for their hard work on this order and further notice of proposed rulemaking.

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[4] *See, e.g.,* Cablevision Systems Corp. v. FCC, 649 F.3d 695, 716 (D.C. Cir. 2011) (stating that "under the APA, agencies may adopt evidentiary presumptions provided that the presumptions (1) shift the burden of production and not the burden of persuasion, … and (2) are rational…. An 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.").