STATEMENT OF
COMMISSIONER AJIT PAI

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

Change is the only constant in the communications sector. This heightens the need for the FCC to make sure that our regulations reflect the current realities of the marketplace. One way to do this is through the use of sunset clauses, which require us to review existing rules and decide whether they should be modified or eliminated in light of competition in a particular market. Today's order highlights the value of sunset clauses, whether imposed by statute or adopted by discretion.[1]

Congress passed the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act)[2] against the backdrop of a video marketplace dominated by cable operators with local monopolies. Among other things, the Act codified a ban on exclusive contracts for satellite-delivered cable and broadcast programming between cable operators and cable-affiliated networks.

Congress understood, however, that if its efforts to encourage competition were successful, the ban on exclusive contracts eventually would become unnecessary. Therefore, it included a sunset clause: the ban would only last for ten years, after which the Commission would decide whether it remained "necessary to preserve and protect competition and diversity in the distribution of video programming."[3] When the exclusivity ban expired in 2002, the Commission voted to renew it for another five years.[4] The Commission extended it again in 2007,[5] and it is set to expire today.

In reviewing our 2007 decision, a divided panel of the U.S. Court of Appeals for the D.C. Circuit deferred to the Commission's finding that the ban was still necessary.[6] However, the court also indicated that the Commission would have difficulty justifying another renewal if cable's market share continued to decline.[7] This is because the Cable Act predicates extension of the ban on a finding that it remains necessary to promote competition.[8]

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[1] *See* Statement of Commissioner Ajit Pai, Hearing before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce at 2 (July 10, 2012) (by "requir[ing] periodic re-evaluation of existing regulations," sunset clauses "ensure[] timelier decision-making and a regulatory framework better calibrated to a dynamic communications marketplace"), *available at* http://go.usa.gov/YDcJ.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 47 U.S.C. § 548(c)(5).

[4] *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, Report and Order, 17 FCC Rcd 12124 (2002) (*2002 Sunset Extension Order*).

[5] *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; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007).

[6] *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) (*Cablevision I*).

[7] *Id*. at 1314 ("We expect that if the market continues to evolve at such a rapid pace, the Commission will soon be able to conclude that the exclusivity prohibition is no longer necessary to preserve and protect competition and diversity in the distribution of video programming.").

[8] *See* 47 U.S.C. § 548(c)(5) ("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.").

Two decades after Congress instituted the program exclusivity ban, we are compelled by the law and the facts to change course. When the Cable Act was enacted, 95% of MVPD subscriptions were attributable to cable.[9] When the exclusivity ban first came up for reauthorization in 2002, cable's share of the market had shrunk to 78%. When the ban was last extended in 2007, cable's share of the multichannel video programming distribution (MVPD) market had further fallen to 67%. It now rests at just over 57%, meaning that there has been nearly a 40% decline in just twenty years.[10] And more competitive challenges are on the way, as telephone companies, over-the-top distributors, and others continue to make inroads into the video marketplace.[11] Vertical integration has diminished recently as well. Currently, only 14% of programming networks are affiliated with cable companies, down from 35% a decade ago.[12]

In short, it is indisputable that competition in the video distribution market has become substantially more vibrant over the past twenty years. I therefore believe that the exclusivity ban has outlived its statutory purpose as well as its constitutional justification.[13] The market has changed, and our rules must follow.

Some have expressed concern that cable operators may use exclusive contracts to harm competition and impede entry into video distribution markets. However, as cable's market share has fallen, cable-affiliated programmers are earning an ever-larger share of revenues from licensing content to non-cable MVPDs. This reduces their incentives to forgo licensing fees for programming in the hope of inducing rivals' customers to switch providers. In short, there just won't be a business case for many cable-affiliated programmers to withhold content.

More significantly, exclusivity can promote competition. It can provide non-cable MVPDs with the incentive to develop content to compete with cable, just as it enhances cable operators' incentive to further develop their programming. Examples involving local news programming demonstrate that exclusive arrangements can yield greater investment in programming and more diverse content. This can allow video distributors to differentiate their products, and thereby compete to deliver better content than their competitors. Eliminating the exclusivity ban thus can help foster a system of broader competition on service and quality, not one limited to a game of price wars.

Another benefit of ending the ban is that it will bring parity to our regulatory treatment of regional sports networks (RSNs). The exclusivity ban only applies to satellite-delivered RSN content, while terrestrially-delivered RSNs are handled on a case-by-case basis. This disparity does not make any sense; the competitive concerns raised by RSN distribution do not differ based on how signals reach customers.

To be clear, removal of the ban does not mean abdication of our responsibility to enforce section 628 of the Communications Act.[14] Even after today's decision, MVPDs may file a complaint at the Commission alleging that a particular exclusive contract is an unfair act that violates section 628(b).[15] I

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[9] *See* Report and Order at Appendix E.

[10] *See* SNL Kagan, U.S. Cable Subscriber Highlights, June 2012.

[11] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Fourteenth Report, 27 FCC Rcd 8610, 8626–27, para. 40 (2012) (98.5% of American consumers can choose among three or more MVPDs, in addition to traditional broadcast television stations); *id*. at 8627–28, para. 41 ("[S]ince the Commission's first report on the status of competition in the market for the delivery of video programming in 1995, almost no subscriber has fewer MVPD choices and most subscribers have more MVPD choices.").

[12] *2002 Sunset Extension Order*, 17 FCC Rcd at 12131, para. 18.

[13] Because the ban is no longer necessary as a means of preserving competition, it likely fails intermediate scrutiny and thus runs afoul of the First Amendment. *Cf. Cablevision I*, 597 F.3d at 1311.

[14] 47 U.S.C. § 548.

[15] 47 U.S.C. § 548(b) ("It shall be unlawful for a cable operator, a satellite cable programming vendor in which a

am aware of the costs (both the actual expenses of litigation and costs incurred through delay) that can be imposed upon MVPDs during the pendency of such complaints. For this reason, I believe the Commission must adjudicate these disputes in a timely manner. I am therefore pleased that my colleagues agreed to adopt a six-month deadline for resolving section 628(b) complaints concerning denials of programming.

I am mindful, too, of the special considerations applicable to RSNs. The Commission has long recognized that many RSNs carry programming that consumers consider "must-have" and competitors cannot replicate.[16] This precedent suggests that it is appropriate to apply a rebuttable presumption that RSN exclusivity has the "purpose or effect" of "hinder[ing] significantly or . . . prevent[ing]" a rival MVPD from providing competitive programming within the meaning of section 628(b).[17] This presumption reverses the burden of production, not the burden of persuasion, and may ultimately reduce litigation costs and/or deter anticompetitive behavior.[18]

In sum, it is time to replace our flat prohibition on exclusive programming contracts with a more pragmatic, fact-specific adjudicatory approach. Our decision to eliminate the across-the-board ban on such contracts brings our regulations more in line with the competitive realities of the marketplace and has the potential to promote greater competition among cable and non-cable MVPDs. I am therefore pleased to support the item.

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cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, 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.").

[16] *See, e.g.*, *Review of the Commission's Program Access Rules & Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Rcd 746, 750, para. 9 (2010).

[17] 47 U.S.C. § 548(b).

[18] *See*, *e.g.*, Antonio Bernardo et al., *A Theory of Legal Presumptions*, 16 J.L. ECON. & ORG. 1, 2–3 (2000) (positing that "evidentiary rules adopted by courts—that is, initial presumptions and burdens of proof—are an important mechanism for striking an optimal balance between" the competing inefficiencies of litigation and the types of conduct that give rise to litigation in the first place).