ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 07–1425 & 07–1487

CABLEVISION SYSTEMS CORPORATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

THOMAS O. BARNETT
ASSISTANT ATTORNEY GENERAL

JAMES J. O'CONNELL, JR.
DEPUTY ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

MATTHEW B. BERRY
GENERAL COUNSEL

JOSEPH R. PALMORE
DEPUTY GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

NANDAN M. JOSHI
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418–1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners.

2. Ruling under review

Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007) (J.A. ___).

3. Related cases

This case has not previously been before this Court. We are not aware of any related case pending before this or any other court.

TABLE OF CONTENTS

Page

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF ISSUES PRESENTED 2

COUNTERSTATEMENT 3

A. Statutory framework 3

B. *Time Warner v. FCC (Time Warner I)* 6

C. The *2002 Extension Order* 7

D. The order on review 11

SUMMARY OF ARGUMENT 17

STANDARD OF REVIEW 22

ARGUMENT 24

I. The Commission reasonably concluded that the exclusivity prohibition remained necessary to protect and preserve competition and diversity in video distribution 24

A. The Commission correctly interpreted the statutory standard for extending the exclusivity prohibition 26

B. The Commission reasonably concluded that the extension of exclusivity prohibition was necessary under § 628(c)(5) 32

1. The Commission reasonably concluded that vertically integrated cable operators have the ability to harm competition in video distribution by withholding access to critical programming networks 33

2. The Commission reasonably found that vertically integrated cable operators retain the incentive to withhold programming from rivals 41

3. Petitioners' remaining arguments lack merit 52

Page

C. The Commission provided a reasonable explanation for its decision not to modify the scope of the exclusivity prohibition 55

II. If the Court concludes that a remand is warranted, the exclusivity prohibition should not be vacated 61

CONCLUSION 64

TABLE OF AUTHORITIES

Page

Cases

Allied-Signal, Inc. v. United States Nuclear Regulatory Commission, 988 F.2d 146 (D.C. Cir. 1993) 61, 62

ALLTEL Corp. v. FCC, 838 F.2d 551 (D.C. Cir. 1988) 61

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 31

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 30

BellSouth Corp. v. FCC, 144 F.3d 58 (1998) 23, 24

Bryant v. Gates, Nos. 07–5121 *et al.*, 2008 WL 2727600 (D.C. Cir. July 15, 2008) 37, 56

Cellco Partnership v. FCC, 357 F.3d 88 (D.C. Cir. 2004) 29

Cellular Telecommunications & Internet Ass'n v. FCC, 330 F.3d 502 (D.C. Cir. 2003) 30

Charter Communications, Inc. v. FCC, 460 F.3d 31 (D.C. Cir. 2006) 29

Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 22

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 23

City of Los Angeles v. United States Dep't of Transp., 165 F.3d 972 (D.C. Cir. 1999) 32

Comcast Corp. v. FCC, 526 F.3d 763 (D.C. Cir. 2008) 60

Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002) 62

In re Core Communications, Inc., 455 F.3d 267 (D.C. Cir. 2006) 33, 46

Page

KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111 (2004) 38

National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 22, 23

National Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327 (2002) 23

National Mining Ass'n v. Kempthorne, 512 F.3d 702 (D.C. Cir. 2008) 31

Northhampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991) 50

Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007) 45, 46, 50

Taucher v. Brown-Hruska, 396 F.3d 1168 (D.C. Cir. 2005) 30

Time Warner Entertainment Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001) 24

* *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) 6, 7, 23, 52

Time Warner Entertainment Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000) 23, 54

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 24

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) 23, 24

United States v. Jin Fuey Moy, 241 U. S. 394 (1916) 31

Vernal Enters., Inc. v. FCC, 355 F.3d 650 (D.C.Cir. 2004) 60

Administrative Decisions

Adelphia Communications Corporation, 21 FCC Rcd 8203 (2006) 36, 37, 38, 41

Page

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 21 FCC Rcd 2503 (2006) 13, 40, 44, 59

Cablevision Industries Corp. and Sci-Fi Channel, 10 FCC Rcd 9786 (CSB 1995) 60

Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962 (1990) 3, 4

Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, 21 FCC Rcd 15087 (2006) 43

Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, 22 FCC Rcd 5101 (2007), *aff'd, Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) 44

Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 3359 (1993) 54

* *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12124 (2002) 8, 9, 10, 11, 14, 27, 28, 34, 35, 41, 51, 52, 54, 56

New England Cable News Channel, 9 FCC Rcd 3231 (1994) 60

NewsChannel, 10 FCC Rcd 691 (CSB 1994) 60

Outdoor Life Network and Speedvision Network, 13 FCC Rcd 12226 (CSB 1998) 60

The Commission's Cable Horizontal and Vertical Ownership Limits, 23 FCC Rcd 2134 (2008)............................. 49, 50

Time Warner Cable, 9 FCC Rcd 3221 (1994) 60

Statutes and Regulations

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460 4

§ 2(a)(2), 47 U.S.C. § 521 note 27

§ 2(a)(5), 47 U.S.C. § 521 note 4, 8

5 U.S.C. § 706(2)(A) 23

17 U.S.C. § 111(c)–(f) 31

28 U.S.C. § 2342(1) 1

47 U.S.C. § 161 30

47 U.S.C. § 251(d)(2) 30

47 U.S.C. § 402(a) 1

47 U.S.C. § 405(a) 2, 20, 45, 50

47 U.S.C. § 543(a)(2) 38

47 U.S.C. § 543(l)(1)(B) 38

47 U.S.C. § 548 4

47 U.S.C. § 548(b) 4, 6, 27, 31

47 U.S.C. § 548(b) 6

47 U.S.C. § 548(c)(2)(A)–(C) 5

47 U.S.C. § 548(c)(2)(B) 6, 53, 54

47 U.S.C. § 548(c)(2)(C) 52, 57

* 47 U.S.C. § 548(c)(2)(D) 2, 5, 7, 32, 51, 53, 54, 55

47 U.S.C. § 548(c)(4) 3, 6, 55, 60

47 U.S.C. § 548(c)(4)(C) 53

* 47 U.S.C. § 548(c)(5) 2, 6, 8, 18, 25, 26

47 C.F.R. § 76.1001 6

47 C.F.R. § 76.1002(b) 6

Others

H.R. Rep. No. 102–628 (1992) 3

S. Rep. No. 102–92 (1991) 3

U.S. Government Accountability Office, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets*, GAO–05–257, Apr. 2005) 40

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

DBS	Direct broadcast satellite
DMA	Designated market area
MVPD	Multichannel video programming distributor
RSN	Regional sports network

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 07–1425 & 07–1487

CABLEVISION SYSTEMS CORPORATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTION

The Commission released the order on review on October 1, 2007. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (*Order*) (J.A. ___–___). A summary of the *Order* was published in the *Federal Register* on October 4, 2007. 72 Fed. Reg. 56645. Cablevision Systems Corporation filed its petition for review on October 19, 2007, and Comcast Corporation filed its petition for review on December 3, 2007. This Court's jurisdiction rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to Petitioners' opening brief. In addition, 47 U.S.C. § 405(a) is pertinent in this case and is reproduced in the appendix to this brief.

STATEMENT OF ISSUES PRESENTED

Section 628(c)(2)(D) of the Communications Act required the Federal Communications Commission to adopt a rule prohibiting exclusive contracts between cable operators and cable-owned networks with respect to the distribution of programming in areas served by cable systems. 47 U.S.C. § 548(c)(2)(D). Under § 628(c)(5), the exclusivity prohibition would have sunset had the Commission not determined that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. § 548(c)(5). In an unchallenged 2002 order, the Commission established the legal framework for evaluating whether to extend the exclusivity prohibition and then concluded that, in light of the market conditions that existed at the time, the prohibition continued to be necessary under the § 628(c)(5) standard. It therefore extended the prohibition for an additional five years. In the order on review, the Commission, after evaluating current market conditions under that same framework, extended the exclusivity prohibition for another five years. The questions presented are:

1. Whether the Commission reasonably decided to extend the exclusivity prohibition that Congress established in § 628(c)(2)(D).

2. Whether the Commission provided a reasonable explanation for its decision not to limit the scope of the exclusivity prohibition and, instead, to rely on the "public interest" exception set forth in § 628(c)(4) to address situations where the prohibition should not apply.

3. If the Court concludes that a remand is warranted, whether the exclusivity prohibition should be vacated.

COUNTERSTATEMENT

A. Statutory framework

For decades, most Americans could receive video programming packages only from incumbent cable operators that enjoyed local monopolies within their communities.[1] Several of these cable operators were also vertically integrated with many of the programming networks they carried. Senate Report at 24–25. By the early 1990s, a significant number of the most popular and subscribed-to programming networks carried by cable were also owned by cable.[2]

In a 1990 report to Congress, the Commission found that "[v]ertically integrated cable operators often have the ability to deny alternative multichannel video providers access to [their] cable programming services."

---

[1] S. Rep. No. 102–92, at 8 (1991) (Senate Report) ("A cable system serving a local community, with rare exceptions, enjoys a monopoly."); H.R. Rep. No. 102–628, at 30 (1992) (House Report) ("cable's competitors serve, in the aggregate, fewer than 5 percent of American households").

[2] House Report at 41 (finding that 57% of cable networks were vertically integrated); *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5006–08 ¶¶ 77–81 (1990) (*1990 Cable Report*).

1990 Cable Report, 5 FCC Rcd at 4972–73 ¶ 13(6). The Commission explained that a "major component of the ability to compete with cable systems is the ability to secure programming," *id.* at 5021 ¶ 112, and that competition from "second competitive cable systems" and Direct Broadcast Satellite (DBS) service could emerge if competitive providers could "obtain reasonable access to programming" owned by the cable companies, *id.* at 5020 ¶ 111.

Two years later, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102–385, 106 Stat. 1460. Congress found that the "cable industry [had] become vertically integrated" and that "[v]ertically integrated program suppliers . . . [had] the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies." 1992 Cable Act § 2(a)(5), 47 U.S.C. § 521 note. Congress addressed this barrier (and other barriers) to new entry in the video distribution market by adding § 628 to the Communications Act, 47 U.S.C. § 548.

As relevant here, § 628 prohibits various practices that impair the ability of competitive video distributors to offer programming services to subscribers. Section 628(b) sets forth a broad proscription that bars cable operators and cable-owned networks from engaging 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 [or MVPD] from providing" cable programming to consumers. 47 U.S.C. § 548(b).

Section 628(c)(2), in turn, directs the Commission to adopt rules addressing specific types of anticompetitive conduct. Under § 628(c)(2)(A) through (C), the FCC was to (1) "establish effective safeguards to prevent a cable operator" from "unduly or improperly influencing the decision" of its programming affiliate with respect to the sale of programming to unaffiliated MVPDs; (2) "prohibit discrimination" by a cable-owned programming affiliate "in the prices, terms, and conditions of sale or delivery" of programming among MVPDs; and (3) "prohibit practices, understandings, arrangements, and activities, including exclusive contracts" that prevent distribution of cable-owned programming to areas not served by any cable operator. 47 U.S.C. § 548(c)(2)(A)–(C).

In § 628(c)(2)(D), Congress directed the Commission to adopt the exclusive-contract prohibition at issue in this case. That provision states in pertinent part that, "with respect to distribution [of programming] to persons in areas served by a cable operator," the Commission shall "prohibit exclusive contracts" between a cable operator and a cable-owned programming network. 47 U.S.C. § 548(c)(2)(D). That prohibition applies to programming delivered to cable systems by satellite; it does not reach cable programming delivered to cable systems over a terrestrial network. *See generally Order* ¶ 78 (J.A. ___). Section 628(c)(2)(D) also creates a "public interest" exception to the exclusivity prohibition. 47 U.S.C. § 548(c)(2)(D). Under that exception, the Commission may authorize an exclusive contract after considering: the effect it would have on competition and diversity in the MVPD market, including the effect on

competition from non-cable technologies; "the attraction of capital investment in the production and distribution of new satellite cable programming"; and the duration of the exclusive contract. 47 U.S.C. § 548(c)(4).

The 1992 Cable Act does not require cable-owned networks to offer programming to competing video distributors (often called competitive MVPDs) at any particular price or on any particular terms or conditions. Rather, the prices, terms, and conditions of programming agreements are determined through marketplace negotiations, subject only to § 628(b)'s prohibition against "unfair methods of competition or unfair or deceptive acts or practices" and the bar on discrimination set forth in § 628(c)(2)(B). 47 U.S.C. § 548(b), (c)(2)(B); *see also* 47 C.F.R. §§ 76.1001, 76.1002(b) (implementing §§ 628(b) and 628(c)(2)(B)).

The exclusivity prohibition is subject to a sunset provision. Under § 628(c)(5), the prohibition "shall cease to be effective 10 years after [October 5, 1992], unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. § 548(c)(5).

B. *Time Warner v. FCC (Time Warner I)*

Shortly after Congress enacted § 628, various cable companies brought a facial challenge to the provision, claiming that it violated their First Amendment rights. In *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (*Time Warner I*), this Court rejected that claim. Applying intermediate scrutiny

because § 628(c)(2)(D) was "content-neutral on [its] face," the Court held that the exclusivity prohibition advanced the government's substantial interest "in regulating vertically integrated programmers and operators" to ensure "fair competition in the video marketplace." *Id.* at 977–978. The Court rejected the argument that the exclusivity prohibition was unconstitutional because "prohibiting [exclusive] contracts might result in reduced programming—that is, less speech." *Id.* at 979. The Court found the alleged impact on speech to be "conjectural" and too "attenuated" to support the cable operators' First Amendment claims. *Ibid.* Moreover, the Court noted that "Congress considered [cable operators'] argument and concluded that the benefits of these provisions—the increased speech that would result from fairer competition in the video programming marketplace—outweighed the disadvantages—the possibility of reduced economic incentives to develop new programming." *Ibid.* The Court declined to second-guess Congress's balancing of benefits and possible harms. *See ibid.*

C. The *2002 Extension Order*

With § 628 prohibiting incumbent cable operators from denying competitive MVPDs access to critical programming, competitors made inroads into the video distribution market. Ten years after the 1992 Cable Act was passed, the cable industry's share of MVPD subscribers nationwide had fallen from 95 percent to 78 percent, with DBS providers serving the lion's share of the rest. *Implementation of the Cable Television Consumer Protection and*

Competition Act of 1992, 17 FCC Rcd 12124, 12132–33, 12134 ¶¶ 20, 23 (2002) (*2002 Extension Order*). And despite the cable operators' argument in *Time Warner* that the exclusivity prohibition would result in "less speech," 93 F.3d at 979, between 1992 and 2002, the total number of satellite-delivered national programming networks increased from 68 to 294, and the number of cable-affiliated networks in particular increased from 39 to 104. *Compare* House Report at 41 *with 2002 Extension Order*, 17 FCC Rcd at 12131–32 ¶ 18.

Against this backdrop, the Commission in 2002 considered whether to extend the exclusivity prohibition under § 628(c)(5). Finding "guidance in the concerns Congress expressed in 1992," the Commission explained that its analysis would focus on "whether, in the absence of the exclusivity prohibition, vertically integrated programmers would currently have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and program distributors using other technologies and, if they would, whether such behavior would result in a failure to protect and preserve competition and diversity in the distribution of video programming." *2002 Extension Order*, 17 FCC Rcd at 12130 ¶¶ 15–16 (citing 1992 Cable Act § 2(a)(5)). The Commission explained that, "because the program access provisions . . . have been in effect since 1992, there is little direct evidence of anticompetitive foreclosure . . . upon which we can rely." *Id*. at 12135 ¶ 25. Accordingly, the Commission stated that, in deciding whether to extend the exclusivity prohibition, it would consider not only "specific factual evidence" of exclusionary conduct (*e.g.*, withholding of

terrestrially delivered programming), but also “economic theory” and its “predictive judgment.” *Id.* at 12131 ¶ 16, 12135 ¶ 25.

After a thorough review of marketplace developments since 1992, the Commission decided to extend the exclusivity prohibition for an additional five years. *2002 Extension Order*, 17 FCC Rcd at 12138 ¶ 32. The Commission found “[m]ost significant” that, despite the growth in the number of programming networks, 35 percent of the most watched cable programming and 45 percent of the most subscribed-to programming was owned by cable. *Ibid.* As the Commission explained, “[f]ailure to secure even a portion of vertically integrated programming would put a nonaffiliated cable operator or competitive MVPD at a significant disadvantage vis-à-vis a competitor with access to such programming.” *Ibid.*

The Commission rejected the cable industry’s argument that programming is fungible, such that the withholding of vertically integrated programming from competitors would not harm MVPD competition. *2002 Extension Order*, 17 FCC Rcd at 12139 ¶ 33 (“cable programming—be it news, drama, sports, music, or children’s programming—is not akin to so many widgets”). As the Commission observed, “when an MVPD loses access to a popular national news channel, there is little competitive solace that there is a music channel or children’s programming channel to replace it.” *Ibid.* Moreover, “even when there is another news channel available, [a competitive] MVPD may not be made whole” if viewers “desire the programming and personalities”

associated with the withheld channel or if they value cable's ability to offer the gamut of national news networks. *Ibid.* Because "a considerable amount of vertically integrated programming in the marketplace today remains 'must have' programming to most MVPD subscribers," the Commission concluded that the absence of even "some" of this programming from competitive MVPDs' line-ups would jeopardize "their ability to retain subscribers." *Ibid.*

The Commission also found that cable operators still had the incentive to withhold programming from competitive MVPDs. *2002 Extension Order*, 17 FCC Rcd at 12143–44 ¶ 45. The Commission observed that the cable operators' 78-percent share of MVPD subscribers was "formidable," *id.* at 12144 ¶ 46; in many television markets, their share was even higher, *id.* at 12149 ¶ 54; "four of the five largest vertically integrated cable operators serve 34 percent of all MVPD subscribers," *id.* at 12148 ¶ 53; and the incentive to engage in exclusionary conduct, "specifically with respect to regional programming, is also strengthened by cable system clustering," *i.e.*, the consolidation of ownership of cable systems operating in a particular region, *id.* at 12145 ¶ 47. The Commission concluded that "[c]able's dominant market position coupled with the continuing need for access to 'must have' vertically integrated programming by competitive MVPDs, in many cases, imparts an incentive for cable [operators] to exert anticompetitive control over vertically integrated programming services." *Id.* at 12147 ¶ 53.

The Commission rejected arguments that it limit the scope of the exclusivity prohibition. *2002 Extension Order*, 17 FCC Rcd at 12156–57 ¶¶ 69–70. Noting 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," the Commission concluded that the better course was to extend the exclusivity prohibition without modifying Congress's framework. *Id.* at 12156 ¶¶ 69–70.

The Commission concluded that a five-year extension of the exclusivity prohibition was warranted because that was the minimum period within which "the level of competition and diversity envisioned by Congress" could take hold. *2002 Extension Order*, 17 FCC Rcd at 12160 ¶ 79. The Commission committed to conducting a proceeding near the end of that five-year period to consider whether the exclusivity prohibition should be extended further. *Id.* at 12161 ¶ 80.

No party sought judicial review of the *2002 Extension Order*.

D. The order on review

As promised, the Commission initiated a rulemaking proceeding in 2007 to examine whether to extend the exclusivity prohibition for an additional period of time. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 4252 (2007) (J.A. ___). In the order on review, the Commission decided to extend the prohibition for another five years,

with a commitment that it would again examine the continued need for the prohibition in the last year of that five-year period.

At the outset, the Commission rejected cable operators' arguments that it reconsider the standard for extension that it had applied in the *2002 Extension Order*. *Order* ¶¶ 13–14 (J.A. ___). The Commission stated that, as in 2002, it would rely on "specific factual evidence" of withholding, "economic theory," and its "predictive judgment" to determine whether, "in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected." *Ibid.*

Turning to its market analysis, the Commission noted some positive developments since 2002. The Commission found, for instance, that the number of national satellite-delivered programming networks had increased to 531, up from 294 in 2002; the number of regional networks had increased from 80 to 96, and the cable industry's share of MVPD subscribers had fallen from 78 percent to 67 percent. *Order* ¶¶ 17, 21, 23 (J.A. ___, ___, ___).[3] The Commission noted that these trends decrease the likelihood that cable operators could harm competition and diversity by withholding programming from competitive MVPDs. *Order* ¶ 29 (J.A. ___).

The Commission observed, however, that other trends maintained, or even enhanced, the ability and incentive of cable operators to withhold

---

[3] Petitioners cite (Br. 44) a November 27, 2007, press release in which the Commission reported that there are 565 national programming networks as of June 2006. That press release is based on data collected by the Commission after it issued the order on review.

programming. The Commission found that cable operators continued to control a sizable share of national programming networks. In 2002, cable-owned networks represented 36 percent of national programming networks; by 2007, cable operators owned 34 percent of domestic, English language networks and 22 percent of all satellite-delivered networks. *Order* ¶ 18 (J.A. ___).[4] Likewise, between 2002 and 2007, the percentage of regional programming networks owned by cable operators remained fairly steady, dropping only three points from 49 percent to 46 percent. *Order* ¶ 22 (J.A. ___).

Even more "significant," the Commission found that cable-owned networks "continue[d] to represent some of the most popular and significant programming available today." *Order* ¶ 37 (J.A. ___). The Commission observed that the four largest cable operators "still have an interest in six of the Top 20 satellite-delivered networks as ranked by subscribership,[5] seven of the Top 20 satellite-delivered networks as ranked by prime time ratings,[6] almost half of all RSNs [*i.e.*, regional sports networks], popular subscription premium networks,

---

[4] Prior to 2006, the Commission's data on national programming networks failed to include many non-English and international networks. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2576 ¶ 158 n.572 (2006) (*Twelfth Video Competition Report*). Accordingly, it is difficult to make an apples-to-apples comparison of changes in the number or percentage of cable-owned and non-cable-owned networks between 2002 and 2007.

[5] These networks are The Discovery Channel, CNN, TNT, TBS, TLC, and Headline News. *Order* ¶ 37 n.176 (J.A. ___).

[6] These networks are TNT, Adult Swim, HBO, TBS, American Movie Classics, Cartoon Network, and The Discovery Channel. *Order* ¶ 37 n.177 (J.A. ___).

such as HBO and Cinemax, and video-on-demand . . . networks, such as iN DEMAND." *Ibid.* (footnote references omitted). Reaffirming its conclusion that not all programming is fungible, *id.* ¶ 38 (J.A. ___) (citing *2002 Extension Order*, 17 FCC Rcd at 12139 ¶ 33), the Commission found that "access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable substitutes to the incumbent cable operator in the eyes of consumers," *id.* ¶ 37 (J.A. ___); *see also id.* ¶ 32 n.150 (J.A. ___) (citing record evidence that an "MVPD cannot 'operate successfully' if that system lacks access to cable-affiliated networks such as CNN, HBO, TNT, and The Discovery Channel"). Indeed, the Commission observed that cable-owned networks made up "approximately 32 percent of the more than 250 regional and national networks that comprise Verizon's FiOS TV service." *Order* n.67 (J.A. ___) (citing Comments of Verizon, MB Dkt. No. 07–29 (filed Apr. 2, 2007), at 8 (J.A. ___)).

The Commission noted that "empirical evidence" confirmed that withholding of programming can have "a material adverse impact on competition" in video distribution. *Order* ¶ 39 (J.A. ___). Because of the exclusivity prohibition, examples of withholding of satellite-delivered programming are necessarily rare or non-existent. However, terrestrially delivered programming is not covered by the exclusivity rule, and in at least two instances—Philadelphia and San Diego—cable operators have used the terrestrial "loophole" to deny their DBS competitors access to regional sports networks. *Ibid.* The Commission found that without "access to the cable-

affiliated RSN in Philadelphia, the percentage of television households that subscribe to DBS service in Philadelphia is 40 percent below what would otherwise be expected," while in San Diego, there was a "33 percent reduction in the households subscribing to DBS service." *Order* ¶ 39 (J.A. ___); *see also Order*, App. B (J.A. ___) (explaining regression analysis used to calculate the competitive effect of withholding).

The Commission further concluded that cable operators' share of the MVPD subscribers "has not reached a point where withholding would be unprofitable." *Order* ¶ 52 (J.A. ___). The Commission observed that, with 67 percent of subscribers nationwide and an even higher share in many Designated Market Areas (DMAs) (*i.e.*, geographic areas used in determining network ratings), vertically integrated cable companies could "make withholding . . . a profitable strategy." *Ibid.* Indeed, the record showed that, with respect to programming not subject to the exclusivity prohibition (*i.e.*, terrestrially delivered programming), "vertically integrated programmers have withheld and continue to withhold programming" from competitive MVPDs. *Order* ¶ 51 (J.A. ___); *see also Order* ¶ 49 (J.A. ___).

The Commission also found that three developments since 2002 "provide cable-affiliated programmers with an even greater economic incentive to withhold programming from competitive MVPDs." *Order* ¶ 53 (J.A. ___). First, the Commission noted that "the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable

[operators] (Comcast, Time Warner, Cox, and Cablevision) has increased from 34 percent to between 54 and 56.75 percent." *Order* ¶ 54 (J.A. ___). Second, the Commission found that the percentage of cable subscribers served by cable systems that were part of a regional cluster had increased from 80 percent to between 85 and 90 percent. *Order* ¶ 55 (J.A. ___). Third, the Commission found that the incentive to withhold programming had increased because of "the emergence of new entrants into the video marketplace, including telephone companies." *Order* ¶ 60 (J.A. ___).

The Commission also performed an economic analysis to determine whether the incentive to withhold was "realistic." *See Order* ¶ 59 (J.A. ___), App. C ¶¶ 7–9 (J.A. ___). Looking at Comcast and Time Warner—two vertically integrated cable operators with numerous regional clusters—the Commission estimated that there are as many as 59 DMAs in which one of these two companies could find it profitable to withhold a regional network. The Commission also found that, for certain national networks, withholding could be profitable if as few as 1.9 percent of MVPD subscribers nationwide switched to cable. *Order* ¶¶ 52, 59 (J.A. ___, ___). This analysis, the Commission found, indicated that withholding would likely be profitable in a "significant range of cases." *Order* ¶ 59 (J.A. ___).

The Commission rejected the argument that the exclusivity prohibition "reduces incentives for cable operators and competitive MVPDs to create and invest in new programming," finding "no evidence to support this theory." *Order*

¶ 64 (J.A. ___). In addition, as in 2002, the Commission rejected arguments that it modify the exclusivity prohibition to exempt certain types of programming or certain types of cable operators from its reach. *Order* ¶¶ 68–74 (J.A. ___–___).

Based on its findings, the Commission extended the exclusivity prohibition for an additional five years (until 2012) and committed to reviewing the continued need for the rule during "the last year of this extension period." *Order* ¶ 79 (J.A. ___). The Commission "emphasized that, if adequate competition emerges before five years, the Commission could initiate its review earlier either on its own motion or in response to a petition." *Order* ¶ 81 (J.A. __). Indeed, the Commission initiated a new rulemaking to consider whether to "shorten the term of the extension if, after two years (*i.e.*, October 5, 2009) a cable operator can show competition from new entrant MVPDs has reached a certain penetration level" in a DMA. *Order* ¶ 114 (J.A. ___).

SUMMARY OF ARGUMENT

The Commission acted reasonably in extending the exclusivity prohibition for another five years. Based on a thorough review of the MVPD industry, the Commission concluded that the concerns that led Congress to enact the exclusivity prohibition still have relevance today. In particular, the record showed that cable operators continue to dominate MVPD subscribership and that they retain control over significant programming networks that competitive MVPDs require if they are to be viable competitors against cable incumbents. In light of this record evidence, the Commission reasonably predicted that cable

operators would have the ability and incentive to harm competition and diversity in video distribution by denying competitive MVPDs access to cable-owned networks. Petitioners provide no basis for overturning the Commission's reasoned analysis.

I. The Commission's decision to extend the exclusivity prohibition should be affirmed.

A. The Commission correctly interpreted the standard set forth in § 628(c)(5) for extending the congressionally created exclusivity prohibition, *i.e.*, whether the prohibition "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. § 548(c)(5). Consistent with the statute, the Commission properly considered whether sunset of the exclusivity prohibition would harm competition and diversity in video distribution, an analysis that entails consideration of the effect that sunset would have on competitive MVPDs. The Commission did not, however, regard mere harm to competitors as harm to competition, as the *Order* makes clear.

The Commission also reasonably concluded that, under § 628(c)(5), the exclusivity prohibition continues to be "necessary" if, in the absence of the prohibition, competition and diversity would not be preserved and protected. Petitioners' contention that the Commission should have clarified that "necessary" means "essential" is in reality an untimely attack on the Commission's interpretation of this term from 2002 and is, in any event,

meritless. This Court has held that "necessary" is an ambiguous term whose meaning depends on context. And in the context of other statutory provisions that require the Commission to review whether its rules remain "necessary," this Court has consistently held that "necessary" need not be interpreted as "essential."

B. The Commission reasonably concluded that vertically integrated cable operators continue to have the ability and incentive to harm competition and diversity in video distribution by withholding programming from their rivals. Petitioners launch a series of small-bore attacks on the Commission's economic methodology and conclusions, but none succeeds, especially in light of the deference the agency receives on such matters.

1. The record supports the Commission's judgment that cable operators have the ability to harm competition by denying competitors access to cable-owned programming. Vertically integrated cable operators own many of the most highly demanded national networks and almost half of all regional programming networks, including nearly half of all regional sports networks. The Commission found, consistent with its *2002 Extension Order*, that many cable-owned networks have no good substitutes. As a result, the inability of competitive MVPDs to obtain access to highly demanded, nonsubstitutable networks would threaten their viability. Indeed, the Commission found that in Philadelphia and San Diego, DBS subscription rates were 40 percent and 33

percent lower, respectively, because DBS providers were denied access to just a single RSN in those communities.

2. The Commission reasonably concluded that cable operators retained the incentive to withhold programming. The Commission found that the cable industry controls 67 percent of all MVPD subscribers—a percentage that is even higher in many DMAs—and that consolidation in the cable industry has increased significantly since 2002. The Commission explained that these factors increase the likelihood that withholding of programming will be a profitable endeavor. In addition, cable operators have an increased incentive to withhold programming in order to frustrate new entry by incumbent telephone companies. The exclusivity prohibition has prevented vertically integrated cable operators from withholding satellite-delivered programming, necessarily meaning that there would be no examples of such withholding in the record. Nonetheless, the Commission noted that, in several instances involving terrestrially delivered programming (to which the exclusivity prohibition does not apply), cable operators have taken advantage of their ability to deprive competitors access to cable-owned networks.

Petitioners simultaneously criticize and rely on the economic analysis the Commission performed in Appendix C of the *Order* to support their claim that withholding would not be profitable in a significant number of cases, but these arguments are barred under 47 U.S.C. § 405(a) because they were never presented to the Commission. In any event, Petitioners' arguments are

misguided. Appendix C makes assumptions that actually understate the likelihood of withholding. Even with those conservative assumptions, Appendix C confirms the Commission's prediction that withholding of programming would be realistic in a significant range of cases. Petitioners' other arguments for why withholding of programming should not be a concern are similarly insubstantial.

3. Petitioners' remaining arguments also lack merit. The Commission considered the argument that the exclusivity prohibition may discourage investment in new programming, but found no evidence to support that claim. To the contrary, the Commission found that investment in new program networks has flourished as competition to the cable industry has grown. The Commission also reasonably rejected the argument that other provisions of § 628 were adequate substitutes for the protections afforded by the exclusivity prohibition.

C. The Commission reasonably declined to create exemptions to the exclusivity prohibition for certain cable operators or for certain programming services. The Commission found no basis in the record for creating exceptions to the regulatory framework that Congress established in § 628, which includes an express provision authorizing the Commission to approve particular exclusive agreements under a public-interest exception. Petitioners' suggestion that the public-interest exception is meaningless in practice is refuted by the historical record.

II. If the Court concludes that a remand for further explanation is warranted in this case, it should not vacate the *Order*. Petitioners' arguments against the Commission's decision rest primarily on the adequacy of the Commission's explanation, and it is likely that the Commission would be able to address any alleged deficiencies in that explanation on remand. On the other hand, vacating the exclusivity rule and dramatically upsetting the status quo pending remand would create significant regulatory uncertainty without providing any commensurate benefit to vertically integrated cable operators.

STANDARD OF REVIEW

Judicial review of the Commission's interpretation of the Communications Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if the intent of Congress is clear, then "the court, as well as the agency, must give effect to [that] unambiguously expressed intent." *Id.* at 842–843. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Under the Administrative Procedure Act, the Commission's analysis must be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[T]he ultimate standard of review is a narrow one," and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Judicial deference to the Commission's "expert policy judgment" is especially appropriate where the "subject matter . . . is technical, complex, and dynamic." *Brand X Internet Servs.*, 545 U.S. at 1002–03 (quoting *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)).

To the extent the Commission's decision to extend the exclusivity prohibition implicates the First Amendment, it is subject to review under the intermediate-scrutiny standard. *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996). "A regulation will be upheld under intermediate scrutiny 'if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'" *BellSouth Corp. v. FCC*, 144 F.3d 58, 69–70 (1998) (quoting *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*)). "In applying intermediate scrutiny [to federal statutes], [the courts] inquire 'not whether Congress, as an objective matter, was correct' that the [regulatory] provision is necessary to [achieve the government's objective], but rather 'whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress.'" *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313, 1322 (D.C. Cir. 2000) (*Time*

Warner II) (quoting *Turner II*, 520 U.S. at 211); *see also BellSouth*, 144 F.3d at 70 (courts "owe Congress's economic judgments considerable deference, so as not to infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy") (internal quotation marks omitted). As applied to the Commission's predictive judgment, the intermediate-scrutiny standard considers whether the agency has "draw[n] 'reasonable inferences based on substantial evidence.'" *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994)). "Substantial evidence does not require a complete factual record—[the courts] must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency." *Ibid.*

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT THE EXCLUSIVITY PROHIBITION REMAINED NECESSARY TO PROTECT AND PRESERVE COMPETITION AND DIVERSITY IN VIDEO DISTRIBUTION

Congress enacted the exclusivity prohibition in 1992 because it determined that competition to cable would not take hold unless competitive MVPDs could offer subscribers programming networks owned by incumbent cable companies. Since then, DBS service, with the ability to offer cable-owned programming, has grown from a fledgling technology in 1992 into the MVPD service used by almost a third of the nation's households. *Order* ¶ 23 (J.A. ___). Programmers have thrived in this competitive environment as well; there are

531 national networks being distributed by MVPDs today, compared to only 68 in 1992. *Order* ¶ 17 (J.A. ___); House Report at 41. And telephone companies have recently begun making serious inroads into video distribution, offering consumers the prospect of not only more choice but greater price competition than DBS service alone has been able to achieve. *Order* ¶ 24 (J.A. ___).

However, despite this progress, cable operators continue to dominate the MVPD landscape. More than two-thirds of MVPD customers nationwide still subscribe to cable service, and in many parts of the country that percentage is even higher. *Order* ¶¶ 23, 52 (J.A. ___, ___). Indeed, because of consolidation at both the national and regional levels, vertically integrated cable operators now serve a higher percentage of MVPD subscribers than ever before. *Order* ¶¶ 27–28 (J.A. ___–___). And cable operators still own a third of all domestic, English-language networks and almost half of all regional networks, including many of the most popular and highly demanded networks distributed by MVPDs today. *Order* ¶¶ 18–19, 22, 37 (J.A. ___–___, ___, ___). Given these market conditions, the Commission reasonably concluded that the exclusivity prohibition still served Congress's goals; in the words of the statute, it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. § 548(c)(5).[7] The Commission's decision was based on

---

[7] The Commission's analysis under the Communications Act is distinct from the analysis the Department of Justice would perform under the antitrust laws, and the decision to retain the statutory prohibition at issue in this case should not be viewed as a finding that the prohibited agreements would constitute antitrust violations.

substantial evidence in the administrative record and was a proper exercise of its predictive judgment. It should be affirmed.

A. The Commission correctly interpreted the statutory standard for extending the exclusivity prohibition

At the outset, Petitioners contend that the Commission misinterpreted the standard under § 628(c)(5) for extending the exclusivity prohibition. The Commission largely addressed Petitioners' objections in the *2002 Extension Order*. In the order on review, the Commission reasonably decided not to reconsider those determinations. *See Order* ¶¶ 13–14 (J.A. ___–___).

1. "Competition." Petitioners assert (Br. 36–37) that § 628(c)(5) uses the term "competition" and that it is wrong to "equate[] harm to competition with harm to competitors." On that point, there is no dispute. The Commission stated clearly that its inquiry focused on whether access to cable-owned programming remained necessary "for viable *competition* in the video distribution market." *Order* ¶ 30 (J.A. ___) (emphasis added); *see also id.* ¶ 39 (J.A. ___) (finding that access to cable-owned programming is "necessary for competition in the video distribution market to remain viable"), ¶ 42 (J.A. ___). And contrary to Petitioners' suggestion (Br. 37), the Commission understood the relationship between competition and consumer welfare. As it explained, "[i]n the long term, a withholding strategy may result in a reduction in competition in the video distribution market, thereby allowing the affiliated cable operator to raise rates" on consumers. *See Order* ¶ 52 (J.A. ___); *see also id.* ¶ 40 (J.A. ___) (finding that withholding of cable-owned programming from competitors

"harm[s] competition and diversity in the distribution of video programming, to the detriment of consumers"); *2002 Extension Order*, 17 FCC Rcd at 12126 ¶ 6 ("The lack of competition to cable in the delivery of multichannel programming enabled cable operators to engage in anticompetitive behavior to the detriment of subscribers, nascent competitors, and nonaffiliated programmers."). Accordingly, the Commission's decision to extend the exclusivity prohibition did not rest on "whether individual competitors will remain in the market," but on "how competition in the video distribution market will be impacted if the exclusive contract prohibition were to sunset." *Order* ¶ 61 (J.A. ___).

To be sure, the Commission did not ignore the question whether "competitors would be hurt" by the sunset of the exclusivity prohibition. Pets. Br. 37. Nor should it have. Section 628(b) makes clear that Congress enacted § 628 because it was concerned about all unfair practices, "the purpose or effect of which is to hinder significantly or to prevent *any multichannel video programming distributor* from providing" programming to subscribers. 47 U.S.C. § 548(b) (emphasis added). In light of Congress's understanding that new entry into video distribution would not be easy, *see* 1992 Cable Act § 2(a)(2), 47 U.S.C. § 521 note (citing "the extraordinary expense of constructing more than one cable television system to serve a particular geographic area"), the Commission properly considered the effect that exclusive contracts would have on cable's competitors. Indeed, to the extent that access to cable-owned programming is necessary for MVPDs competing with cable to become or remain

"viable," *Order* ¶ 37 (J.A. ___), there is a strong link between the effect that exclusive contracts have on competitors and the effect that they have on competition. The Commission made clear, however, that its "primary focus [in this proceeding] is on the impact that sunset would have on competition and diversity in the distribution of programming generally, not on individual competitors." *Order* ¶ 61 (J.A. ___).

Petitioners make several arguments about why the Commission erred in allegedly applying a mere harm-to-competitor standard (Br. 37–41), but because the Commission did not apply such a standard, that discussion is misplaced. For instance, Petitioners claim (Br. 38–40) that the exclusivity prohibition would never sunset if any harm to competitors justified an extension, but the Commission anticipated that the exclusivity prohibition would sunset "when market conditions warrant." *Order* ¶ 29 (J.A. ___). Petitioners may disagree with the Commission about whether that time has arrived, but they are wrong that the Commission applied an incorrect standard in reaching its decision.

2. "Necessary." In the *2002 Extension Order*, the Commission stated that the "exclusivity prohibition continues to be 'necessary' if, in the absence of the prohibition, competition and diversity would not be preserved and protected." *2002 Extension Order*, 17 FCC Rcd at 12130 ¶ 14. In the order on review, the Commission rejected arguments that it apply a stricter standard in this proceeding. *Order* ¶ 13 (J.A. ___) ("We find no basis to revisit the

conclusions reached in the *2002 Extension Order*, which, we note, were never challenged.").

Petitioners contend (Br. 41–43) that the Commission should have held that the term "necessary" in § 628(c)(5) can only mean "essential." As an initial matter, Petitioners' claim on this point is untimely: the interpretation of the word "necessary" they challenge took place in 2002 and was not reopened by the Commission in this proceeding. *See*, *e.g.*, *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 38–39 (D.C. Cir. 2006). However, even if they could properly assert their challenge now, it would fail. Petitioners do not offer any explanation as to why the standard chosen by the Commission is flawed. If it is the Commission's predictive judgment that competition and diversity would not be preserved and protected in the absence of the prohibition on exclusive contracts, it makes eminent sense to say that the prohibition "continues to be necessary to preserve and protect competition and diversity." *See Order* ¶ 13 (J.A. ___) ("exclusivity prohibition continues to be 'necessary' if, in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected").

While petitioners complain that the Commission "appears to have erred" because it did not equate the term "necessary" with "essential," this Court has recognized that the "term 'necessary' is a chameleon-like word whose meaning . . . may be influenced by its context." *Cellco Partnership v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004). And in the context of other provisions of the

Communications Act that require the Commission to consider whether regulation continues to be "necessary," this Court has held that the Commission need not interpret "necessary" to mean "essential." *See ibid.* (interpreting requirement in 47 U.S.C. § 161 that the Commission determine whether regulation remains "necessary in the public interest"); *Cellular Telecommunications & Internet Ass'n v. FCC*, 330 F.3d 502, 509–512 (D.C. Cir. 2003) (interpreting requirement in 47 U.S.C. § 160 that requires the Commission to forbear from regulation that, among other things, is no longer "necessary" to protect consumers).

Petitioners argue that the Commission must interpret "necessary" in a manner that "appl[ies] some limiting standard, rationally related to the goals of the Act." Br. 43 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999)). But "some limiting standard" need not be an "essential" standard, and petitioners offer no argument as to why the Commission's standard is insufficiently limiting. *Cf. Iowa Utils. Bd.*, 525 U.S. at 388 (declining to decide whether the Commission must interpret the "necessary" and "impair" standards in 47 U.S.C. § 251(d)(2) as equivalent to the essential-facilities doctrine).[8] Nor is there any basis for Petitioners' claim that "necessary" must mean "essential" because the exclusivity prohibition "imposes highly disfavored obligations

---

[8] Petitioners' argument that the "essential" standard is required rests solely on Justice Breyer's separate opinion in *Iowa Utilities Board*, which no other member of the Court joined. *See Iowa Utils. Bd.*, 525 U.S. at 430 (Breyer, J., concuring in part and dissenting in part). As then-Judge Roberts has explained, "the comments in the concurring opinions are just that: comments in concurring opinions." *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1175 (D.C. Cir. 2005).

(essential facilities-type sharing)" on "intellectual property" (as opposed to "physical facilities"). Br. 43. Petitioners obviously "disfavor" the obligations imposed by § 628, but Congress did not. It acted to prevent vertically integrated cable operators from engaging in one method of "unfair . . . competition" by forbidding them from withholding critical programming necessary to the development of video competition.[9] Nor has Congress "disfavored" all sharing obligations in the context of intellectual property: Cable operators themselves benefit from a compulsory copyright that enables them to retransmit the signals of television broadcast stations (and the intellectual property contained therein) without obtaining the consent of the copyright owner. *See* 17 U.S.C. § 111(c)–(f).

Petitioners also briefly invoke the First Amendment. Br. 43. It is true that, under the canon of constitutional avoidance, a "statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (quoting *United States v. Jin Fuey Moy*, 241 U. S. 394, 401 (1916)). To invoke the canon, however, the petitioner must show one of those constructions creates "a serious likelihood that the statute will be held unconstitutional." *Id.* at 238. Petitioners have made no such showing. *See National Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) ("we do

---

[9] 47 U.S.C. § 548(b); *see also Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) ("[T]he government's interest in regulating vertically integrated programmers and operators is the promotion of fair competition in the video marketplace."); *Order* ¶ 4 (J.A. ___) ("Congress placed a higher value on new competitive entry into the MVPD marketplace than on the continuation of exclusive distribution practices when such practices impede this entry").

not abandon *Chevron* deference at the mere mention of a possible constitutional problem; the argument must be serious."). Their back-door constitutional attack on the exclusivity prohibition thus fares no better than the facial attack on the statute that this Court has already rejected. *See Time Warner Entertainment Co.*, 93 F.3d at 977–979.

B. The Commission reasonably concluded that the extension of exclusivity prohibition was necessary under § 628(c)(5)

Applying the statutory standard and the framework established in the *2002 Extension Order*, the Commission reasonably concluded, after a thorough market analysis, that the congressionally mandated exclusivity prohibition should be extended. While exclusive distribution agreements and refusals to deal are not necessarily anticompetitive, the Commission found that the particular concerns about the structure of the video distribution market that led Congress to enact § 628(c)(2)(D) remained. Specifically, just as in 1992 and 2002, vertically integrated programmers still have the ability and incentive to withhold programming from competitive MVPDs to the detriment of competition and diversity in the distribution of video programming. *Order* ¶ 29 (J.A. ___). Petitioners invite the Court to second-guess the Commission's economic analysis, but they fail to demonstrate that it was unreasonable. *See City of Los Angeles v. United States Dep't of Transp.*, 165 F.3d 972, 977 (D.C. Cir. 1999) ("[W]e do not sit as a panel of referees on a professional economics journal, but as a panel of generalist judges obliged to defer to a reasonable judgment by an agency acting

pursuant to congressionally delegated authority.”); *In re Core Communications, Inc.*, 455 F.3d 267, 279 (D.C. Cir. 2006) (“The question before us is not whether the FCC’s economic conclusions are correct or are the ones that we would reach on our own, but only whether they are reasonable.”).

1. The Commission reasonably concluded that vertically integrated cable operators have the ability to harm competition in video distribution by withholding access to critical programming networks

Despite the overall growth in the number of programming networks, the Commission found, based on substantial record evidence, that cable operators continued to control a significant number of programming assets, including many of the most popular and highly demanded programming networks currently distributed by competitive MVPDs. *See Order* ¶¶ 37–38 (J.A. ___–___). Cable-owned networks make up approximately 34 percent of all domestic, English-language programming, *Order* ¶ 18 (J.A. ___), and several competitive MVPDs explained that many cable-owned networks (such as HBO and CNN) offer programming that they “must have” if they are to remain viable in the MVPD marketplace. *See*, *e.g.*, Comments of SureWest Communications, MB Dkt. No. 07–29 (filed Apr. 2, 2007), at 3 (J.A. ___) (“no MVPD could survive without access to the most popular, ‘must-have,’ programming channels such as CNN, TNT and HBO”); Comments of AT&T, Inc., MB Dkt. No. 07–29 (filed Apr. 2, 2007), at 11 (J.A. ___) (“MVPDs still remain highly dependent on key programming owned by the established cable MSOs, including TBS, Discovery, TNT, CNN, TLC, and other popular basic cable networks, and also the regional

sports network programming that the Commission found . . . could be used as a powerful weapon against potential competitors."); Comments of EchoStar Satellite, LLC, MB Dkt. No. 07–29 (filed Apr. 2, 2007), at 7 (J.A. ___) ("Withholding a single 'must have' programming network from competitive MVPD platforms can hamper, if not foreclose, the development and preservation of viable competition."); *see generally Order* ¶ 39 n.193 (J.A. ___). As the Commission observed in the *2002 Extension Order*, "failure to secure even a portion of vertically integrated programming would put a . . . competitive MVPD at a significant disadvantage vis-à-vis a competitor with access to such programming." 17 FCC Rcd at 12138 ¶ 32; *see also id.* at 12151 ¶ 60 ("the foreclosure of even a small part of [vertically integrated programming] would damage an MVPD's ability to compete"). Indeed, the Commission estimated that the withholding of just a single cable-owned RSN in Philadelphia and San Diego reduced DBS subscription in those markets by 40 percent and 33 percent, respectively. *Order* ¶ 39, App. B (J.A. ___).

Petitioners raise several objections to the Commission's analysis, but none of them withstands scrutiny.

a. Petitioners argue (Br. 44–45) that cable operators cannot use "withholding to block rivals" because "most services have close substitutes." The Commission rejected that argument in the *2002 Extension Order*, 17 FCC Rcd at 12139 ¶ 33, and found no reason for reaching a different conclusion here. As the Commission explained, cable networks are "not akin to so many widgets";

although some networks have substitutes, other networks have only "imperfect substitutes" or even "no close substitutes at all." *Order* ¶ 38 (J.A. ___) (quoting *2002 Extension Order*, 17 FCC Rcd at 12139 ¶ 33). For example, although Petitioners claim (Br. 45) that news networks (*e.g.*, CNN, Fox News, CNBC, and MSNBC) are necessarily substitutes for each other, the Commission concluded that viewers often "desire the programming and personalities packaged" by a particular news channel, and they value the ability to receive news programming from more than one network. *Order* ¶ 38 (J.A. ___) (quoting *2002 Extension Order*, 17 FCC Rcd at 12139 ¶ 33).

The common experience of cable viewers confirms the reasonableness of this conclusion. To use Petitioners' example, many viewers who want CNN for its political coverage will not view the 24-hour financial news programming on CNBC as a "substitute[]." *Cf.* Pets. Br. 45. Likewise, viewers who watch the serial dramas on HBO will not see other premium channels, with different programs, as substitutes, nor will a baseball fan who wants to watch the local team's games on a cable-controlled RSN be satisfied by different sports channels featuring different teams. Petitioners provide no basis for disputing the Commission's analysis or its common-sense conclusions. *See Order* n.190 (J.A. ___) (observing that Cablevision "offer[ed] no evidence that these networks [*i.e.*, networks within a particular genre] are substitutable for one another").

Contrary to Petitioners' argument (Br. 57), the Commission's reasoning is consistent with the *Adelphia Order*,[10] in which the Commission found that competitors' lack of access to certain terrestrially delivered networks "would not harm competition or consumers." *Adelphia Order*, 21 FCC Rcd at 8279 ¶ 169. The Commission made that finding only with respect to certain specific (non-sports) programming networks. *Ibid.* Elsewhere in the *Adelphia Order*, the Commission emphasized that, with respect to terrestrially delivered regional sports networks, "an MVPD's ability to gain access to RSNs and the price and other terms or conditions of access can be important factors in its ability to compete." *Adelphia Order*, 21 FCC Rcd at 8259 ¶ 124. Thus, the *Adelphia Order*, like the order on review, recognizes that not all networks have substitutes, and "access to this non-substitutable programming is necessary for competition in the video distribution market to remain viable." *Order* ¶ 39 (J.A. ___).

b. Petitioners dispute whether DBS providers' lack of access to the local RSN in Philadelphia (*i.e.*, Comcast SportsNet) has had a material effect on their competitiveness in the Philadelphia DMA. As noted above, the Commission estimated that Comcast's withholding of SportsNet diminished DBS penetration in Philadelphia by 40 percent. *Order* ¶ 39 (J.A. ___). (The Commission also estimated that the withholding of the local RSN in San Diego reduced DBS

[10] *Adelphia Communications Corporation*, 21 FCC Rcd 8203 (2006) (*Adelphia Order*).

market share there by 33 percent, but Petitioners do not challenge that conclusion.)

Citing the declaration of Cablevision's expert, Dr. Scott Wallsten, Petitioners allege (Br. 58) that the Commission committed "fundamental methodological errors" in the regression analysis it used to calculate the effect of withholding on DBS subscribership. *See Order*, App. B ¶¶ 1, 3, 7 (J.A. ___, ___, ___). Petitioners do not identify any such error in their brief, however, so that claim is not properly before this Court. *See Bryant v. Gates*, Nos. 07–5121 *et al.*, 2008 WL 2727600, at *6 (D.C. Cir. July 15, 2008) (argument is "forfeit[ed]" where "opening brief on appeal . . . offered only the single, conclusory statement"). In any event, their argument is without merit. The Commission considered Dr. Wallsten's critique of its regression analysis (which the Commission had first undertaken in the *Adelphia Order*, 21 FCC Rcd at 8343–47 App. D ¶¶ 12–20), performed the analysis anew to account for his concerns, and found that the "new results . . . support[ed] . . . and in some respects strengthen[ed]" its conclusion. *See Order* ¶ 40 (J.A. ___), App. B ¶ 19 (J.A. ___).

To support their claim that the withholding of Comcast SportsNet has not harmed competition, Petitioners note (Br. 58) that DBS providers have increased their market share in Philadelphia from 4 percent in 2000 to 12 percent in 2006 and that this share is higher than in certain other markets. The Commission has previously found, however, that DBS penetration rates in Philadelphia (and San Diego) rank among the bottom eight of the nation's 210 television markets.

Adelphia Order, 21 FCC Rcd at 8270–71 ¶ 146. But more importantly, the Philadelphia and San Diego examples provide “empirical evidence”—evidence that is unavailable with respect to satellite-delivered networks because of the operation of the exclusivity prohibition—that the withholding of just a single network can impair the ability of competitive MVPDs to attract subscribers. *Order* ¶ 39 (J.A. ___). Even if the withholding of Comcast SportsNet by itself has not eliminated MVPD competition in Philadelphia, the Commission reasonably looked to the experience of DBS providers there to inform its prediction that cable operators retained the ability to weaken competition by implementing a withholding strategy with respect to the many other networks they own. *See Order* ¶ 39 (J.A. ___).

Petitioners also argue (Br. 58-59) that the Commission should have considered the presence of “effective competition” in the Philadelphia DMA under the standard set forth in § 623(l)(1)(B) of the Communications Act, 47 U.S.C. § 543(l)(1)(B). The effective-competition test, however, is designed solely for the purpose of triggering cable-rate deregulation. *See* 47 U.S.C. § 543(a)(2). Had Congress intended that test to be used to determine whether sunset of the exclusivity prohibition was warranted, it could have easily said so in the statute. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or

exclusion.") (brackets and quotation marks removed). The Commission properly declined to apply the effective-competition standard to its § 628(c)(5) analysis in this proceeding.

c. Petitioners argue (Br. 56) that sunset of the exclusivity prohibition would not harm competition because "competitive MVPDs have sunk significant costs in deploying their own physical networks and have attracted nearly a third of MVPD subscribers nationwide." This argument is flawed in several respects.

First, and most importantly, consumers do not purchase service from competitive MVPDs because of their "sunk costs" or their existing "market share." Pets. Br. 56. To be viable, competitive MVPDs must win and retain subscribers by offering them programming packages they desire. In that respect, the Commission found that "satellite-delivered vertically integrated programming remains programming for which there are often no good substitutes." *Order* ¶ 30 (J.A. ___). No matter its size or its sunk costs, a competitive MVPD cannot readily replicate the content of a cable-owned RSN or create a replacement for a withheld national network that has earned a substantial level, even decades-worth, of viewer familiarity and goodwill. In the end, Petitioners' claim that competitive MVPDs are too "entrenched" (Br. 66) to falter or fail depends entirely on their view that "most [programming] services have close substitutes"—a view that, as explained above, the Commission reasonably rejected.

Second, the lion's share of subscribers to competitive MVPD services subscribe to DBS service. *See Order* ¶ 23 (J.A. ___). New MVPD entrants, such as telephone companies, have barely a foothold—only 1.9 percent of MVPD subscribers nationwide. *Order* ¶ 24 (J.A. ___). These new entrants depend on access to cable-owned networks to develop compelling program packages and attract subscribers. *See* Verizon Comments at 8 (J.A. ___) (asserting that "approximately 32 percent of the more than 250 regional and national networks that comprise Verizon's FiOS TV service" are cable-affiliated). And because new entrants "have no established customer base," *Order* ¶ 41 (J.A. ___), they are particularly vulnerable to competitive harm if, through withholding, cable incumbents are able to degrade the quality of their programming packages.

Finally, although DBS operators currently serve more than 30 percent of MVPD subscribers nationwide, their penetration rates in different localities has varied considerably. As of 2004, for example, DBS service had penetration rates of "approximately 29 percent in rural areas, 18 percent in suburban areas, and 13 percent in urban areas." *Twelfth Video Competition Report*, 21 FCC Rcd at 2359 n.263 (citing U.S. Government Accountability Office, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets*, GAO–05–257, Apr. 2005) (GAO Report)).[11] Therefore, despite DBS providers' nationwide share of MVPD subscribers, cable operators have the

---

[11] In the order on review, the Commission observed that, while DBS subscribership increased by 11.6 million since 2002, cable subscribership declined by only 3.4 million in that period. *Order* ¶ 23 (J.A. ___). Thus, most new DBS subscribers do not come from cable's existing subscriber base.

ability to harm competition in many communities by withholding access to critical programming networks. *See Adelphia Order*, 21 FCC Rcd at 8270 ¶ 146 ("DBS penetration levels are lower when DBS providers cannot offer the local RSN to their subscribers than they are when DBS providers carry the local RSN.").

2. The Commission reasonably found that vertically integrated cable operators retain the incentive to withhold programming from rivals

As a general rule, video programmers disfavor exclusive deals because it is in their interest to increase the size of their potential audience and, thereby, their revenues from advertising and affiliation fees (*i.e.*, fees that MVPDs pay to a programmer for the right to carry its network). *Order* ¶ 51 (J.A. ___). That is why programmers not affiliated with cable companies rarely find it profitable to enter into exclusive distribution deals. *See* Pets. Br. 48–49. A vertically integrated programmer, however, is in a different boat; any loss in revenue caused by an exclusive contract may be compensated by the increased revenue its cable affiliate would earn from new subscribers, higher affiliation fees (paid by noncompeting cable operators), and higher cable rates charged to all subscribers. *Order* ¶ 52 (J.A. ___); *see also 2002 Extension Order*, 17 FCC Rcd at 12147–48 ¶ 53. The incentive to enter into exclusive deals increases with the number of subscribers the cable affiliate has and the more homes it passes, because the increase in revenue from new subscribers, and higher rates imposed

on all subscribers, makes it more likely that withholding will be profitable. *Order* ¶ 44 (J.A. ___).

With that in mind, the Commission concluded that cable operators' share of MVPD subscribers has not declined to "a point where withholding would be unprofitable." *Order* ¶ 52 (J.A. ___). The Commission explained that, despite the inroads made by DBS providers, "almost seven out of ten subscribers still choose cable over competitive MVPDs." *Order* ¶ 50 (J.A. ___). The Commission also noted that, because of consolidation, "the percentage of MVPD subscribers receiving their video programming from one of the four largest vertically integrated cable [operators] (Comcast, Time Warner, Cox, and Cablevision) has increased . . . from 34 percent [in 2002] to between 54 and 56.75 percent." *Order* ¶ 54 (J.A. ___).

Moreover, the "cable industry has continued to form regional clusters since the *2002 Extension Order*," *Order* ¶ 55 (J.A. ___), and in many DMAs, cable's subscribership share is much higher than its national share. *Order* ¶ 52 (J.A. ___); *see also Order* n.300 (J.A. ___) (noting that "there are 40 DMAs" in which cable subscribership share "is greater than 78 percent").

Furthermore, although the existence of the exclusivity prohibition necessarily meant that the record could not include examples of cable operators' withholding national programming (which is typically delivered by satellite), *see Order* ¶ 39 (J.A. ___), the record provided "specific factual evidence that vertically integrated programmers have withheld and continue to withhold

programming, including both sports and non-sports programming, from competitive MVPDs" at the regional level, where terrestrial delivery is feasible. *Order* ¶ 51 (J.A. ___). And as Commission observed, "because it is outside of the scope of the program access provisions, the withholding of terrestrially delivered programming presents the most direct, factually based evidence of cable MSO behavior if the prohibition is permitted to lapse." *Order* ¶ 51 (J.A. ___).

The Commission also reasonably determined that "vertically integrated cable programmers may have an even greater economic incentive to withhold programming" because of "the emergence of new entrants into the video marketplace, including telephone companies." *Order* ¶ 60 (J.A. ___). As the Commission explained, "[b]ecause recent entrants have minimal subscriber bases at this time, the costs that a cable-affiliated programmer would incur from withholding programming from recent entrants are negligible." *Ibid.* Yet the gains to the cable operator from impeding new entry can be huge. Although "DBS competition . . . does not appear to constrain cable prices," cable rates "are 17 percent lower where wireline cable competition is present." *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 21 FCC Rcd 15087, 15087–88 ¶ 2 (2006); *see also Order* ¶ 24 (J.A. ___) (noting that the GAO Report concluded that "wireline video entry provides more price discipline to cable than DBS and is more likely to cause cable operators to enhance their own services and to improve customer service"); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of*

1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, 22 FCC Rcd 5101, 5126 ¶ 50 (2007) (*Franchising Order*) ("the presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without competition"), *aff'd, Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) (pet. for reh'g filed). Moreover, DBS providers are much weaker competitors to cable in areas where the cable operator offers consumers "advanced services," such as digital cable, broadband Internet access, and telephone service; according to the GAO, DBS penetration was only 16 percent in markets where the incumbent cable operator offered one or more of these services, compared to 36 percent where the cable operator did not offer advanced services. *See Twelfth Video Competition Report*, 21 FCC Rcd at 2539 ¶ 72 (citing GAO Report). Telephone companies, however, compete directly with cable operators on all fronts—video, voice, and Internet access. *See Franchising Order*, 22 FCC Rcd at 5103, 5126–27 ¶¶ 2, 50–51. Cable operators accordingly have a strong incentive to withhold programming in order to "hinder[] and potentially eliminat[e] competition from new entrants." *Order* ¶ 60 (J.A. ___).

Petitioners do not contest the Commission's analysis of cable operators' incentive to withhold programming. Rather, they claim that withholding would not be a profitable strategy in a sufficient number of cases to have an appreciable effect on competition. That claim does not hold up to scrutiny.

a. Petitioners argue (Br. 50) that Appendix C of the *Order* supports their claim that the exclusivity prohibition is no longer needed to protect competition in the MVPD market. In Appendix C, the Commission conducted an economic analysis to determine whether its predictive judgment that cable operators had an incentive to withhold programming was "plausible." *Order*, App. C ¶ 11 (J.A. ___); *see also Order* ¶ 59 (J.A. ___). The purpose of the analysis was to estimate the percentage of subscribers who would need to switch from a competitive MVPD to cable to make the withholding of a regional network and a national network profitable. *Order*, App. C ¶¶ 10–13 (J.A. ___–___). Petitioners make two basic arguments. First, they contend that the analysis in Appendix C was "unfairly skewed to overstate the likely extent of withholding." Br. 50. Second, they argue that Appendix C predicts that only a "small" amount of withholding would occur if the exclusivity prohibition were to sunset. Br. 55.

As a threshold matter, Petitioners' criticism of, and reliance on, Appendix C are barred by the exhaustion requirement set forth in 47 U.S.C. § 405(a). Section 405(a) provides that the "filing of a petition for reconsideration" is a "condition precedent to judicial review" of any FCC order "where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." "[T]his circuit has 'strictly construed' § 405(a), 'holding that [this Court] generally lacks jurisdiction to review arguments that have not first been presented to the Commission.'" *Qwest Corp. v. FCC*, 482 F.3d 471, 474 (D.C. Cir. 2007) (quoting *Core*, 455 F.3d

at 276. The exhaustion requirement applies equally to issues that arise for the first time in the order a petitioner seeks to challenge. Because "one of the purposes of section 405 is to afford the Commission the initial opportunity to correct errors in its decision or the proceeding leading to decision," *id.* at 475 (brackets and internal quotation marks omitted), the failure to raise an issue before the Commission "isn't excused merely because the issue arose unequivocally only at the moment the Commission took action," *id.* at 474. "[E]ven when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file a petition for reconsideration with the Commission before it may seek judicial review." *Ibid.* (quoting *Core*, 455 F.3d at 276–77). In this case, Petitioners did not afford the Commission the opportunity to address any of their claims with respect to Appendix C, so they are all barred.

Even if the merits of Appendix C are properly before the Court, Petitioners' arguments are misplaced. Contrary to Petitioners' contention (Br. 50–55), Appendix C *understates* the extent to which a withholding strategy would be profitable. First, the Commission based its estimate on the additional revenue that a cable operator would earn from inducing subscribers to switch to cable; it did not take into account, however, the revenue a cable operator would earn through higher cable rates and affiliation fees. *See Order* ¶ 52 (J.A. ___)

(discussing the revenue gains that withholding can generate).[12] Second, with respect to regional programming, the Commission assumed that no television market in the country would experience switching rates higher than the minimum amount of switching that the Commission predicted must have occurred in Philadelphia to make Comcast's withholding of SportsNet from DBS providers profitable. *Order*, App. C ¶ 17 (J.A. ___). Thus, to the extent the analysis in Appendix C is "skewed" (Pets. Br. 50), it is because the Commission used conservative assumptions that downplay cable operators' incentives to withhold.

In any event, Petitioners are incorrect that Appendix C estimates withholding in only a "small" number of markets. Appendix C evaluates two companies—Comcast and Time Warner—and estimates (using conservative assumptions) that withholding of regional programming may be profitable in as many as 59 of the 186 markets in which they operate, including several of the top-50 markets in the country. *Order*, App. C ¶¶ 18–19 nn.21, 23 (J.A. ___) (estimating withholding of regional programming would be profitable in up to 39 markets for Comcast and 20 markets for Time Warner). Appendix C also indicates that withholding of certain national networks may be profitable if it causes as few as 1.9 percent of subscribers to switch from competitive MVPDs to

[12] Although Petitioners claim (Br. 54–55) that the Commission made "no attempt whatsoever to account for the potential risks and losses that the cable operator would incur from engaging in such withholding," that consideration is an express part of the Commission's formula. *See Order*, App. C. ¶ 12 (J.A. ___) (discussing the "loss from withholding").

cable. *Order*, App. C ¶ 21 (J.A. ___). This amount of switching is far less than the level of switching seen, for example, in Philadelphia because of Comcast's decision to withhold just one RSN from DBS operators, and the Commission reasonably concluded that the "lack of access to popular non-RSN networks would not have a materially different impact on a [competitor's] subscribership than would lack of access to an RSN." *See Order* ¶ 39 (J.A. ___) (explaining that "[a] number of [national] networks receive ratings higher than or equal to those of RSNs that are currently being withheld from DBS providers"). And the amount of switching is "sufficiently low as to make it likely that cable [operators] will pursue national 'cable only' withholding strategies with some networks in the absence of the exclusivity prohibition." *Id.* ¶ 52 (J.A. ___). Thus, even though the analysis in Appendix C does not predict that withholding will occur in every market (or for every cable-controlled network), it provided a sound basis for the Commission's conclusion that withholding would be profitable "in a significant range of cases" and that, without the exclusivity prohibition, withholding would, in fact, occur (as it has with respect to terrestrially delivered networks that fall outside the scope of the prohibition). *Id.* ¶ 59 (J.A. ___).

Finally, Petitioners argue that withholding would be limited because Comcast and Time Warner own RSNs in only some television markets and

control only some of the nation's most popular cable networks. Br. 51, 53, 55.[13] The Commission's analysis, however, holds up for any regional network (not just RSNs) whose revenues resemble the revenue assumptions used in Appendix C. *See Order*, App. C ¶ 20 (J.A. ___); *see also Order* ¶ 58 (J.A.__) (stating that the Appendix C analysis applies to "any market" in which a cable operator has a regional network or may start or acquire such a network). In any event, Appendix C was not designed to foretell each cable operator's particular withholding strategy. Rather, the Commission used the analysis in Appendix C to inform its predictive judgment that, in the absence of the exclusivity prohibition, withholding would be a "realistic" possibility in a significant range of cases. *Order* ¶ 59 (J.A. ___).

b. Petitioners next assert (Br. 47) that, because "must have" programming "typically garners the highest licensing fees and advertising revenues," the cost of withholding would not be recovered through the increased revenues earned from switching subscribers. To support this assertion, they quote the Commission's statement in its 2008 *Horizontal Ownership Order*—an order issued *after* the order on review in this case—that "due to switching costs, consumers are reluctant to switch MVPDs except when there is a large benefit." Br. 48 (quoting *The Commission's Cable Horizontal and Vertical Ownership*

[13] Petitioners' claim (Br. 53) that the Commission evaluated national networks as if they were "owned by both Comcast and Time Warner" is simply incorrect. The Commission made clear that it calculated critical values for each network "on the assumption that they were owned by Comcast *or* by Time Warner." *Order*, App. C. ¶ 21 (J.A. ___) (emphasis added).

Limits, 23 FCC Rcd 2134, 2168 n.236 (2008) (*Horizontal Ownership Order*)). As an initial matter, Petitioners did not rely on the later-issued *Horizontal Ownership Order* before the Commission, so their arguments based on that order are both "barred under § 405(a)," *Qwest*, 482 F.3d at 386, and legally irrelevant, *Northhampton Media Associates v. FCC*, 941 F.2d 1214, 1217 (D.C. Cir. 1991) (FCC has no obligation to consider "'precedents' that did not precede").

In any event, nothing in the *Horizontal Ownership Order* suggests that cable operators lack the incentive to withhold popular programs that garner high advertising revenues and licensing fees. The statement that Petitioners quote refers to the likelihood that a cable subscriber would switch from cable to DBS service to obtain a *new* programming network not carried by a cable operator. In that context, the Commission stated that "[w]hile consumers can and do switch MVPDs in response to the loss of a program network *with which they are familiar*, they are unlikely to respond similarly for a program network that distributes content that they have never viewed." 23 FCC Rcd at 2169 ¶ 70 (emphasis added). Because programming that "typically garners the highest licensing fees and advertising revenues" (Pets. Br. 47) tends to be programming "with which [subscribers] are familiar" (*Horizontal Ownership Order*, 23 FCC Rcd at 2169 ¶ 70), the *Horizontal Ownership Order* fully supports the Commission's reasoning in this case.

c. Petitioners contend (Br. 45) that a vertically integrated programmer lacks the incentive to withhold programming outside of the footprint of its cable

affiliate. As the Commission has explained, however, "[a] cable operator may gain by weakening a current or potential rival (such as a DBS operator) even in markets that the cable operator itself does not serve," *Order* ¶ 72 (J.A. ___), because "[r]educing the rival's customer base in other markets would raise the rival's average cost of serving customers in the cable operator's own market(s), and thereby reduce the rival's competitive strength," *2002 Extension Order*, 17 FCC Rcd at 12141 n.108. The record indicates, moreover, that incumbent cable operators have attempted to implement such a strategy, even with the exclusivity prohibition in effect. *See*, *e.g.*, Reply Comments of the Coalition for Competitive Access to Content (CA2C), MB Docket No. 07–29 (filed Apr. 16, 2007), at 7 (J.A. ___) (cable-owned pay-per-view network "iN DEMAND . . . has offered that content to all non-competing cable incumbents, but tried to deny service to any competitors to incumbent cable").[14] Notably, Congress also was concerned about this practice. It did not bar exclusive contracts only in areas served by the particular cable operator affiliated with the relevant programming network, but instead barred exclusive contacts in areas served by any cable operator. *See* 47 U.S.C. § 548(c)(2)(D). Indeed, Congress was so concerned with cable operators' refusal to deal with MVPDs operating outside of their service

[14] Verizon has also recently alleged that "Cablevision is refusing to provide [RSN] programming to Verizon in HD format" for distribution in Buffalo, "even though Cablevision itself is not a cable operator in that area." Letter from Leona Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Dkt. Nos. 07–29 & 07–198 (filed July 17, 2008), at 2 (available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520034573).

areas that it prohibited cable operators and cable-owned programmers from entering into exclusive contracts that prevent an MVPD from obtaining programming for distribution in areas *not* served by *any* cable operator (47 U.S.C. § 548(c)(2)(C))—and this prohibition does *not* sunset.

3. Petitioners' remaining arguments lack merit

a. Petitioners argue that the Commission erred by failing to "balance" the harm that cable-only exclusivity agreements may cause to MVPD competition with the "improved incentive" to invest in new programming that they allege would be created if the exclusivity prohibition were lifted. Br. 61–62. In *Time Warner*, however, this Court considered the argument that "prohibiting [exclusive] contracts might result in reduced programming" and found it to be "conjectural." 93 F.3d at 979. The Commission likewise found "no evidence" in the administrative record to support this theory. *Order* ¶ 64 (J.A. ___). To the contrary, the Commission found that, as competition among MVPDs has grown, so too has the investment in new programming. The number of national networks "has increased by almost 400 percent since 1994 [the year the Commission adopted the exclusivity rule] and by 80 percent since 2002," *ibid.*; and the number of cable-owned networks has likewise increased from 56 in 1994 to 116 in 2007, *id.* ¶ 20 (J.A. ___); *2002 Extension Order*, 17 FCC Rcd at 12131–32 ¶ 18. The record also showed that competitive MVPDs were investing in new program content. *See*, *e.g.*, *Order* ¶ 64 & n.332 (J.A. ___) (noting Verizon's investment in local news programming). And the Commission noted that

"[d]espite the option to seek approval to enter into exclusive contracts" under § 628(c)(2)(D), cable operators had filed "only ten exclusivity petitions" in 15 years, and, of the three petitions that were denied, the networks at issue (Court TV (now TruTV)), Speed, and the Sci-Fi channel) "have flourished despite the lack of exclusivity." *Order* ¶ 63 (J.A. ___).[15] Given this evidence, the Commission reasonably found "no basis to conclude that extending the exclusive contract prohibition will create a disincentive for the creation of new programming." *Order* ¶ 64 (J.A. ___).

b. Petitioners argue (Br. 62) that "even if, on balance, there were any small harm to competition" from the sunset of the exclusivity prohibition, that harm can be addressed by the non-sunsetting provisions of § 628(c)(2). The Commission reasonably found, however, that those provisions "are not adequate substitutes for the particularized protection afforded" by the exclusivity prohibition. *Order* n.320 (J.A. ___). For example, the "undue influence" prohibition in § 628(c)(2)(A) plays only a "supporting role" in the statutory scheme, and a violation "may be difficult . . . to establish" because it often requires evidence of improper influence "such as might come from an internal 'whistleblower.'" *Implementation of Sections 12 and 19 of the Cable Television*

---

[15] Congress expressly made "the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming" a factor for the Commission to consider when deciding whether to provide a waiver of the exclusivity prohibition. *See* 47 U.S.C. § 548(c)(4)(C). This suggests that Congress viewed this consideration as one that was best taken into account on a case-by-case basis through the waiver process.

Consumer Protection and Competition Act of 1992, 8 FCC Rcd 3359, 3424 ¶ 145 (1993) (*1993 Order*). Similarly, the nondiscrimination provision does not necessarily prohibit the exclusive agreements at issue here. Rather, as relevant here, the Commission noted that the provision would limit a vertically integrated programmer's ability to distinguish among competitive MVPDs (*e.g.*, withhold programming from "a recent entrant with a minimal subscriber base" but offer programming to all other competitive MVPDs).[16] *See Order* nn. 309, 320 (J.A. ___, ___); *see also 1993 Order*, 8 FCC Rcd at 3412 ¶ 116, 3416–22 ¶¶ 123–141 (discussing requirements for demonstrating a violation of § 628(c)(2)(B)). As the Commission observed in 2002, "Congress found the exclusivity prohibition in Section 628(c)(2)(D) to be necessary to preserve and protect competition and diversity," notwithstanding the other provisions in § 628. *2002 Extension Order*, 17 FCC Rcd at 12154 n.206; *cf. Time Warner II*, 211 F.3d at 1320 ("As a structural limitation, the subscriber limits provision adds a prophylaxis to the law and avoids the burden of individual proceedings to remedy particular instances of anticompetitive behavior."); *id.* at 1322–23 ("a prophylactic, structural limitation is not rendered unnecessary merely because preexisting statutes impose behavioral norms and *ex post* remedies").

---

[16] Indeed, the Commission noted commenters' arguments that the existence of the nondiscrimination provision would actually increase cable-affiliated programmers' incentive to enter into exclusive contracts were the exclusive contract provision to expire. *See Order* n.320 (J.A. ___) (contending that cable-affiliated programmers would enter into exclusive contracts "to avoid allegations of unfair acts or practices or discrimination with respect to their dealings with unaffilated competitors").

Petitioners have offered no persuasive reason for reaching a different conclusion here.

C. The Commission provided a reasonable explanation for its decision not to modify the scope of the exclusivity prohibition

By its terms, § 628(c)(2)(D) prohibits (1) all "exclusive contracts" between (2) a cable operator and a programmer affiliated with a cable operator (3) "with respect to distribution to persons in areas served by a cable operator," unless the Commission concludes that "such contract is in the public interest" under § 628(c)(4). 47 U.S.C. § 548(c)(2)(D). Petitioners argue that the Commission should have narrowed the scope of the exclusivity prohibition in a number of ways, but the Commission reasonably decided that there was insufficient justification for doing so, especially in light of the process Congress established in § 628(c)(4) for providing exemptions in particular cases. Petitioners' arguments to the contrary are without merit.

1. Petitioners first argue (Br. 63–64) that the Commission should have exempted "small" cable operators from the exclusivity prohibition. Petitioners—two of "the four largest vertically integrated cable" companies in the country, *Order* ¶ 54 (J.A. ___)—never explain how they could possibly have standing to advocate for a "small" operator exception. In any event, the Court need not address this claim because Petitioners make only a conclusory statement unsupported by any legal argument for why the Commission's decision not to create a small-operator exemption was incorrect. *See Bryant*, 2008 WL 2727600,

at *6 (argument is "forfeit[ed]" where "opening brief on appeal . . . offered only the single, conclusory statement).[17]

2. Petitioners also contend that the Commission should have fashioned an exemption for "agreements with cable operators outside the service-area" because it is "implausible" that a cable-owned network would deny program access to a MVPD in a different region in order to weaken it as a national competitor. Br. 65–66. The Commission has explained, however, that such withholding is not implausible. As discussed above (at pp. 50–51), "[r]educing the rival's customer base in other markets would raise the rival's average cost of serving customers in the cable operator's own market(s), and thereby reduce the rival's competitive strength." *2002 Extension Order*, 17 FCC Rcd at 12140 n.108. Especially given that Congress thought it necessary to extend the exclusivity prohibition to all agreements between cable operators and cable-owned networks (rather than just agreements between a cable operator and a network affiliated with that particular operator)—and even to ban permanently exclusive agreements that preclude the distribution of programming in areas *not* served by

---

[17] To the extent Petitioners believe that operators such as Cablevision should qualify for a "small" operator exemption, their contention would fail to take into account that even regional operators often control a large share of subscribers within their service areas. *See* "About Cablevision," http://www.cablevision.com/about/index.jsp (visited Aug. 7, 2008) ("Cablevision operates the nation's single largest cable cluster, passing more than 4.5 million households and 600,000 businesses in the New York metropolitan area . . . ."). Accordingly, even a supposedly small cable operator has the potential to harm competition by withholding programming from its competitors. *See Order* ¶ 49 (J.A. ___) (discussing RCN's and Verizon's difficulties in obtaining Cablevision-owned sports programming in New York).

any cable operator, *see* 47 U.S.C. § 548(c)(2)(C)—the Commission reasonably found no compelling justification for creating a flat exemption for all "out of service area" exclusivity deals. *Order* ¶ 72 (J.A. ___).

3. Petitioners argue that the Commission should have created an exemption to the exclusivity prohibition where the cable operator "face[s] competition from both DBS and telephone companies." Br. 63–64 (quoting *Order* ¶ 70 (J.A. ___)). Because DBS providers offer service throughout the nation, Petitioners are, in effect, seeking an automatic exemption from the exclusivity prohibition based on telephone-company entry into video distribution. Petitioners argue that the exclusivity prohibition is unwarranted because "where there are entrenched competitors who have sunk investments and are therefore unlikely to exit, withholding is unlikely to cause consumers harm." Br. 66.[18] But the Commission rejected that very argument in deciding to extend the exclusivity prohibition, *see supra* pp. 39–40, and it becomes no more persuasive when couched in terms of an exemption to the statutory rule. Indeed, as the Commission explained, the cable industry's desire to keep competition from

[18] In support of their argument for an exemption where the cable operator faces competition from DBS and telephone companies, Petitioners dispute the Commission's statement in paragraph 74 of the *Order* that "[t]he resources of competitors or the number of years they have spent in the market [have] no bearing on the goal of Section 628(c)(2)(D)." Br. 66 (quoting *Order* ¶ 74 (J.A. ___)) (brackets in original). The Commission made that statement in explaining why it did not create an exemption that would have denied the benefits of § 628(c)(2)(D) to certain types of *competitive MVPDs*. Petitioners have not challenged that decision in this case. *Compare* Pets. Br. 63 (limiting argument to exemptions "based on the status of the cable operator") *with Order* ¶ 70 (J.A. ___) (same) *and Order* ¶ 73 (J.A. ___) (addressing exemptions based on "status of the competitive MVPD").

telephone companies at bay *enhances* their incentive to adopt a withholding strategy. *Order* ¶ 72 (J.A. ___); *see also Order* ¶ 60 (J.A. ___). If, as Petitioners suggest, nascent competition from a telephone company were instead a basis for doing away with the prohibition on exclusive access to cable-owned programming, then the benefits to consumers from such new entry would likely be "severely hindered," if not eliminated altogether. *See Order* ¶ 61 (J.A. ___).

4. The final exemption that Petitioners seek is for "new and niche programming." Br. 67–69. In the *2002 Extension Order*, the Commission declined to create such an exemption 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." 17 FCC Rcd at 12156 ¶ 69. It also concluded that making determinations about whether a particular network is "essential" outside the context of a concrete factual setting might raise constitutional concerns. *Ibid*. In the current order, the Commission reaffirmed those conclusions. *Order* ¶ 69 (J.A. ___).

Petitioners respond that Cablevision proposed a "rational and workable" test to the Commission, under which "new services," services that are not carried "to a significant number of the nation's television households," and services "with low average prime-time ratings" would be exempt for the exclusivity rule. Br. 70 (internal quotation marks omitted). Cablevision, however, offered no suggestion for how to define a "new" service, what to regard as a "significant number" of households, or how low is "low" in terms of prime-time ratings. For

example, should a cable operator's creation of a new regional sports network that obtains the rights to distribute popular local sports programming be regarded as a "new service"? *See*, *e.g.*, "About SportsNet New York," http://web.sny.tv/about/index.jsp (visited Aug. 11, 2008) (describing "New York's new regional sports network founded [in 2006] by Sterling Entertainment Enterprises, Time Warner and Comcast," which "features up to 125 regular season New York Mets telecasts" as well as other sports programming). What about Time Warner's recent "[m]ajor [r]ebranding" of "Court TV" as "truTv"? *See* Press Release, Time Warner, "Court TV Prepares Major Rebranding Initiative as truTV," Oct. 29, 2007 (available at http://www.timewarner.com/corp/newsroom/pr/0,20812,1677252,00.html). Would any regional network ever be carried on a "significant" number of the nation's television households? And simply looking at whether a channel's prime-time ratings are "low" could easily mask other qualities of a network that make it important. Cinemax is not one of the top 15 cable programs by prime-time ratings (nor, for that matter, in the top 20 in terms of subscribership). *See Twelfth Video Competition Report*, 21 FCC Rcd at 2654–55, Table C–5 & C–6. Yet the record shows that it is one of the key cable-owned networks that subscribers expect competitive MVPDs to carry. *See Order* n.179 (J.A. ___); *see also* AT&T Comments at 13 (J.A. ___); Verizon Comments at 9 (J.A. ___). The Commission's conclusion that Cablevision's proffered test was not "rational and workable" was a reasonable one. *Order* ¶ 69 (J.A. ___).

5. Although the Commission declined to modify the exclusivity prohibition by rule, it explained that "through individual exclusivity petitions, [it] may determine (in accordance with the statutory criteria) whether a particular exclusive contract . . . is in the public interest." *Order* ¶¶ 66, 71 n.363 (J.A. ___, ___). Petitioners assert (Br. 68) that this exception is "cold comfort," but there is no basis for their pessimism. In the 15 years since the 1992 Cable Act was enacted, only ten exclusivity petitions have been filed, of which five were adjudicated; of those five, two were granted and three were denied. *See Order* ¶ 63 & nn.323 & 324 (J.A. ___).[19] And the last time the full Commission addressed the exclusivity issue was in June 1994—more than 14 years ago.[20] Nor did the Commission in these cases consider only whether "lack of exclusivity would threaten the service's very existence." Br. 69. Rather, it examined the petitions for exclusivity in light of the five factors Congress established in § 628(c)(4). There is simply no justification for Petitioners' view that the § 628(c)(4) process is a lost cause.

---

[19] The five exclusivity petitions that were filed but not adjudicated were dismissed at the request of the parties. *Order* ¶ 63 (J.A. ___).

[20] *New England Cable News Channel*, 9 FCC Rcd 3231 (1994) (granting exclusivity petition); *Time Warner Cable*, 9 FCC Rcd 3221 (1994) (denying exclusivity petition). The other three agency orders adjudicating petitions for exclusivity under § 628(c)(4) were staff decisions issued by the FCC's former Cable Services Bureau. *See NewsChannel*, 10 FCC Rcd 691 (CSB 1994); *Outdoor Life Network and Speedvision Network*, 13 FCC Rcd 12226 (CSB 1998); *Cablevision Industries Corp. and Sci-Fi Channel*, 10 FCC Rcd 9786 (CSB 1995). "[U]nchallenged staff decisions are not Commission precedent," however, and "'an agency is not bound by the actions of its staff if the agency has not endorsed those actions.'" *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (quoting *Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 660 (D.C.Cir. 2004)).

Petitioners also contend that the Commission cannot justify the exclusivity rule by "tacking on a waiver procedure." Br. 68 (quoting *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988). The rule here is not arbitrary to begin with (as explained above), and, in any event, both the exclusivity rule and the public-interest exemption process are creations of Congress, not the Commission. It was Congress's choice to establish a broad prophylactic rule but then establish a specific waiver procedure for cases in which application of the rule is not in the public interest. It was far from arbitrary for the Commission to adhere to Congress's statutory design.

II. IF THE COURT CONCLUDES THAT A REMAND IS WARRANTED, THE EXCLUSIVITY PROHIBITION SHOULD NOT BE VACATED

For the reasons provided above, the Court should hold that the Commission provided a reasoned explanation for its decision to extend the exclusivity rule for an additional five years. Nonetheless, if the Court concludes that a remand for further explanation is warranted, it should not vacate the *Order*, but instead allow the exclusivity prohibition to remain in effect during the Commission's proceedings on remand.

In *Allied-Signal, Inc. v. United States Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), this Court explained that an "inadequately supported rule . . . need not necessarily be vacated." *Id.* at 150. Rather, in deciding whether to vacate, this Court considers "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be

changed." *Id.* at 150–151. Thus, if it is "conceivable that the Commission may be able to explain" adequately its rationale on remand, and "the consequences of vacating [the rule] may be quite disruptive," a remand without vacatur is the appropriate remedy. *Id.* at 151; *see also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048–49 (D.C. Cir. 2002) (declining to vacate the national television station ownership rule where it was "by no means inconceivable" that the Commission could justify its rule on remand, even though the disruptive consequences of vacating the rule "might not be great"), *reh'g granted in part on other grounds*, 293 F.3d 537 (D.C. Cir. 2002).

Under the *Allied-Signal* test, the order on review should not be vacated. First, the *Order*'s "deficiencies," if any, are not serious. The Commission's statutory authority is not in question. Nor is this a situation in which the Commission failed to give a "plausible reason" for the exclusivity prohibition or to "respond to the objections put before it," such that the rule can be viewed as a "hopeless cause." *Fox*, 280 F.3d at 1053. Rather, Petitioners' claims (some of which were never presented to the Commission, *see supra* pp. 45, 49) turn largely on the sufficiency of the Commission's competition analysis. Thus, even if the Court concludes that any of Petitioners' claims have merit, it is "by no means inconceivable" that the Commission could provide additional support for its decision on remand. *Fox*, 280 F.3d at 1048.

Second, vacating the order on review would be highly disruptive. The industry has operated under the § 628 framework for 15 years. A sudden change

in the status quo—coupled with the uncertainty with respect to what rules, if any, the Commission might adopt on remand—would leave competitive MVPDs unsure of their legal rights. It could be especially disruptive for new entrants, such as telephone companies, which would suddenly face obstacles to obtaining access to critical networks just as they are beginning to make inroads among MVPD subscribers. Nor is keeping the exclusivity rule in place during remand proceedings likely to cause harm to the cable industry. Although cable-owned networks would continue to be required to make programming available to competitive MVPDs, they would do so under prices, terms, and conditions that they themselves have negotiated in the marketplace. In these circumstances, if the Court concludes that remand is warranted, a remand without vacatur would be the proper disposition under the *Allied-Signal* test.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

Thomas O. Barnett
Assistant Attorney General

James J. O'Connell, Jr.
Deputy Assistant Attorney General

Catherine G. O'Sullivan
Nancy C. Garrison
Attorneys

United States Department Of Justice
Washington, D.C. 20530

Matthew B. Berry
General Counsel

Joseph R. Palmore
Deputy General Counsel

Daniel M. Armstrong
Associate General Counsel

Nandan M. Joshi
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418–1740 (telephone)
(202) 418–2819 (fax)

August 13, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CABLEVISION SYSTEMS CORPORATION, ET AL., PETITIONERS,	)	
v.	)	NOS. 07–1425 & 07–1487
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and this Court's order of May 20, 2008, I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 15826 words.

NANDAN M. JOSHI
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418–1740 (TELEPHONE)
(202) 418–2819 (FAX)

August 13, 2008

STATUTORY APPENDIX

Contents:

Communications Act of 1934 § 405(a), 47 U.S.C. § 405(a)

Section 405(a) of the Communications Act of 1934 (47 U.S.C. § 405(a)) provides in relevant part as follows:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(c)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(c)(1), in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.