**PRESS STATEMENT OF COMMISSIONER KEVIN J. MARTIN**
**APPROVING IN PART, CONCURRING IN PART**

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

The Program Access rules, and in particular the prohibition against exclusive contracts,[1] have been instrumental to the growth of viable competitors to the incumbent cable operators in the multichannel video programming distribution market. When Congress enacted the program access provisions in 1992, however, Congress placed a limit on the prohibition against exclusive contracts. Section 628(c)(5) of the Communications Act provides that the exclusivity ban would cease to be effective in October of 2002 (ten years from the date of passage) unless the Commission makes an affirmative finding that the prohibition "continues to be necessary to preserve and protect competition and diversity in the in the distribution of video programming."[2]

I am very cognizant of the D.C. Circuit's recent rulings criticizing the Commission's application of the term "necessary."[3] I also am aware that the courts have been reviewing our decisions with increasing scrutiny, demanding both adherence to statute and reasoned decisionmaking based on specific evidence. I believe these decisions must inform how we articulate and meet the legal standard set forth in § 628(c)(5), particularly given the close parallels between that language and §202(h). Section 628(c)(5) states that:

> The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after October 5, 1992, unless the Commission finds … that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.[4]

Section 202(h), passed four years later and applying to cable as well as broadcast rules, states:

> The Commission … shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[5]

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1 Section 628(c)(2)(D) generally prohibits, in areas served by a cable operator, exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable operators. 47 U.S.C. § 548(c)(2)(D).

2 47 U.S.C. § 548(c)(5).

3 *See, e.g., Fox Television Stations, Inc., et al. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (interpreting Section 202(h) of the Telecommunications Act); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2000) (interpreting Section 202(h) of the Telecommunications Act); *United States Telecom Association, et al., v. FCC*, No. 00-1012 (D.C. Cir. 2002) (interpreting Section 251(d)(2) of the Communications Act).

4 47 U.S.C. § 548(c)(5).

5 § 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

Both provisions address communications regulations. Both create a presumption in favor of eliminating (or modifying) a rule. Both instruct the Federal Communications Commission to make specific findings regarding whether a rule is "necessary". I am troubled that the Order does not acknowledge these similarities. More fundamentally, I am concerned that the Order's articulation of the legal standard we must meet is not sufficiently rigorous or responsive to recent court rulings, and I therefore concur in this aspect of the order.

I have approached the statutory test in § 628(c)(5) as creating a presumption that the rules should sunset and that specific evidence is needed to justify a conclusion that *without* the prohibition, competition and diversity in the distribution of video programming *could not be* preserved and protected. I agree with parties that argue, for instance, that:

> Congress has clearly directed the restrictions on exclusive programming arrangements sunset absent solid proof of their necessity to preserve and protect competition and diversity. It is not sufficient to show that exclusivity restrictions are merely "helpful" or "beneficial" to some particular competing multichannel video programming distributors. The statutory language is clear and ambiguous – the exclusivity restrictions can be retained only if "necessary to preserve and protect competition and diversity in the distribution of video programming."[6]

A finding that the exclusivity ban "promotes" competition, or remains "beneficial" to the marketplace, would not be sufficient. Nor could the Commission merely rely on some notion of its expert judgement, unrelated to the record. To do so would be to "apply too low a standard," as the D.C. Circuit recently explained in *Fox Television, Inc.*[7]

For me, this was a very close call. On balance, I have concluded that the record does support the Order's conclusion that the prohibition against exclusive contracts continues to be necessary to preserve and protect competition and diversity, and therefore I support the item in this regard.

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[6] Reply Comments of AOL Time Warner at *i* (describing statements made by "several commenters" in the initial round of comment) (emphasis in original).

[7] *Fox Television Stations,* 280 F.3d at 1049 (D.C. Cir. 2002)