

**SEPARATE 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

Since adoption of this *Order*, the D.C. Circuit revisited the court’s previous ruling in *Fox Television Stations, Inc. v. FCC*.³ The court concluded that the interpretation of the statutory term “necessary in the public interest”⁴ was not necessary to the earlier opinion, since whether the term meant “indispensable” or “merely useful,” “it was clear the Commission failed to justify the NTSO and the CBCO rules under either standard.”⁵ Because the term had not been fully briefed by all the parties, the court determined that “[i]n these circumstances, we think it better to leave unresolved precisely what § 202(h) means.”⁶ The court thus modified the earlier decision in order to “leave this question open.”⁷

While the statutory interpretation of “necessary” in § 202(h) remains unresolved, I continue to believe that the term (as used both in § 202(h) and § 628(c)(5)) means more than just “helpful” or “useful.” I believe “necessary” should mean something closer to “indispensable” or “essential.” Because the legal standard in the *Order* does not articulate such a high burden, I concur in this aspect of the *Order*.

I believe the Commission must let the exclusivity ban sunset *unless* it can determine based on specific evidence – not solely the Commission’s “expert” or “predictive” judgement – that the ban is essential to preserving and protecting competition and diversity in the distribution

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

⁴ See Section 202(h) of the Telecommunications Act of 1996.

⁵ See *Fox Television Stations, Inc. v. FCC*, No. 00-12222 (D.C. Cir. June 21, 2002), slip. op. at 2, 4.

⁶ *Id.* at 4.

⁷ *Id.* at 5.

of video programming. Thus, I believe that a finding that the exclusivity ban is “beneficial” to or “promotes” competition and diversity would not be sufficient. I agree with parties that argue:

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.”⁸

For me, whether the exclusivity ban continues to be necessary 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.

⁸ Reply Comments of AOL Time Warner at *i* (describing statements made by “several commenters” in the initial round of comment) (emphasis in original).