

S. 1504 PRESERVES CONGRESSIONAL INTENT TO PROMOTE VIEWER CHOICE

ACCESS TO VIDEO CONTENT IS NECESSARY FOR EFFECTIVE COMPETITION.

The world of telecommunications is rapidly changing. The advent of cable brought new competition to the broadcast networks and new choices for the American viewing public. Digital Broadcast Satellite (“DBS”) did the same. Now, broadband is bringing more competition and more choices. At each stage, new competitors have depended on access to programming – without access to the content that subscribers want, competitive entry is foreclosed and the viewing public is left with fewer choices and higher prices. S.1504 ensures that these new entrants will have access to programming by correcting current loopholes in the law and making sure that new entrants have the ability to provide highly desirable content, such as sports programming, to their customers.

CONGRESS INTENDED A LEVEL PLAYING FIELD BUT LOOPHOLES DEVELOPED.

In 1992, Congress recognized that the cable industry could use its control over access to video programming to stifle competition. To prevent this, and to ensure a level playing field, Congress prohibited vertically-integrated cable companies – those that have ownership interests in programming networks – from refusing to make their content available to competitive multichannel video programming distributors (e.g. DBS and non-incumbent cable companies). This prohibition is codified in Section 628 of the Communications Act of 1934. As a technical matter, Congress tied this prohibition to how cable companies received cable programming at the time – satellite feeds from video programmers to “head-ends” around the country. However, fiber-based terrestrial networks have become economical alternatives to transmitting programming to the head-end via satellite, particularly for regional sports and news programming controlled by regionally clustered cable operators. Therefore, a significant loophole developed. The current version of Section 628, which addresses this access to content issue, did not foresee these developments, so vertically-integrated cable companies which distribute their programming terrestrially are not covered. S.1504 closes this “terrestrial loophole.”

S. 1504 UPDATES SECTION 628 AND BRINGS MORE COMPETITION TO CONSUMERS.

Section 628 protection was key to the development of satellite-based competition like DIRECTV and EchoStar. S. 1504 will help drive the new wave of video innovation through broadband competition. The bill is designed to ensure that all multichannel video programming distributors (MVPDs), which include cable, satellite and broadband programming distributors, have greater access to programming. To accomplish this, the FCC would be tasked with developing rules to prohibit vertically-integrated MVPDs, regardless of their transmission technology, from engaging in unfair or deceptive practices to hinder access to programming. In particular, MVPDs would be prohibited from improperly influencing their affiliates on terms and conditions for sale to non-affiliated MVPDs. In addition, programming vendors would be generally prohibited from entering into exclusive contracts with their affiliates.

Exclusive contracts entered into prior to June 1, 1990 for satellite cable programming and prior to 1993 for non-satellite cable programming would be exempted from the prohibition on exclusive contracts for the term of the contract. In addition, nothing in this bill prohibits programming

vendors from charging different rates/terms to MVPDs based on legitimate criteria such as number of subscribers, credit worthiness or cost of programming development. These provisions guarantee that current contracts would not be disturbed and that programming vendors would have sufficient latitude in negotiating carriage arrangements.

S. 1504 ENSURES ACCESS TO VALUABLE SPORTS PROGRAMMING

Sports programming is a major competitive factor in the video distribution marketplace. Customers will often choose their video service provider based on the availability of televised hometown sporting events. Therefore, unless new entrants have the chance to acquire sporting content, they will be unable to provide this most desired type of programming to consumers. S.1504 addresses this issue by extending the prohibition on exclusivity to any MVPD programming that includes the transmission of sports programming. This prohibition applies regardless of whether the programming vendor and MVPD are vertically integrated. Once again, the exclusion for prior contracts would also be applicable to exclusive sports programming agreements.

REGULATION WOULD SUNSET ONCE VIDEO MARKETPLACE COMPETITION EXISTS

Regulation should only be used when a lack of competition in the marketplace exists. Consequently, the prohibition on exclusive contracts contained in S.1504 would sunset 10 years after passage of the bill. This should allow ample time for robust competition in the video marketplace to flourish. However, if competition has not yet developed and the need for the prohibition remains, the FCC, in the ninth year, may extend the prohibition as necessary to preserve and protect competition and diversity in the distribution of video programming.